

FBAR and FFA – some key issues

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Agenda

- FBAR – Form 90-22.1
- FFA – Form 8938
- Other international tax forms
- Q & A

FBAR

- Background
- Who must file FBAR
- What is considered Foreign Financial Account
- What constitutes Financial Interest
- What constitutes Signature or other Authority
- Key exceptions from reporting
- Procedural rules for filing FBAR
- Penalties that may be imposed

Who must file FBAR – Final Regulations

Reports of Foreign Financial Accounts must be provided by:

- (a) Each "United States person" having a
 - Financial interest in, or signature or other authority over
 - Financial account
- In a foreign country
- If foreign financial accounts exceeding \$10,000 are maintained during the calendar year. [31 U.S.C. § 1010.306(c) Filing of reports.]
- Reports shall be filed with the Commissioner of Internal Revenue on or before June 30 of each following calendar year
- FBAR must be received by Treasury on or before due date – 2011 Revised Instructions

U.S. Person Defined

- Final Regulations:
 - U.S. person defined to include:
 - A citizen of the U.S.
 - A resident of the U.S.
 - Defines U.S. resident as a resident alien under IRC § 7701(b) and the regulations thereunder
- United States. The States of the United States, the District of Columbia, the Indian lands (as that term is defined in the Indian Gaming Regulatory Act), and the Territories and Insular Possessions of the United States.
- An entity created, organized or formed under laws of the U.S., any State, D.C., Territories and Insular Possessions, and Indian tribes

U.S. Person Defined

- Only Includes U.S. Entities (entities created under U.S. law):
 - Eliminates prior (2008) FBAR instruction's requirement of reporting by foreign persons in and doing business in the U.S.

U.S. Person Defined

- Entities that may be required to file include (but are not limited to)
 - Corporations, partnerships, LLCs, trusts, estates
 - U.S. Disregarded Entity (DRE) may be filer
- U.S. trust is potential filer even though U.S. trustee (who would file on behalf of the trust) may also have separate filing requirement with respect to trust's foreign financial accounts due to trustee's signature authority over the account
 - Trust is not defined by IRC Rules – Preamble
- FinCEN wants broader definition of trust than under IRC

U.S. Person: Resident

- Resident Under Section 7701(b) with Title 31 Definition of United States
 - File FBAR for period covered by election to be resident under IRC section 7701(b)
 - Section 7701(b) resident must file FBAR even if elect to be NRA under a tax treaty – Preamble
 - Disregard section 6013(g) and 6013(h) elections in determining whether a "Resident" – Preamble
 - For FBAR purposes "United States" includes the States, D.C., all U.S. territories and possessions, and the Indian lands – Revised Instructions

What is considered a FF Account

- (1) Bank Account
 - Savings deposit, demand deposit, checking or other account maintained with a person engaged in the business of banking
- (2) Securities account
 - Account with a person engaged in the business of buying, selling, holding or trading stock or other securities

What is considered a FF Account

- (3) Other financial account
 - With person in business of accepting deposits as financial agency
 - Account that is insurance or annuity policy with cash value
 - Account with person acting as broker or dealer for futures or options in any commodity on or subject to rules of a commodity exchange or association
- 2011 Revised Instructions elaborate on definition of financial account
 - Includes, but not limited to: securities, brokerage, savings, demand, checking, deposit, time deposit, or other account, commodity futures or options account, an insurance policy with cash value (such as whole life insurance policy), an annuity policy with cash value, and shares in a mutual fund or similar pooled fund (i.e., available to general public with regular net asset value determination and regular redemptions)

Look to Location

- Focus is on the geographic location of the branch where account is maintained
 - Foreign account if branch located outside of United States
- Report account with foreign branch of a U.S. bank
- Do not report account with U.S. branch of a foreign bank
- Foreign country includes all geographic areas located outside the U.S., which includes the states, territories and possessions of the U.S.

