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**MEMORANDUM**

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**RE:     U.S. TAXPAYER REPORT OF FOREIGN BANK & FINANCIAL  
          ACCOUNTS (“FBAR”) (FORM TD F 90-22.1)**

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On April 2, 2009, the IRS announced they will reduce the penalty for not filing a Report of Foreign Bank and Financial Account, known as a FBAR Form.

The current penalty is up to fifty percent (50%) of the highest annual balance of each account for each of the last 3 years. The 50% penalty is imposed annually. After 2 years of the 50% penalty, the account can be “wiped out” and the investor may still owe taxes (and interest).

The IRS announced they will not generally prosecute Taxpayers who come forward voluntarily, provided they are not drug dealers, arms merchants or others with “ill-gotten gains”.

The IRS will not assess a 35% penalty (due under Form 3520) on money secretly transferred to foreign trusts (i.e., tax evasion).

The IRS will reduce the penalty to 5 to 20%, depending in part on whether the wealth was inherited. The IRS will levy the penalty just once, on the highest balance in the accounts over the last 6 years.

Under the IRS plan, Taxpayers will be required to pay any taxes and interest owed over the last 6 years. The IRS will assess either the standard, accuracy-related penalty of 20%, or a 25% penalty for filing tax returns later. Taxpayers in the program must also file amended tax returns for up to the last 6 years.

**U.S. Taxpayers:**

1. Have 6 months to accept the IRS plan (i.e., by 10/2/09)
2. Under criminal investigation for tax evasion are not eligible

3. Are not required to provide information about the bankers, lawyers and accounts who assisted them

The IRS plan was developed amid widening investigation into American clients of UBS but will apply to clients of other banks. **According to Douglas Shulman, the IRS Commissioner, the goal “is to get Taxpayers who have been hiding assets offshore back into the system.”**

The following is a summary of tax returns due for Foreign Bank Accounts:

## **I. Returns Relating to Foreign Bank Accounts**

### **A. In General**

1. Each U.S. person having a financial interest in, or signature or other authority over, any foreign financial accounts with an aggregate value exceeding \$10,000 at any time during the calendar year must report such relationship by filing **Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (“FBAR”)**,

2. In addition, they have to disclose the foreign account filing requirement on **Schedule B of Form 1040** and including the income from these accounts on the United States person's U.S. federal income tax return.

### **B. Who Must File**

Form TD F 90.22-1 is required to be filed by every U.S. person for each calendar year in which such person has a financial interest in, or signature or other authority over, any foreign financial accounts with an aggregate value exceeding \$10,000 at any time during the calendar year. **The test is based in the alternative – financial interest in or signature authority over the account.**

## **1. Definitions**

For purposes of FBAR, the term "United States person" means (1) a citizen or a resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust.

The term "financial account" generally includes any bank, securities, securities derivatives or other financial instrument accounts, (including any accounts in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund), savings, demand, checking, deposit, time deposit, or any other account maintained with a financial institution (or other person engaged in the business of a financial institution).

Any of the financial accounts described above is considered to be a foreign financial account for purposes of FBAR, if it is located outside the United States, Guam, Puerto Rico, and the Virgin Islands. The situs of a financial account is determined by the location where the branch is, not the location of the institution's home office.

## **2. Ownership of Accounts**

Under the instructions to Form TD F 90-22.1, a U.S. person has a financial interest in a bank, securities, or other financial account in a foreign country under either of the following circumstances:

1. A U.S. person is the owner of record or has legal title, whether the account is maintained for his or her own benefit or for the benefit of others including non-U.S. persons. If an account is maintained in the name of two persons jointly, or if several persons own a partial interest in an account, each of those U.S. persons has a financial interest in that account.
2. A U.S. person has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is:
  - a. A person acting as an agent, nominee, attorney, or in

some other capacity on behalf of the U.S. person;

- b. A corporation in which the U.S. person owns directly or indirectly more than 50 percent of the total value of shares of stock;
- c. A partnership in which the U.S. person owns an interest in more than 50 percent of the profits (distributive share of income); or
- d. A trust in which the U.S. person either has a present beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.

### **3. Signature Authority**

For purposes of Form TD F 90.22-1, a U.S. person is considered to have signature authority over a foreign financial account if such person can control the disposition of money or other property in the account by delivering his or her signature (or his or her signature and that of one or more other persons) to the bank or other person maintaining the account.

In addition, a U.S. person has "other authority" subject to FBAR reporting if such person can exercise comparable power over an account by direct communication to the bank or other person maintaining the account, either orally or by some other means.

### **4. Exceptions**

Notwithstanding the general rules, Form TD F 90.22-1 is not required to be filed under the following circumstances:

- 1. An officer or employee of a bank which is subject to the supervision of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, or the Federal Deposit Insurance Corporation need not report that he has signature or other authority over a foreign bank, securities or other financial account maintained by the bank, if the officer or employee has NO personal

financial interest in the account.

2. An officer or employee of a domestic corporation whose equity securities are listed upon national securities exchanges or which has assets exceeding \$10 million and 500 or more shareholders of record need not file such a report concerning the other signature authority over a foreign financial account of the corporation, if he has NO personal financial interest in the account and he has been advised in writing by the chief financial officer of the corporation that the corporation has filed a current report, which includes that account.
3. As noted above, a U.S. person is not required to report any account maintained with a branch, agency, or other office of a foreign bank or other institution that is located in the United States, Guam, Puerto Rico, and the Virgin Islands.

### **C. Mechanics of Filing**

Reporting on Form TD F 90-22.1 is required for each calendar year that a U.S. person maintains such interest or authority over foreign financial accounts. Persons having a financial interest in 25 or more foreign financial accounts are required only to note that fact on the form (i.e., a general statement indicating that information on all such accounts will be available upon request). (31 CFR § 103.24. Such persons will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.)

