



Sandy Klein - Current status of reporting foreign bank and financial accounts

June 13, 2011 - Spotlights

The requirement to report the ownership of foreign bank and financial accounts has been in place for many years, but until the recent UBS scandal it was treated more like a formality and was probably not given too much attention by practitioners who have since treated it as an important filing requirement. A Report of Foreign Bank and Financial Accounts (FBAR) must be filed by each U.S. person who owns, has a financial interest in, or has signature authority over foreign financial accounts whose aggregate value exceeds \$10,000.

On February 24, 2011 the Treasury Department through the Financial Crimes Enforcement Network (FinCEN), issued final regulations relating to the FBAR. As a result of these final regulations, in March 2011 Form TD F 90-22.1 and its instructions were revised.

Who Is a U.S. Person? - The definition in the old regulations contained the words, "a person in and doing business in the United States." The new regulations removed this phrase. A U.S. person is finally defined as 1) A U.S. citizen, 2) A resident alien as defined under Sec. 7701(b) of the code or 3) an entity not limited to a corporation, trust, partnership or limited liability which is organized or formed under the laws of the United States, any state, any U.S. territory or possession and the Indian land.

Financial Interest - If the U.S. owner is the owner of record, whether or not the account is maintained for his or her benefit, the U.S. owner has a financial interest. There is a financial interest if any of the following conditions exist:

- 1) An agent, nominee etc. is the holder of legal title and is acting on behalf of the U.S. person.
- 2) A corporation is the owner of the account and the U.S. person owns directly or indirectly more than 50% of the share value or voting power of all shares of stock.
- 3) A partnership or limited liability company is the holder of legal title and the U.S. person owns more than 50% of the profits or partnership capital.
- 4) A trust is the holder of legal title and the U.S. person is the grantor and has an ownership interest in the trust. IRC Sec. 671-679 will determine whether the grantor has an ownership interest.
- 5) A trust in which the U.S. person has a greater than 50% present beneficial interest in the assets or income of the trust.

Signature Authority - FinCEN made a change to the signature authority requirement by identifying the person as 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." Even if the U.S. person has no financial interest in the account, the FBAR must still be filed. Even though this may result in the duplicate reporting of accounts, FinCEN is aware of this and requires filing.

Reportable Account - Accounts with a financial institution in the U.S. which holds assets of foreign

entities do not have to be reported by the U.S. account owner unless the owner can access the foreign accounts directly. Insurance or an annuity with a cash value must file the FBAR but the filing requirement is with the policy owner and not the beneficiary. An IRA owner or beneficiary is not required to report a foreign account held in the IRA nor is a participant in or beneficiary of a retirement plan described in IRC Sec. 401(a), 403(a) or 403(b).

The due date for filing the FBAR is June 30, 2011, and this means that the form must be received by the Department of the Treasury by that date. Finally, the IRS has announced the Offshore Voluntary Disclosure Initiative, which allows taxpayers who have neglected to comply with the reporting requirements until August 31, 2011 to file all amended returns and related documents. The date is important because it will most likely be the last such program and all documents such as amended returns and FBARs must be filed by August 31, 2011.

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