Financial Account Exclusions eliminated

- 2011 revised instructions eliminated some exclusions in 2008 instructions:
 - Individual bonds, notes, or stock certificates held by the filer
- Now must see general definitions of financial account in final regulations and 2011 Revised Instructions
 - e.g., Listed shares of defined foreign mutual fund may be foreign financial account
 - An unsecured loan to a foreign trade or business that is not a financial institution
- 2011 Revised Instructions provide that account with person "performing services of financial institution" may be a reportable "financial account"

What Constitutes Financial Interest in a Financial Account?

U.S. person has financial interest in bank, securities or other financial account if that person is:

(1) Record Owner or Holder of Legal Title

- Each person whose name is on account may have filing obligation
- Even if for benefit of others

What Constitutes Financial Interest in a Financial Account?

U.S. Person has financial interest if it holds:

(2) Other Financial Interest - U.S. person has financial interest in account in which another is owner of record or holds legal title, if that other person is:

- Agent, nominee, attorney or other capacity on behalf of the U.S. person
- Corporation if U.S. person owns directly or indirectly > 50% vote or value of shares
- Partnership if U.S. person owns directly or indirectly > 50% profits or capital interests
- Any other entity (other than trusts) if U.S. person owns directly or indirectly > 50% vote, value, equity, assets or profits interest

What Constitutes Financial Interest in a Financial Account?

U.S. person has financial interest in account in which another is owner of record or holds legal title, if that other person is:

- Trust in which U.S. person is grantor and has an ownership interest for U.S. federal tax purposes for the year
 - Trust in which U.S. person has either
 - Present beneficial interest > 50% of assets
- OR
- Receives > 50% of current income

Special Rules – Retirement Plans and Trusts

Certain Retirement Plans: Filing exemption:

- U.S. participants and beneficiaries of IRC section 401(a), 403(a), 403(b) retirement plans
- U.S. owners and beneficiaries of section 408 and 408A Individual Retirement Accounts (IRAs)
- Preamble – U.S. owners of non-exempted plans (including foreign pension plans) may be required to report accounts if own > 50%

- Exemption for U.S. person with current beneficial interest of > 50% of trust’s assets or that receives > 50% of trust’s current income if U.S. trust, U.S. trustee or U.S. agent files

What Constitutes Signature or Other Authority

- Authority of Individual (Alone or in Conjunction with Another)

– Excludes entities from having signature authority

- To Control Disposition of Money, Funds or Other Assets Held in Financial Account

- By Direct Communication (in writing or otherwise) With Person with Whom Account is Maintained

– Mere participation in decisions is not enough if foreign financial institution will not act on direct communication

Exemption for certain employees/officers

- Exclusion for person with no personal financial interest in the account if officer or employee of:

– An entity with a class of securities listed (or ADRs listed) on any U.S. national securities exchange

- Includes an officer or employee of a U.S. subsidiary of the U.S. entity if the U.S. subsidiary is part of the consolidated FBAR

- Exclusion not available to officers or employees of:

- Foreign subsidiaries of U.S. corporations with respect to foreign financial accounts of the foreign subsidiary
- U.S. sub of foreign corp (voluntary filing by foreign corp is irrelevant)
- U.S. parent corp with respect to foreign accounts of its U.S. sub
- U.S. sub with respect to foreign accounts of its U.S. parent

FBAR - Overview

- New version of the FBAR released (Rev. March 2011)
 - Form is unchanged from 2008 version except for Part V deletion of reference to corporate consolidated filing
 - Instructions have been revised to conform to final regulations
- 2011 FBAR provides the following reporting format:
 - Filer Information – Part I
 - Accounts owned separately -- Part II
 - Accounts owned jointly -- Part III
 - No financial interest but signature or other authority -- Part IV
 - Consolidated report -- Part V
- IRS Delegation Order
 - IRS delegated authority by FinCEN to enforce FBAR requirements