The Form TD F 90-22.1 is filed with the U.S. Department of the Treasury, P.O. Box 32621, Detroit, MI 48232-0621, or it may be hand carried to any local office of the Internal Revenue Service for forwarding to the Department of the Treasury in Detroit, MI. The Form TD F 90-22.1 must be filed on or before June 30 each calendar year. An extension for filing one's U.S. income tax return does not extend the deadline for making a TD F 90-22.1 filing.

## **D. Additional Issues**

Each U.S. person subject to this reporting requirement must also maintain records showing, (1) the name in which each such account is maintained, (2) the number or other designation of such account, (3) the name and address of the foreign bank or other person with whom such account is maintained, and (4) the type of such account, and the maximum value of each such account during the reporting period (31 CFR §103.32). These records must be retained for a period of 5 years and must be kept at all times available for inspection as authorized by law.

## **E. U.S. Trustee Foreign Non-Grantor Trust**

### **Report of Foreign Bank and Financial Accounts – Form TD F 90-22.1**

A U.S. trustee of a foreign nongrantor trust must file Form TD F 90-22.1 if the Trustee has a financial interest in or signature authority or other authority over any financial accounts, including bank, securities, or other types of financial accounts in a foreign country if the value of such accounts exceeds \$10,000. A person has a financial interest in any such account if she has legal title to it.

Trustees generally have legal title to accounts in which trust funds are invested. In addition, if legal title to an account is held by a corporation or partnership and the trustee owns more than 50% of the corporation or partnership, the trustee will be treated as having a financial interest in such account.

A person has signature authority over an account if she can control the disposition of account property by the delivery of a document signed by her and one or more other persons. A person has other authority over an account if she can control such disposition by direct communication to the person with whom the account is maintained.

Form TD F 90-22.1 must be filed by June 30th of the year following the year in which the U.S. person had such financial interest or signature or other authority.

## **F. Form TD F 90.22-1**

A willful violation of the Form TD F 90.22-1 requirements (i.e., failure to file Form TD F 90.22-1, failure to supply information on the report, or filing a false or fraudulent report) could result in the imposition of civil and/or criminal penalties. (The instructions for Form TD F 90.22-1 specifically provide that criminal penalties for failing to comply with FBAR are provided in 31 U.S.C. § 5322(a) and (b), and 18 U.S.C. § 1001. In addition, civil penalties for failure to comply are generally provided in 31 U.S.C. § 5321.)

### **Civil Penalties**

If any U.S. person willfully violates the Form TD F 90.22-1 filing requirement, such person may be liable to the U.S. government for a civil penalty of not more than \$25,000 (31 U.S.C. § 5321. Section 5321 generally provides that if a U.S. person willfully violates a regulation, such person may be liable for a civil penalty of not more than the greater of the amount (not to exceed \$ 100,000) involved in the transaction (if any) or \$25,000.

With respect to reporting on Form TD F 90.22-1, a U.S. person is not reporting a transaction but, rather, reporting his interest or signature authority over a foreign financial account. Thus, the maximum amount of potential civil penalty is \$25,000.):

### **Criminal Penalties**

1. If a U.S. person willfully violates the reporting requirement, such person may be subject to a fine of not more than \$250,000, or imprisoned for not more than 5 years, or both (31 U.S.C. § 5322(a)); and
2. If a U.S. person willfully violates the reporting requirement while violating another law of the United States, or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period, such U.S. person may be subject to a monetary fine of not more than \$500,000, or imprisoned for not more than 10 years, or both (31 U.S.C. § 5322(b)).

If a U.S. person, with respect to Form TD F 90.22-1, (1) falsifies, conceals, or covers up by any trick, scheme, or device a

material fact, (2) makes any materially false, fictitious, or fraudulent statement or representation, or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, such person may be fined, or imprisoned for not more than 5 years, or both (18 U.S.C. § 1001).

Failure to File the FBAR form (Civil and Criminal Penalties)

	<b>Negligent Violation</b>	<b>Civil Penalties</b>	<b>Criminal Penalties</b>	<b>Comments</b>
(1)	Non-Willful Violation	Up to \$10,000 for each violation.	N/A	31 U.S.C. § 5321(a)(5)(B)
(2)	Negligent Violation	Up to the greater of \$100,000, or 35 percent of the greatest amount in the account.	N/A	31 U.S.C.
	<b>Intentional Violation</b>	<b>Civil Penalties</b>	<b>Criminal Penalties</b>	<b>Comments</b>
(1)	Willful - Failure to File FBAR or retain records of account	Up to the greater of \$100,000, or 50 percent of the greatest amount in the account.	Up to \$250,000 or 5 years or both	31 U.S.C. §5321(a)(5)(C) 31 U.S.C. § 5322(a) and 31 C.F.R. §103.59(b) for criminal
(2)	Willful - Failure to File FBAR or retain records of account while violating certain other laws	Up to the greater of \$100,000, or 50 percent of the greatest amount in the account.	Up to 500,000 or 10 years or both	31 U.S.C. § 5322(b) and 31 C.F.R. §103.59(c) for criminal
(3)	Knowingly and Willfully Filing False FBAR	Up to the greater of \$100,000, or 50 percent of the greatest amount in the account.	\$10,000 or 5 years or both	18 U.S.C. § 1001, 31 C.F.R. § 103.59(d) for criminal

Gary S. Wolfe  
A PROFESSIONAL LAW CORPORATION  
9100 Wilshire Blvd., Suite 505 East  
Beverly Hills, CA, 90212  
Tel: 310-274-3116 Fax: 310-274-3118  
<http://gswlaw.com>  
email: [gsw@gswlaw.com](mailto:gsw@gswlaw.com)