

Important New Development Regarding Reporting of Foreign Bank and Financial Accounts: What Tax-Exempt Organizations Need to Know

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The Internal Revenue Service (IRS) has stepped up enforcement of foreign bank and financial account reporting obligations for all taxpayers, including tax-exempt organizations and their employees. As discussed below, the penalties for noncompliance can be particularly punitive, and the hurdle for the application of such penalties is low. With tax season approaching, the next few weeks are an excellent time to review compliance with these obligations because these reporting requirements require tax-exempt organizations and certain employees to “check the box” on Form 990 or Schedule B of their Form 1040 returns, as applicable, regarding the existence of and signature authority over such accounts.

The IRS recently posted a significantly revised version of Treasury Form 90-22.1, “Report of Foreign Bank and Financial Accounts” (commonly known as the FBAR). Penalties for failure to satisfy the FBAR reporting requirements are significant and range from criminal sanctions to civil penalties of up to 50% of the balance of an undeclared account per year. The requirements apply equally to organizations and individuals. Although there are some narrow exceptions to the FBAR filing requirements, they generally are not applicable to tax-exempt organizations.

The FBAR requires any U.S. person, including a tax-exempt organization, with signature authority over or a financial interest in a foreign bank or financial account to file an information return by June 30 of the following calendar year. There is no extension of time available for filing the FBAR, regardless of whether a proper extension has been secured for an organization’s Form 990 or 990-PF filing. Given the number of bank accounts maintained by tax-exempt organizations with overseas operations and/or offices, care must be exercised to identify all existing accounts in which the organization has a financial interest and to file the FBAR on a timely basis. Compliance with this filing requirement is cross-referenced by a question on Form 990—Part V, Question 4 on the newly revised 2008 form—in order to highlight this obligation for tax-exempt organizations. Although the Form 990-PF does not include a similar question, private foundations are nonetheless subject to the FBAR filing obligations.

Employees of tax-exempt organizations who have signatory authority over their employers’ foreign bank and financial accounts have an independent individual filing requirement. For such individuals, the FBAR form is cross-referenced in a check-the-box question about foreign accounts on every individual taxpayer Form 1040, Schedule B. A knowingly false negative answer could set the stage for federal prosecution for tax fraud or false statement. Given that some individuals will soon begin

filing their 2008 income tax returns, this is an excellent time to focus on compliance with the FBAR requirements. For tax-exempt organizations, care should be taken about advising employees with signature authority over foreign accounts regarding their individual filing obligations. The best course may be to simply advise relevant employees of this obligation and suggest they consult with individual tax advisors if they have questions. Some organizations have chosen to retain counsel to advise these employees about their obligations with respect to both the FBAR and their individual Forms 1040, Schedule B.

Significant changes recently made to the FBAR include:

- **Definition of U.S. Person Required to File.** The definition has been expanded beyond U.S. citizenship, residency, or (as to entities) domicile. It now includes anyone “in and doing business in the United States.” Foreign persons required to file must provide a foreign identification number, such as a foreign passport number.
- **Exact Maximum Value of Account.** The FBAR now requires the filer to calculate and report the “maximum value of the account during the calendar year reported.” The form provides detailed instructions for calculating the “maximum value.”
- **Definition of Financial Account.** The definition has been expanded to apply to debit card and prepaid credit card accounts.
- **Foreign Trusts and Trust Protectors.** The filing requirement is expanded to U.S. persons that are owners and holders of record title with respect to any foreign trust that was settled by that U.S. person and for which a trust protector has been appointed.
- **Identification of Non-U.S. Person with Financial Interest.** The FBAR now requires any U.S. person with signatory authority over an account to identify any foreign person with a financial interest in the foreign account, and also provide a foreign identification number.
- **Amended/Delinquent Filings.** The FBAR is now structured to provide for an amended filing. The instructions require the filer to attach a copy of the original form as well as a statement explaining the changes. Similarly, the form now requires late filers to “attach a statement explaining the reason for the late filing.”

If you have any questions concerning these important legal developments or would like copies of any of the documents mentioned, please contact any of the following Morgan Lewis attorneys:

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