Account Valuation

- The maximum value of an account is a reasonable approximation of the greatest value of currency or nonmonetary assets in the account during the calendar year
 - Each account must be valued separately
- Preamble clarifies that periodic account statements may be used to determine account value if:
 - Bona fide account statements prepared in the ordinary course of business
 - Statements fairly reflect the maximum value of the account during the CY

Account Valuation

- Foreign currency should be converted by using the Treasury's Financial Management Service rate
 - The rate can be found at www.fms.treas.gov
 - Use the rate from the last day of the calendar year
- If no Treasury Financial Management Service rate is available, use another verifiable exchange rate and provide the source of that rate
- If a country uses multiple exchange rates, use the rate that would apply if the currency in the account were converted into U.S. dollars on the last day of the calendar year

Completing FBAR Form

- Consolidated report – U.S. Person that is entity may file consolidated report with directly and indirectly > 50% owned other entities
 - Consolidated reports can include any entity (for example, partnerships can now be included)
- A financial interest in 25 or more accounts
 - Check “Yes” in Box 14; provide the number of accounts
- Required information not available on June 30
 - File as complete a form as possible; continue to pursue information; promptly amend form when information available
- Amending an FBAR
 - Check the box in top corner of page 1; report only the additions or corrections; staple original form to amended FBAR; provide statement explaining changes
 - Per new instructions – wait 90 days before amending an FBAR

Completing FBAR Form

- Instructions for Part IV of the FBAR
 - Must provide name of account owner (if more than one person, provide name of principal joint owner)
 - If same owner for several accounts – identify owner once and write “same owner” for other accounts
- 25 or more foreign financial accounts – in Part IV, only report identity of person with financial interest; detailed account information is not required (check “No” in Box 14 of Part I)
 - But must be prepared to provide account information if requested

Completing FBAR Form

Record Maintenance – 5 Years
– 31 U.S.C. 1010.420
– Exception – employees who file an FBAR because of signature or other authority over the foreign financial accounts of their employer are not expected to personally maintain the records of such accounts

When and Where to File

- FBAR must be received by June 30
 - Can be hand delivered to any local IRS office or IRS tax attaché in a U.S. embassy or consulate for forwarding – But not filed until received in Detroit, Michigan
- “Timely mailing is timely filing” rule does not apply
- Do not include FBAR with the tax return
- Address for private delivery services
IRS Enterprise Computing Center
ATTN: CTR Operations Mailroom, 4th Floor
985 Michigan Avenue
Detroit, MI 48226
- Contact Phone # (313) 234-1062 (for delivery purposes only; not for filing questions or filing confirmations)

Contacting IRS

- For questions regarding completing the form:
 - Email to FBARquestions@irs.gov
 - Calling 800-800-2877 and selecting option 2
 - Verification that FBAR was received -- per FBAR FAQs on IRS website
 - By calling the above telephone number – up to 5 documents may be verified over the phone (it’s free)
 - By mail (\$5 for first 5; \$1 for each additional FBAR)
- IRS Enterprise Computing Center/Detroit
ATTN: Verification
P.O. Box 32063
Detroit, MI 48232
[Include filer’s name, TIN, filing period, and check to U.S. Treasury]

Penalties

- Penalties were broadened to go beyond willful violations (American Jobs Creation Act of 2004)
 - First effective for filings due in June 2005
- Non-willful failure to timely file – up to \$10,000 for each violation; amount is within discretion of IRS
- Willful failure – the greater of:
 - \$100,000, or
 - 50% of the account balance at time of violation
- Waiver for non-willful violations
 - Reasonable cause and income properly reported
- Statute of limitations is six years

Delinquent FBAR filings

- OVDI
- For taxpayers that reported and paid tax on all taxable income for the years at issue, FAQs issued in connection with the IRS's 2011 Offshore Voluntary Disclosure Initiative provide penalty relief for delinquent FBARs filed by August 31, 2011 (FAQ # 17)
 - Under FAQ #17, delinquent FBARs are not filed under the OVDI, but rather should be filed in accordance with FBAR instructions
 - Attach a statement explaining why the FBAR is late
- 2011 FBARs must still be filed by June 30, 2012

