



# Final foreign bank and financial account reporting *Are you ready?*

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Ellen MacNeil  
Sam Lowenthal

# Introduction

# FBAR – Why now?

- An expanded FBAR rule effective March 28, 2011 impacts virtually all companies.
  - Employees and officers having signature authority over one or more foreign financial accounts of the company must file a FBAR with respect to each account, unless one of the limited exceptions apply.
    - An exception applies only with respect to foreign financial accounts directly owned by the entity that employs the officer or employee.
- Compliance may require a substantial information gathering, analysis, and documentation effort.
- Forms must be *received* by **June 30, 2011**.

# Final FBAR regulations and compliance requirements

# Who is required to file Form TD F 90-22.1?

- Any United States person with a financial interest in, **or signature or other authority over**, any foreign financial account if the aggregate value of all accounts exceeds \$10,000 at any time during the calendar year is generally required to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (“FBAR”).
- **U.S. person defined:** United States citizen or United States resident. Including:
  - An alien residing in the United States.
  - An entity (corporations, partnerships, limited liability companies, etc.) created or organized in the United States or under the laws of the United States, or a trust or estate formed under the laws of the United States.

# What is a foreign financial account?

- **Foreign financial account defined:** A financial account located outside of the United States. Includes:
  - Bank accounts
  - Securities accounts
  - Insurance and annuity policies with a cash value
  - Commodities or futures options
  - Mutual or other pooled funds
    - Available to the general public with a regular net asset value
  - The location of an account, not the nationality of the financial institution with which the account is held, determines whether the account is in a foreign country.

# What is a financial interest?

- **Defined:** The U.S. person is the owner of record or has legal title over the account, or the owner of record or holder of legal title over the account is:
  - A person acting as agent, nominee, or attorney for the U.S. person,
  - A corporation in which the U.S. person owns directly or indirectly more than 50% of the stock value or voting power
  - A partnership in which the U.S. person owns an interest in more than 50% of the profits or capital
  - A trust where the U.S. person (1) is the trust grantor and has an ownership interest for U.S. tax purposes, or (2) has a greater than 50% present beneficial interest in the assets or income of the trust, or (3) has established an appointed trust protector that is subject to the U.S. person's direct or indirect instruction
  - Any other entity in which the U.S. person owns directly or indirectly more than 50% of the voting power, total value of the equity interest or assets, or interest in profits

# What is signature or other authority?

- **Signature or other authority defined:** The authority of an individual (alone or in conjunction with another) to control the disposition of money, funds, or other assets held in a financial account by **direct communication** (whether in writing or otherwise) to the person with whom the financial account is maintained.

# Signature or other authority: exceptions

## Limited exceptions for public companies

- An officer or employee with signature or other authority over, but no financial interest in, a foreign financial account of an entity with a class of equity securities, whether foreign or domestic, listed on any United States national securities exchange.
  - An officer or employee of a U.S. subsidiary of a listed U.S. entity if the U.S. subsidiary is included in a consolidated FBAR report of the parent and the officer or employee has no financial interest in the subsidiary's financial account.
  - **Only applies with respect to foreign financial accounts directly owned by the entity that employs the employee or the entity in which the person is an officer.**

# Signature or other authority: exceptions

- These exceptions *do not apply* to:
  - A U.S. officer or employee of a private company, who has signature authority over a foreign financial account of the private company or a domestic or foreign subsidiary of a private company
  - A U.S. officer or employee of a controlled foreign corporation (“CFC”) that has signature authority over a CFC’s foreign financial account
  - An officer or employee of a U.S. subsidiary who has signature authority over a U.S. parent’s foreign financial account
  - An employee of a U.S. subsidiary with a foreign parent

# Signature or other authority: exceptions

## Other exceptions

- An officer or employee with signature or other authority over a foreign financial account of a U.S. corporation that has a class of equity securities registered under section 12(g) of the Securities Exchange Act and the officer or employee has no financial interest in the account
- Any person with signature or other authority over, but no financial interest in, a foreign financial account and who is an officer or employee of:
  - A bank that is examined by federal banking agencies,
  - A financial institution that is registered with and examined by the Securities and Exchange Commission or Commodity Futures Trading Commission, or
  - An Authorized Service Provider where there is an account owned or maintained by an investment company that is registered with the Securities and Exchange Commission

# Signature or other authority: exceptions

## Private companies, U.S. and foreign partnerships, foreign subsidiaries, etc.

- There are **no exceptions** for employees and officers of private U.S. companies, U.S. and foreign partnerships, foreign subsidiaries, private foreign corporations, and subsidiaries of foreign corporations, who are U.S. citizens or residents and have signature or other authority over a foreign financial account of such an entity.

