

PUBLICATION

Many Foreign Nationals Must File U.S. Reports About Foreign Financial Accounts

Authors: Robert C. Divine

September 29, 2009

Citizens and many unsuspecting foreign nationals in the United States must submit annual reports to the U.S. Department of Treasury concerning a broad array of foreign financial accounts exceeding \$10,000. The Internal Revenue Service initially announced a voluntary disclosure program in March 2009 with a deadline for reporting previous violations of September 23, 2009. The IRS has announced a one-time extension of the deadline until October 15, 2009. Required persons must submit an increasingly detailed Form TD F 90-22.1. Penalties for noncompliance are severe.

Background

The obligation arose from the Bank Secrecy Act enacted in 1970. The BSA requires the filing of the Report of Foreign Bank and Financial Accounts (FBAR) to keep U.S. persons from hiding assets in foreign banks and otherwise evading U.S. taxes. The FBAR is not a tax return and is not covered by the confidentiality enjoyed by tax returns. The obligation to file the FBAR is separate from the obligation to pay taxes on any income earned throughout the world.

U.S. law has long required "U.S. persons" to report the person's interest in or authority over foreign bank and financial accounts outside the United States aggregating in value over \$10,000 at any time during a calendar year. The person files the FBAR for a calendar year by June 30 of the succeeding calendar year. The FBAR is not filed with the person's tax return, but instead is filed with the Department of Treasury in Detroit, centralized nationally. Extension of time to file an income tax return does not extend the time to file an FBAR.

2008 Revision and Penalties

In September, 2008, the IRS revised the FBAR (Form TD F 90-22.1) requiring far more detail about foreign accounts and amounts, with new guidance for valuation of security and other non-monetary assets. Also in 2008, the IRS issued reminders about the reporting requirements and the severity of penalties for failure to file. Civil penalties for a non-willful violation can be up to \$10,000 per violation. Civil penalties for a willful violation can be the greater of \$100,000 or 50% of amount in the account. Even more severe criminal penalties, including \$500,000 and five years in prison, can result in combination with other types of violations.

Covered Persons and Accounts

The scope of "U.S. persons" subject to the FBAR requirements is surprisingly broad. It includes just about any type of entity. As far as individual persons, it includes U.S. citizens, U.S. tax "residents," and even other persons doing more than "sporadic" business in the United States. "Resident" means not only a permanent resident (the "green card test") but also any person meeting a "substantial presence test" for any calendar year. "Substantial presence" means physical presence in the United States on at least 31 days during the current year. The obligation does not go away immediately, because "substantial presence" also is established through a total of 183 days of physical presence during last three years according to the following formula, adding together: (i) all presence from the current year, (ii) one-third of the days present during the first preceding year, and (iii) one-sixth of the days during the second preceding year. This test and the "doing business" test capture a great many people temporarily in the United States, on what U.S. immigration law refers to as "non-immigrant" status, who do not expect obligations like the FBAR. Other terms under the rules,

including financial interests, authority and account are defined broadly so that most persons in the U.S. staying over a month are subject to the requirements to report accounts aggregating \$10,000 or more.

Many foreign nationals in the United States earn income from assets abroad that in effect are not taxable in the United States by virtue of tax treaties between the United States and the other country. Exception from taxation does not exempt one from FBAR filing. Exemptions are narrow and specific. Almost all types of financial accounts are covered, including even hedge funds and mutual funds.

Limited Time for Past Disclosures

Many U.S. taxpayers have become aware of FBAR requirements in connection with the Justice Department's pursuit of certain foreign banks that have agreed to disclose previously unreported accounts. In connection with this effort, the United States has offered relaxation of certain penalties for those persons who disclose past failures as follows:

- Persons who first became a U.S. person with \$10,000 in aggregate accounts abroad in 2008 (and thus should have filed a FBAR by June 30, 2009) may file an FBAR at the regular IRS office in Detroit by June 30, 2010.
- U.S. persons who have paid all taxes owed but have failed to file FBAR for calendar years before 2008 may file the FBAR, along with relevant tax returns showing taxes paid (or not due) at an IRS office in Philadelphia by October 15, 2009.
- Taxpayers who have failed to pay taxes for any years since 2003 (the extent of the criminal statute of limitations) may submit amended income tax returns along with FBAR reports to the local criminal investigative unit of the IRS by October 15, 2009.

Our Tax Department wrote a [previous article on FBAR disclosures](#) on August 5.

Someone confronting FBAR disclosure responsibilities should immediately retain competent tax advice.

How We Can Help

When specifically requested, Baker Donelson's Immigration Group works closely with the Firm's Tax Department consisting of scores of attorneys in its offices from Washington, D.C. to New Orleans. These attorneys practice in a broad range of tax matters including income tax planning, estate planning, business tax planning, tax exempt organizations work, state and local tax issues, and federal and state tax disputes. Baker Donelson assists all types of business entities and individuals, including foreign nationals. Our attorneys work closely with tax advisors and preparers. In the absence of a specific request for tax advice, however, our Immigration Group's services do not include tax advice or assistance.

Circular 230 Disclaimer: Under requirements imposed by the IRS, we inform you that, if any advice concerning one or more U.S. federal tax issues is contained in this communication (including any attachments), such advice was not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any transaction or tax-related matter addressed herein.