Foreign Financial Assets Reporting

- Who Must File
- Specified Person
- Reporting Period
- Applicable Threshold Amounts
- Specified Foreign Financial Assets
- Exceptions to Reporting
- Total Value of Specified Foreign Financial Assets
- Reporting Maximum Value
- Penalties
- Statute of Limitations
- Resources
- Questions and Answers

Form 8938

- Form 8938 is used to report your specified foreign financial assets if the total value of all the specified foreign financial assets in which you have an interest is more than the appropriate reporting threshold (discussed below)
- Form 8938 is attached to your annual return and must be filed by the due date (including extensions) for that return

Who must file 8938

- Subject to certain exceptions, you must file Form 8938 if you are a specified person that has an interest in specified foreign financial assets and the value of those assets is more than the applicable reporting threshold
 - If you do not have to file an income tax return for the tax year, you do not have to file Form 8938, even if the value of your specified foreign financial assets is more than the appropriate reporting threshold

Specified Person

- A specified individual is:
 - A U.S. citizen
 - A resident alien of the United States for any part of the tax year (green card test or substantial presence test)
 - A nonresident alien who makes an election to be treated as a resident alien for purposes of filing a joint income tax return
 - A nonresident alien who is a bona fide resident of Puerto Rico or a section 931 possession

Specified Person

- The IRS has issued proposed regulations that will require a domestic entity to file Form 8938 if the entity is formed or availed of to hold specified foreign financial assets and the value of those assets exceeds the appropriate reporting threshold
 - For the 2011 tax year, only individuals must file Form 8938

Reporting Period

- Unless an exception applies, the reporting period for Form 8938 is your tax year
 - If you are a specified individual for less than the entire tax year, the reporting period is the part of the year that you are a specified individual
 - George, a calendar year taxpayer, is not a U.S. citizen or married. George arrived in the United States on February 1 and satisfied the substantial presence test for the tax year. The Form 8938 reporting period begins on George's U.S. residency starting date, February 1, and ends on December 31.

Thresholds

Unmarried taxpayer living in the United States – threshold satisfied if the total value of your specified foreign financial assets is more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the tax year

Thresholds

Married taxpayers filing a joint income tax return and living in the United States – threshold satisfied if the total value of your specified foreign financial assets is more than \$100,000 on the last day of the tax year or more than \$150,000 at any time during the tax year

Thresholds

- **Taxpayers living abroad** – If your tax home is in a foreign country and you meet one of the presence abroad tests below, threshold satisfied if:
 - you are not filing a joint return and the total value of your specified foreign financial assets is more than \$200,000 on the last day of the tax year or more than \$300,000 at any time during the tax year
 - you are married and file a joint income tax return and the total value of all specified foreign financial assets you or your spouse owns is more than \$400,000 on the last day of the tax year or more than \$600,000 at any time during the tax year

Thresholds

- You satisfy the presence abroad test if you are one of the following:
 - A U.S. citizen who has been a bona fide resident of a foreign country or countries for an uninterrupted period that includes an entire tax year
 - A U.S. citizen or resident who is present in a foreign country or countries at least 330 full days during any period of 12 consecutive months that ends in the tax year being reported

Specified FFA

- Specified foreign financial assets include:
- **Financial accounts** maintained by a **foreign financial institution**
 - A **financial account** is any depository or custodial account maintained by a foreign financial institution as well as any equity or debt interest in a foreign financial institution (other than interests that are regularly traded on an established securities market). A specified foreign financial asset includes a financial account maintained by a financial institution that is organized under the laws of a U.S. possession (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, or the U.S. Virgin Islands).

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Foreign Financial Institutions

A foreign financial institution includes investment vehicles such as foreign mutual funds, foreign hedge funds, and foreign private equity funds.