# Signature or other authority

## Example 1

- Susan, a payroll supervisor and U.S. employee of BigCo, a publicly traded U.S. corporation engaged in the manufacture of consumer electronics, had the ability to direct a foreign banking institution to transfer funds from a non-U.S. bank account (with funds in excess of \$10,000) owned by FranceCo., a wholly owned French subsidiary of BigCo, to FranceCo's employees throughout the 2010 calendar year. Does Susan need to file a FBAR?
- Yes, Susan has signature authority over a foreign subsidiary's bank account and must file a FBAR with respect to FranceCo's foreign account.

# Signature or other authority

## Example 2

- Same as example 1, except that the foreign bank account is owned by BigCo, Susan's employer, rather than FranceCo. Does Susan need to file a FBAR with respect to BigCo's foreign bank account?
- No, while Susan has signature authority over a foreign bank account, Susan is an employee of BigCo, the owner of the account. Because BigCo is a company with equity securities traded on a U.S. securities exchange, the exception for employees and officers of a publicly traded corporation applies.

# Signature or other authority

## Example 3

- Same as example 1, except that Susan is a U.S. employee of ServicesCo, a wholly owned U.S. subsidiary of BigCo. In addition, John, who is the CFO of BigCo and a U.S. employee, also has signature authority over FranceCo's foreign bank account. Who must file a FBAR?
- Both John and Susan must file a FBAR with respect to FranceCo's foreign bank account.
  - Susan's employment by BigCo's subsidiary does not alter Susan's requirement to file a FBAR with respect to FranceCo's foreign account.
  - John has signature authority over a foreign subsidiary's bank account and must file a FBAR with respect to FranceCo's foreign account.

# Signature or other authority

## Example 4

- Same as example 1, except that Susan retired in February of 2010, and FranceCo had her removed as a person with signature authority at such time. Does Susan still need to file a FBAR?
- Yes, Susan must still file a FBAR for the 2010 calendar year with respect to FranceCo's accounts even though she stopped working for BigCo in February 2010. Any U.S. person with signature authority over a foreign financial account at any time during the calendar year, must file a FBAR with respect to that foreign account.

# Signature or other authority

## Example 5

- In 2010, Tom, a procurement manager and U.S. citizen employed by BigBoxStore Inc., a publicly traded U.S. corporation engaged in the retail sale of consumer products, transferred to and became an employee of China Supply Co. (CSC), a wholly-owned direct Chinese subsidiary of BigBoxStore, Inc., to oversee foreign product procurement. Tom was given signing authority over CSC's non-U.S. bank accounts. In addition, Bill, BigBoxStore Inc.'s CFO who is a U.S. person, and Sharon, a Chinese national and employee of CSC, also have signature authority over CSC's foreign accounts. Who must file must file a FBAR with respect to CSC's foreign accounts for 2010?
- Tom and Bill must each file a FBAR with respect to CSC's foreign financial accounts. They are both U.S. persons with signature authority over a foreign subsidiary's accounts.
- Provided Sharon was not a U.S. resident, Sharon would not be considered a U.S. person, and does not have to file a FBAR.

# Signature or other authority

## Example 6

- Miguel is a Mexican citizen who works for a wholly-owned Mexican subsidiary of a publicly traded U.S. corporation. As part of Miguel's responsibilities, Miguel has signature authority over all of the Mexican subsidiary's financial accounts in Mexico. In March 2010, Miguel moved to the U.S. as an employee of the Mexican subsidiary to work directly with his U.S counterparts at the U.S. parent. Miguel also continued to own his personal bank accounts in Mexico. Does Miguel need to file a FBAR for 2010? Would there be a different result if Miguel transferred and became an employee of the U.S. parent?
- Provided Miguel is considered a U.S. resident for 2010, Miguel must file a FBAR with respect to each Mexican bank account for which he has signature authority. The result would be the same even if Miguel transferred and became an employee of the U.S. parent. In addition, Miguel must file a FBAR with respect to each of his personal foreign bank accounts.

# Signature or other authority

## Example 7

- Big Bank plc is a U.K. company listed on the FTSE and trades in ADRs in the U.S. Big Bank plc, through its U.K. and non-U.K. subsidiaries, is engaged in commercial banking activities, asset and wealth management activities, and proprietary investments. Janis, the CEO of Big Bank plc resides in London but retains her U.S. citizenship. For all of 2010, Janis had signature authority over all of Big Bank plc's corporate banking and financial accounts, including U.K. and other non-U.S. financial accounts. In addition, the treasury function for all of Big Bank plc's non-U.K. operations are conducted by its wholly owned subsidiary, BBP Super Holdco, a Swiss company. Janis also has signature authority over BBP Super Holdco's financial accounts. Does Janis need to file a FBAR?
- Because Janis is a U.S. citizen, she must file a FBAR with respect to the non-U.S. financial accounts of BBP Super Holdco. However, Janis does not need to file a FBAR with respect to Big Bank plc's U.K. and other non-U.S. financial accounts because the exception for employees and officers of a company with equity securities that trade on a U.S. securities exchange applies.

