

Notes/Minutes from

The ABA Section of International Law
Committee on International Taxation
In cooperation with the
Section of Real Property Trust & Estate Law
&
American Institute of Certified Public Accountants
Presents

Foreign Bank Account Reports: Getting it Straight before the June 30 Deadline!

June 12, 2009

12:00 PM – 1:30 PM

TELECONFERENCE

PANEL:

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FBAR purposes –

- In the 1970s, the Bank Secrecy Act was passed to deal with bank secrecy jurisdictions and the form was created in 1971.
- Separate filings started in 1977 because of Section 7216 purposes (filed with tax returns 1971 – 1976)
- FBAR reports are available to federal and state agencies
- As part of USA Patriot Act, IRS took over administration
- FinCEN may be able to release FBAR information to treaty partners (and federal and state agencies) to use to find assets.
- FBAR information is NOT IRC section 6103 confidential information.

United States Persons definition

- Change – “in and doing business” is from Section 5314 of Title 31.
- But Announcement 2009-51 temporarily reinstates old definition.

- Concern in the field – G4 Visas – international organizations employees and related situations.
- If someone under the residency substantial presence test under Title 26 IRC is considered a Non-Resident Alien (NRA) for tax purposes, then they will likewise be considered a nonresident for FBAR Title 31 purposes. They will not fall into the scope of the FBAR filing requirements for this June 30, 2009.

Timely mailing

- Envelopes are not retained.
- Section 7502 timely filed/timely mailed rule of Title 26 does not apply to FBAR.
- Forms are date stamped when received by Detroit – this becomes the “filed” date.
- Historically, Treasury has been lenient on this – with a generous grace period.
- Can bring forms into an IRS office and receive a date stamp by Taxpayer Service Personnel and also will date stamp on taxpayer copy as well – this is proof of timely filed.
- Can use USPS certified receipt as proof of timely filed.
- Question of what individuals abroad can do – sending by DHL will not work as there is no phone number of the receipt location/just a phone menu at that phone number. It was suggested to send in as early as can prior to June 30, or send to someone in US to send it in for the person.

No extensions

- Even if extended Form 1040s, FBAR due June 30 – foreign clients hard to get the info, so should file the FBAR to best of available info. by June 30 and amend it later when get info. File what have by June 30.

Publication 4769

- On hold, pending changes to elaborate on instructions to the form.
- Contains all FAQs assembled over the years.
- Will come out later in the year, no estimated date.

Delinquent FBARs/Voluntary Compliance Program (VCP)

- Can still file delinquent FBARs for prior 6 years – back to 2002 - with the Detroit processing center with a reasonable cause letter/explanation, which should be fine with no penalty. A prerequisite is that there is NO income tax issue – all income from foreign accounts must have been reported.
- If no income tax understatement, no VCP.
- Delinquent FBARs are being accepted by the Detroit processing center.
- Highly recommended to use the new form.
- The only attachment to an FBAR should be the reasonable cause statement as to why it is late. One of the moderators mentioned that one reason might be that the tax return preparation software default setting. Others may be rely on the advice of a preparer, not aware required to file, etc.

- All data (names, accounts, etc.) must be on the FBAR form (not on whitepaper detail attachments) otherwise Detroit is returning the FBAR and data attachments to the filer as not able to process.
- VCP runs until September 23, 2009. (Not 6 months from the March 26 public notice date, 6 months from the approval date.)
- 20% Penalty - Highest balance at any point in time of UNREPORTED accounts. If an account had previously been reported, then it is excluded from the computation of the 20% penalty.
- If there are loans against the account, the value may be collateralized – offset by loans amount – for the 20% penalty purpose.
- IRS/Fincen removing/eliminating duplication – if two people have the same account, the penalty is not 40% - only 20%. If the money is moved from one account to another – only counting the money once – not both accounts if the same funds – obvious – no count twice. Nets out for one 20% penalty.
- Can ask for audit during VCP.
- VCP for all accounts in the penalty base – will not have to pay more than owe. If actual tax due and normal penalty amount is less than what VCP normally would come up with. If real tax and real penalty below the 20%, IRS will not make you pay a penalty greater than owed. They will audit to find out what really owe.
- IRS does not advise people to file return quietly to the service center because if on the IRS list already it could be viewed as a confession that could be used against them. Suggest come in before contacted by IRS, even if not have all the info. yet, and IRS will give time to get the info. together. Suggest go into VCP and can ask to be examined and determine the correct liability and penalties and have appeals rights and limited to 6 years and criminal investigations sign off on it.
- Criminal Investigations (CI) qualifies whether an individual is eligible for the VCP and CI issues a letter and then passes it off to the civil group to work through the details of the tax and penalties. If CI is already looking at somebody, then these individuals will be disqualified. CI recommends what action be taken with prosecution, etc. CI part in the IRM 9.5.11.9 – on IRS website.
- VCP requires timely, disclose, cooperative to qualify for VCP.
- VCP standard penalties – 6 years – package deal – not able to negotiate between 5% and 20% rate and IRS not considering unusual or special circumstances of why the account was high on a particular day or most of the time lower – just 20% of the highest balance on unreported accounts.
- Another set of FAQ's on the VCP is currently under development and will be available in the future.
- VCP Hotline for previous undisclosed foreign income – 215-516-4777.
- IRS FBAR Question line – 800-800-2877 option 2 or email to FBARQuestions@irs.gov.