Specified FFA

– The following foreign financial assets if they are held for investment and not held in an account maintained by a financial institution:

- Stock or securities issued by someone that is not a U.S. person;
- Any interest in a foreign entity; and,
- Any financial instrument or contract that has an issuer or counterparty that is not a U.S. person.

Note – An interest in a social security, social insurance, or other similar program of a foreign government is not a specified foreign financial asset.

Specified FFA

- Examples of other specified foreign financial assets include the following, if they are **held for investment** and not held in a financial account:
 - Stock issued by a foreign corporation
 - A capital or profits interest in a foreign partnership
 - A note, bond, debenture, or other form of indebtedness issued by a foreign person
 - An interest in a foreign trust or foreign estate
 - An interest rate swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap, or similar agreement with a foreign counterparty
 - An option or other derivative instrument with respect to any of these examples or with respect to any currency or commodity that is entered into with a foreign counterparty or issuer

Specified FFA

- You have an interest in a specified foreign financial asset if any income, gains, losses, deductions, credits, gross proceeds, or distributions from holding or disposing of the asset are or would be required to be reported, included, or otherwise reflected on your income tax return
- You have an interest in a specified foreign financial asset even if there are no income, gains, losses, deductions, credits, gross proceeds, or distributions from holding or disposing of the asset included or reflected on your income tax return for this tax year

Specified FFA

- Special Rules
 - If you are the owner of a **disregarded entity**, you have an interest in any specified foreign financial assets owned by the disregarded entity
 - A **joint owner** of an asset has an interest in the entire asset. (special rules for interests in assets jointly owned by spouses)
 - If you have an interest in a financial account that holds specified foreign financial assets, you **do not** have to report the assets held in the account

Exceptions to reporting

- No reporting of a specified foreign financial asset on Form 8938 is required if you report it on one or more of the following forms that you timely file with the IRS for the same tax year:
 - Form 3520, *Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*
 - Form 3520-A, *Annual Information Return of Foreign Trust With a U.S. Owner, with Form 3520 filings for foreign grantor trusts*
 - Form 5471, *Information Return of U.S. Persons With Respect To Certain Foreign Corporations*
 - Form 8621, *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*

Exceptions to reporting

- Form 8865, *Return of U.S. Persons With Respect to Certain Foreign Partnerships*
- Form 8891, *U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans*
 - However, **you must identify on Form 8938** the form(s) on which you report the specified foreign financial asset and how many of these forms you file
 - You must include the value of the assets reported on the forms above in determining whether you satisfy the reporting threshold that applies to you

Value of Specified FFA

- You need to determine the total value of the specified foreign financial assets in which you have an interest to determine if you satisfy the applicable reporting threshold
- The value of a specified foreign financial asset for purposes of determining the total value of specified foreign financial assets in which you have an interest during the tax year or on the last day of the tax year is the asset's fair market value
 - Value of a specified foreign financial asset denominated in a foreign currency must be first determined in the foreign currency and then converted to U.S. dollars

Value of Specified FFA

- If you do not know or have reason to know based on readily accessible information the fair market value of your interest in a foreign estate, foreign pension plan, or foreign deferred compensation plan during the tax year, the value to be included in determining the total value of your specified foreign financial assets during the tax year is the fair market value, determined as of the last day of the tax year, of the currency and other property distributed during the tax year to the specified person as a beneficiary or participant
 - If you received no distributions during the tax year and do not know or have reason to know based on readily accessible information the fair market value of your interest, use a value of zero for the interest

Value of Specified FFA

- If the maximum value of a specified foreign financial asset is less than zero, use a value of zero for the asset
- In determining if you satisfy the reporting threshold that applies to you, include the value of all specified foreign financial assets, even if they are reported on another form

Value of Specified FFA

If you jointly own an asset with someone else, the value that you use to determine the total value of all of your specified foreign financial assets depends on whether the other owner is your spouse and, if so, whether your spouse is a specified individual and whether you file a joint or separate return