# Prior year filings

## Example 8

- Victoria, a U.S. person, had the ability to direct a foreign banking institution to transfer funds from a non-U.S. bank account (with funds in excess of \$10,000) of her employer during calendar years 2009 and 2010. In June of 2010, Victoria elected not to file an FBAR for signature authority until the IRS issued more definitive guidance. Provided no exceptions apply, does Victoria need to file a FBAR for 2009 and 2010?
- Yes, Victoria has signature authority over her employers' foreign bank account and must file a FBAR for 2009 and 2010 with respect to her employer's foreign account. Victoria must use the March 2011 version of the FBAR form for the 2009 and 2010 years and she must check the appropriate box on Schedule B of her Form 1040.
  - What if Victoria already filed her 2009 and 2010 Form 1040?

# Prior year filings

## Who needs to worry about prior year filings?

- Filers who may not have included all accounts for which they have a reportable financial interest.
- Those who may not have recognized there was a filing requirement.
- Those with signature or other authority who deferred filings for prior years based on IRS guidance.
- Officers and employees who may have retired or are no longer with the organization.

# Filing procedures

# FBAR filing procedures

- Timely filing procedures:
  - Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts*, is completed on a calendar year basis
  - Updated Form and Instructions issued March 2011
  - Must be **received** by June 30 of following year
    - IRC § 7502 mailbox rule does not apply
  - Filed with Detroit Center
- Filing procedures for delinquent and prior year extended filings:
  - Use current year form for all filings, do not use prior year forms
  - Late filing statement if not extended by prior IRS guidance
  - Filed with Detroit Center

# Treasury Form TD F 90-22.1 penalties

Violation	Civil penalties	Criminal penalties	Comments
Negligent violation	Up to \$500		31 U.S.C. § 5321(a)(6)(A) 31 C.F.R. 1010.820(h)
Non-willful violation	Up to \$10,000 for each negligent violation	N/A	31 U.S.C. § 5321(a)(5)(B)
Pattern of negligent activity	In addition to penalty under § 5321(a)(6)(A) with respect to any such violation, not more than \$50,000	N/A	31 U.S.C. § 5321(a)(6)(B)
Willful — Failure to file FBAR or retain records of account	Up to the greater of \$100,000, or 50 percent of the amount in the account at the time of the violation.	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. § 1010.840(b) for criminal The penalty applies to all U.S. persons
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 amount in the account at the time of the violation.	Up to \$500,000 or 10 years or both	31 U.S.C. § 5322(b) and 31 C.F.R. § 1010.840(c) for criminal The penalty applies to all U.S. persons
Knowingly and willfully filing false FBAR	Up to the greater of \$100,000, or 50 percent of the amount in the account at the time of the violation.	\$10,000 or 5 years or both	18 U.S.C. § 1001 31 C.F.R. § 1010.840(d) for criminal The penalty applies to all U.S. persons

Civil and criminal penalties may be imposed together. 31 U.S.C. § 5321(d).

# FBAR compliance process

# Impact, assessment, and execution

- **Data collection:** Identify all foreign accounts and gather all account information that needs to be reported.
  - Accounts include all bank and financial accounts of subsidiaries, disregarded entities, joint ventures and non-corporate accounts, related parties, pension plans, trusts, etc.
    - Closed accounts
    - Inactive accounts
  - Evaluate organization chart and any financial/banking account oversight controls
  - Inquiries to and collect information from legal entities, business units, treasury and accounting functions, etc.

# Information to be gathered

## Required information:

- Name of account owner
- Taxpayer Identification Number of account owner (i.e., EIN or FIN)
- Account holder's mailing address
- Type of foreign account (e.g., bank, securities)
- Name of financial institution holding foreign account
- Mailing address of financial institution holding foreign account
- Account number (or equivalent designation)
- Maximum value of account during the calendar year
- Names of signature authorities
- Designation of whether a U.S. person
- Taxpayer Identification number of signatory (i.e., SSN or employee ID number)

# Impact, assessment, and execution

- **Data analysis and information processing:** Analyze account information, identify filing requirements for entities and employees and officers who are also U.S. persons, apply signature authority and other potential exceptions, and prepare for form preparation.
  - Identify foreign accounts to be included in the company's FBAR filings.
  - Identify foreign accounts of all filing entities.
  - Identify all employees and officers having signatory authority over foreign accounts and determine whether they are U.S. persons.
    - Consider whether any exceptions apply to that person.
    - Consider whether any U.S. person has signature authority and a filing requirement for more than 25 accounts.
    - Consider whether any U.S. persons also have a financial interest in any foreign accounts.

# Impact, assessment, and execution

- **Manage compliance and communications:**
  - Develop a communications policy for impacted employees and officers to ensure filing obligations are met and any questions and issues can be addressed and resolved.
  - Prepare signature and other authority FBAR filings for impacted individuals.
    - Manage delivery process and communications to ensure the FBARs are timely signed and timely **received** by the IRS Service Center in Detroit by **June 30, 2011**.
  - Prepare FBAR filings for financial interests
    - Consolidated reporting
    - Other entity filers

# Questions and answers

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