

Important New Development Regarding Reporting of Foreign Bank and Financial Accounts: What Corporations and Individuals Need to Know

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The Internal Revenue Service (IRS) has made enforcement of foreign bank and financial account reporting obligations a top priority, both with respect to corporate and individual taxpayers. As discussed in detail below, the penalties for any compliance failure are 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 (even for corporations) usually require certain individuals (and corporate employees) to “check the box” on Schedule B of their Form 1040 returns filed each year with respect to their signature authority over these 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 corporations and to individuals. As noted below, there are some narrow exceptions to the FBAR filing requirements.

With respect to corporations, the FBAR requires any U.S. person with signature authority or a financial interest in a foreign bank/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 the tax return filing. Given the numbers of bank accounts frequently maintained by multinationals, care must be exercised to coordinate FBAR compliance with their tax units.

For individuals, the form itself 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 sets the stage for federal prosecution for tax fraud or false statement. Given that individuals will be able to start filing their 2008 income tax returns as early as this month, this is an excellent time to focus on compliance with the FBAR requirements. For corporate clients, care should be taken about advising corporate employees about 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. Other corporations have retained counsel solely for the purpose of advising these employees about their obligations both with respect to the FBAR and their individual Forms 1040, Schedule B.

Corporate Account Filings and CFO Certification. Officers or employees of a domestic corporation that is publicly traded, or which has assets exceeding \$10 million as well as 500 or more shareholders of record, may qualify for a limited exception. An FBAR is not required for an employee if the CFO (or officer of similar standing) has advised such employee in writing that the corporation has filed a current FBAR with respect to such account.

If a U.S. subsidiary is named in a consolidated FBAR filed by the parent, the subsidiary will be deemed to have satisfied the filing requirement. These exceptions also apply to officers and employees of foreign subsidiaries more than 50% owned by a domestic corporation meeting the above-noted requirements.

Significant changes 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 owners and holders of record title with respect to any foreign trust which 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 form 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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