Preparer Penalties and Forms 1040/Corporate Schedule Ns/Circular 230

- Substance over form – ask questions, why money in foreign trust with no experience with that trustee and give discretion or not – creates appearance of no control but still controls. Ask what the purpose of the trust is. Duty on the practitioner to ask – IRS/Fincen interested in substance over form.

- 1040 Schedule B reporting is not new. Preparer must have exercised reasonable due diligence/Circular 230.
- FBARs are not income tax returns, so not covered in many engagement letters. Some preparers are making changes to engagement letters to include or exclude FBAR filing as not an income tax return; some are adding a paragraph or a few paragraphs/addendum on the requirements for foreign financial accounts; some are educating clients with a separate letter/notification to the client and advising the client of the client's FBAR responsibilities. Is making inquiries about foreign accounts and signatory authority enough? Do practitioners also need to clarify filing responsibilities sufficient for Circular 230 and related professional standards? IRS says this is a good idea.
- A Form 1040 Schedule B that doesn't have the Question 7 items answered (blank) but all income is reported – this is a processable return, and is not incomplete. If later find out something, may be incorrect. Could file an amended Form 1040X with the Schedule B attached.
- If find out about foreign bank account held by foreign broker or foreign lawyer/ foreign LLC /foreign corp for real estate transaction, primary concern is to file delinquent FBAR and not worry about the Schedule B question being incorrect - if all income was reported and no tax due. No need to file old information returns for the foreign entity if no tax due – just file delinquent FBARs.
- If foreign estate – US beneficiaries inherit – financial interest of the decedent – beneficiaries of the estate that will be liquidated should file protective FBARs for the assets – annuities, etc. – to the best of their abilities – for the present interest.
- If below the Form 1040 Schedule B filing threshold, no Schedule B is required, so did not answer the Part III questions regarding foreign accounts. Do Schedule B questions need to be answered even if no interest or dividends over the threshold? Should answer those questions regardless of no income being reported.
- At all times practitioners are cautioned that substance controls over form. May need to question foreign trust arrangements.
- Detroit will process old version of FBAR form if sent for a prior year, but prefers new version of form for prior year delinquent returns, and new form must be filed for 2008 – due June 30, 2009.
- OK to submit delinquent FBARs without amending 1040, schedule B.
- Failure to file information returns (with no tax due) – delinquent FBARs can be filed without imposition of penalty. This should be coming out in the next FAQ.

Mutual funds

- US funds with foreign investments are not reported on FBAR.
- A foreign account invested in US securities IS to be reported on FBAR.
- Shares of a foreign mutual account have always been an FBAR reportable account, instructions are clearer now.
- The physical location of where you are sending the checks for the mutual fund to determines if it is a foreign account. If it is not located in the US, it is a foreign financial account. If the mutual fund office is foreign, even if it invests in US securities, regardless of the investments, it is a foreign financial account and FBAR required. If the mutual fund office is in the US, no FBAR is required.

Stocks in a Foreign Company

- Direct ownership of stocks in a foreign company are not required to be filed on an FBAR.

Foreign Partnerships or Foreign Corporations

- Is a foreign partnership itself an account? Yes – if the foreign partnership or foreign corporation operates as similar in nature to a foreign mutual fund. Distinction depends on investor intent. If they are pooling the comingled funds for investment, it is a financial account for FBAR. Look at what the entity does.
- If in doubt, file protective FBARs.
- By definition, if the amount of the investment/ownership interest is more than 50% and entity has a foreign financial account, there is control and need to report as directly own the foreign financial account held by the entity.
- If more than 50% interest in the foreign partnership, then the foreign partnership's accounts are FBAR reportable.