Value of Specified FFA

- If you **jointly own** an asset with someone other than your spouse, each joint owner includes the entire value of the jointly owned asset

Value of Specified FFA

- **Joint ownership with spouse filing joint income tax return** – file one combined Form 8938 for the tax year and include the value of the asset jointly owned with spouse only once
- **Joint ownership with spouse filing separate income tax return (you and your spouse are specified individuals)** – include one-half of the value of the asset jointly owned with spouse to determine the total value of all of your specified foreign financial assets
- **Joint ownership with a spouse who is not a specified individual or someone other than a spouse** – Each joint owner includes the entire value of the jointly owned asset

Reporting maximum value

- Use the currency exchange rate on the last day of the tax year to figure the maximum value of a specified foreign financial asset
 - Note – this rule also applies for purposes of determining the value of a specified foreign financial asset for the purpose of determining the total value of your specified foreign financial assets to determine whether the taxpayer has met the reporting threshold
 - This rate is used even if the taxpayer sold or otherwise disposed of the specified foreign financial asset before the last day of the tax year

Reporting Jointly-Held Assets	Value of Joint Asset to Determine Filing Threshold	Value of Joint Assets to Report on Form 8938
Joint Asset Held with Spouse - Married Filing Joint	Couple includes 100% of value of joint asset to determine if joint threshold is met. Treas. Reg. § 1.6038D-2T(c)(1)(ii)	Couple includes 100% of value of joint asset on Form 8938 (report asset once at 100% of value). Treas. Reg. § 1.6038D-2T(c)(2)(i) See Example at Treas. Reg. § 1.6038D-2T(d)(2)(ii)
Joint Asset Held with Spouse - Married Filing Separate - Spouse is a Specified Individual	Each spouse includes 50% of value of joint asset to determine if separate filing threshold is met. Treas. Reg. § 1.6038D-2T(c)(1)(ii)	Each spouse includes 100% of value of joint asset on their separate Forms 8938. Treas. Reg. § 1.6038D-2T(c)(2)(ii) See Example at Treas. Reg. § 1.6038D-2T(d)(2)(i)
Other Joint Asset Situations - Spouse is not a specified individual or - Held with a non-spouse	Each specified individual who is a joint owner includes 100% of value of joint asset to determine if filing threshold is met. Treas. Reg. § 1.6038D-2T(c)(1)(i)	Each specified individual who is a joint owner includes 100% of value of joint asset on their separate Forms 8938. Reference most clear at Preamble, Explanation of Provisions, 4. Valuation Guidelines, F. Jointly Owned Assets

Penalties

- You may be subject to a \$10,000 failure-to-file penalty if you are required to file Form 8938 but do not file a complete and correct Form 8938 by the due date (including extensions)
 - If you do not file a correct and complete Form 8938 within 90 days after the IRS mails you a notice of the failure to file, you may be subject to an additional penalty of \$10,000 for each 30-day period (or part of a period) during which you continue to fail to file Form 8938 after the 90-day period has expired. The maximum additional penalty for a continuing failure to file Form 8938 is \$50,000.

Penalties

- If you underpay your tax as a result of a transaction involving an undisclosed specified foreign financial asset, you may have to pay a penalty equal to 40 percent of that underpayment. See section 6662 for additional details.
- If you underpay your tax due to fraud, you must pay a penalty of 75 percent of the underpayment due to fraud
- Possible criminal penalties under certain circumstances

Statute of Limitation

- If you do not include in your gross income an amount relating to one or more specified foreign financial assets, and the amount you omit is more than \$5,000, any tax you owe for the tax year can be assessed at any time within 6 years after you filed your return.
 - For this purpose, specified foreign financial assets include any specified foreign financial assets in which you have an interest without regard to the reporting threshold that applies to you and regardless of any exception from reporting a specified foreign financial asset on Form 8938
