

FBAR: Revised TD F 90-22.1 (October 2008)

In October 2008, the IRS issued a revised version of TD F 90-22.1 "Report of Foreign Bank and Financial Accounts ("FBAR"), (copy attached).

The FBAR filing obligation was created by the Bank Secrecy Act (1970)(USC §5314). Prior to 2003, there was minimal enforcement against non-compliant taxpayers because the IRS was not responsible for enforcing the penalties (enforcement was the responsibility of the Financial Crimes Enforcement Network who prioritized terrorism and narcotics crimes over tax fraud).

In 2003, Congress shifted enforcement jurisdiction to the IRS who increased enforcement against non-compliant foreign account holders. In 2004, new penalties were instituted which increased the potential fine for not filing a FBAR to 50% of the maximum account balance per year, which meant after 2 years the FBAR penalties may exceed the account value (31 U.S.C. 5321(a)(5)(C)).

Currently, the IRS is seeking information on U.S. taxpayers holding unreported foreign accounts. In 2009, the IRS served a John Doe summons on UBS for a list of its American account holders. U.S. Taxpayers who fail to file FBARs, for undisclosed foreign accounts (estimated at over 700,000 taxpayers) face criminal investigation and indictment.

The revised FBAR form (October 2008), requires any U.S. person with signature authority over or a financial interest in a foreign bank or financial account to file an information return with a Treasury Department office in Detroit by June 30th of the following calendar year (both individual and corporate taxpayers).

The FBAR is not an income tax return (i.e., Form 1040). Rather, the FBAR is an information return used to disclose foreign bank and financial accounts.

Form 1040 Schedule B, Question 7(a) requests the taxpayer to confirm whether they have either signature authority over or a financial interest in any foreign account.

Taxpayers who answer yes to Question 7(a) must file a FBAR. If a taxpayer answers no to 7(a) but actually has a foreign account, the taxpayer may be criminally investigated and ultimately indicted for:

1. Filing a False Tax Return
2. Unreported Income (willful evasion of tax **[from the foreign account]**)
3. Failure to File a FBAR

The revised FBAR form states: "Do not use previous editions of this form after December 31, 2008". All FBAR's due for Tax Years 2008 (forward) and back year FBAR's (unfiled) are to be reported on the new form.

The revised FBAR form includes new provisions designed to facilitate IRS off-shore enforcement. Specific new provisions are included for:

1. Foreign Trusts (Trust Protector)

If a U.S. person appoints a Trust protector, for a foreign account held by a Foreign Trust, the U.S. person has a financial interest in the account and must file a FBAR.

2. Foreign Trusts (Trust Beneficiaries)

Trust beneficiaries do not have a FBAR filing requirement unless they are a U.S. person who is the beneficiary of more than 50% of a Trust holding a foreign account.

3. Debit Card (Prepaid Credit Cards)

Reportable financial accounts include debit cards and prepaid credit card accounts.

4. Foreign Persons

Foreign persons in and doing business in the U.S. are required to provide identifying information (i.e., "foreign identification number", such as foreign passport number) and file FBAR's.

5. Account Value

Instead of an account value range, U.S. taxpayers must fill in the exact value of the account during the calendar year.

6. Foreign Account Owners

U.S. persons, with signature authority over the account (who file the FBAR) must identify the account's foreign owner.

7. Joint Filing for Married Taxpayers

Previously, married taxpayers had to file separate FBAR's for a jointly owned account. The new FBAR allows joint filing. The new FBAR requires the filer to provide the identifying information for the "principal joint owners".

8. Record Retention

The new FBAR explicitly states the records must be kept for a period of 5 years and must be kept at all times available for inspection.

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