Safe Deposit Boxes

- The box itself is not a financial interest (straight up situations – the owner has to show up with a key to access and cannot access without a key and nobody else can access the box.)
- The assets held (i.e., gold/precious metals) in the box do not require an FBAR if it is your own signature or key access in person.
- However, the relationship with the foreign institution may create situations where a safety deposit box becomes a reportable financial interest for FBAR. It depends on the services performed by the foreign institution with respect to access to the contents of the box. If you communicate/direct contact/tell someone to put something in/deposit and take it out/withdrawal on your behalf, then it is a foreign financial account on your behalf and FBAR required.

Signature Authority

- Supervisory authority over a signatory is not considered FBAR reportable signature authority.
- Beneficial owners/signatories must file, regardless of whether the paper trail looks like that person has ownership or signature authority.

Preparation of the Form

- >25 accounts, no need to fill out Part 2 and 3 of the form. What happens when file? Will this trigger an automatic exam or letter? NO
- Must maintain all the info that would have had to be reported.

Trusts

- Any beneficiaries with more than 50% of the income or assets of the trust must file FBARs

- What if the beneficiary not sure of an interest or doesn't have access to account numbers, balances, etc? File with best available information.
- Discretionary trusts – file FBAR protectively for all beneficiaries.
 - If evidence shows that the US person controls the trustee, based on facts and circumstances, then the US person has an FBAR filing.
 - Discretionary trust for a family with 20 potential beneficiaries (i.e., to parents for life, and on their death to grandchildren, and remainder to charity) – all 20 beneficiaries need to file protective FBAR if expectation each can receive more than 50% of assets or income. Also remainder beneficiaries (such as a charity - although if likelihood so removed, consider if such a catastrophic event likely to occur or not.)
 - If beneficiary of foreign trust receives distributions, file protectively if more than 50% or not sure if have more than 50% of income or assets.
- Foreign nongrantor trust - parent foreign and child in US didn't get distributions until turn 18, so never reported income since no interest in foreign account to report until turn 18 – now aware at 18. Attach reasonable cause and file delinquent FBARs.
- Limited Power of Appointment – no control financial account or sign - generally don't have to file FBAR.
- Foreign trusts – trustees hold assets (cash, stock certificates) for person - must file FBAR, may include financial institutions who are trustees.
- Settlers – must file FBAR.
- Generally, an individual who has a current present interest in a foreign financial account is the one who is responsible for filing. A contingent or uncertain remainder interest may not need to file. If prospect of remainder interest get nothing, not required to file FBAR.
- Trustee duties to act in a fiduciary manner w/r/t the beneficiaries – if beneficiaries ask fiduciaries for information and fiduciary fails to respond or fails to produce the documentation, this CAN be “reasonable cause” for the beneficiary. Suggest letter to the trustee asking for information on the trust and if the distribution and interest is more than 50% of the assets or income of the trust – will help to show reasonable cause – evidence of good faith – lack collusion.
- Fill out to the best of your ability, with a statement explaining that the information was not available.
- Beware of realities – make sure legitimate foreign trusts – effective control – no matter if paper or documentation of control. Question when a US person really is in charge of the trust and the trustee just rubber stamps and follows directions and not an independent trustee. If another person/entity holds foreign account on the person's behalf and the person still controls/directs it – need to file an FBAR.
- Substance over form – ask questions, why money in foreign trust with no experience with that trustee and give discretion or not – creates appearance of no control but still controls. Ask what the purpose of the trust is. Duty on the practitioner to ask – IRS/Fincen interested in substance over form.

Maximum Value

- Instructions say maximum value during the year, and marketable securities to use year-end value.

- Noncash assets – value of stocks or brokerage account at end of year – generally report at end of year value or value at date withdrawn during the year if assets were moved
- Cash assets – should use the highest value in the account at any point during the year, not necessarily the highest balance on the statement date. Use the highest balance during the month if provided from the financial institution statements. If the statement does not have daily values, then OK to use highest reported value available. From a DD standpoint, can always call the bank for the highest value. Suggest contacting financial institution where have the account to get the highest value for cash account.
- Margin accounts – report the highest gross value of assets, not net of any margin loans. Only care about assets in the account, not liabilities, for FBAR. Loans do not matter, even if liquidate and only worth the net value. Suggested that since there is no tax owed on the account balance or FBAR and no penalty, put the higher dollar value since no down side.

Note – 20 pages of questions submitted to the teleconference. 260 people on the call.