

4/1/14

## Foreign Reporting Requirements

### Form 90-22.1 Filing is Required for Non-US Bank and Financial Accounts

If you have a financial interest in or signature authority over a foreign financial account, including a bank account, brokerage account, mutual fund, trust or other type of foreign financial account exceeding certain thresholds, the Bank Secrecy Act may require you to report the account yearly to the Internal Revenue Service by filing electronically a Financial Crimes Enforcement Network (FinCEN) Form 114, *Report of Foreign Bank and Financial Accounts* (FBAR).

Treasury Department Form 90-22.1 details information concerning foreign bank account ownership and/or signature authority for financial accounts in a foreign country with an aggregate value exceeding \$10,000 any time during the calendar year. Form 90.22.1 is filed separately from your tax returns.

We believe that federal government will become more aggressive in levying penalties for noncompliance in this area. In the last decade, the IRS has sued a number of Swiss banking firms, including the Swiss financial institution, UBS, in order to compel UBS to release the names of over 50,000 US citizens with Swiss bank accounts. Additionally, Obama administration has proposed a substantial increase in the civil penalties for non-filing of the form.

If you are required to file Form 20-22.1, we recommend that you file the Form via US Certified Mail, return receipt requested. US Certified Mail is a proof of delivery that the IRS and the US court system accept. Fed Ex does not constitute legal proof of delivery. A simple postmark also does not constitute legal proof of delivery.

#### **Current FBAR Guidance**

##### *FinCEN introduces new forms*

On September 30, 2013, FinCEN posted on their internet site a notice announcing FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (the current FBAR form). FinCEN Form 114 supersedes TD F 90-22.1 (the FBAR form that was used in prior years) and is only available online through the BSA E-Filing System website. The system allows the filer to enter the calendar year reported, including past years, on the online FinCEN Form 114. It also offers an option to “explain a late filing,” or to select “Other” to enter up to 750-characters within a text box where the filer can

provide a further explanation of the late filing or indicate whether the filing is made in conjunction with an IRS compliance program.

On July 29, 2013, FinCEN posted a notice on their internet site that introduced a new form to filers who submit FBARs jointly with spouses or who wish to have a third party preparer file their FBARs on their behalf. The new FinCEN Form 114a, *Record of Authorization to Electronically File FBARs*, is not submitted with the filing but, instead, is maintained with the FBAR records by the filer and the account owner, and made available to FinCEN or IRS on request.

Filing deferral for certain individuals with signature authority only, effective through June 30, 2015

FinCEN Notice 2013-1 extended the due date for filing FBARs by certain individuals with signature authority over, but no financial interest in, foreign financial accounts of their employer or a closely related entity, to June 30, 2015.

### **Who Must File an FBAR**

United States persons are required to file an FBAR if:

1. The United States person had a financial interest in or signature authority over at least one financial account located outside of the United States; and
2. The aggregate value of all foreign financial accounts exceeded \$10,000 at any time during the calendar year to be reported.

United States person includes U.S. citizens; U.S. residents; entities, including but not limited to, corporations, partnerships, or limited liability companies, created or organized in the United States or under the laws of the United States; and trusts or estates formed under the laws of the United States.

### *Exceptions to the Reporting Requirement*

Exceptions to the FBAR reporting requirements can be found in the FBAR instructions. There are filing exceptions for the following United States persons or foreign financial accounts:

- Certain foreign financial accounts jointly owned by spouses;
- United States persons included in a consolidated FBAR;
- Correspondent/nostro accounts;
- Foreign financial accounts owned by a governmental entity;
- Foreign financial accounts owned by an international financial institution;
- IRA owners and beneficiaries;
- Participants in and beneficiaries of tax-qualified retirement plans;
- Certain individuals with signature authority over, but no financial interest in, a foreign financial account;
- Trust beneficiaries (but only if a U.S. person reports the account on an FBAR filed on behalf of the trust); and
- Foreign financial accounts maintained on a United States military banking facility.

Review the FBAR instructions for more information on the reporting requirement and on the exceptions to the reporting requirement.

## **Reporting and Filing Information**

A person who holds a foreign financial account may have a reporting obligation even though the account produces no taxable income. The reporting obligation is met by answering questions on a tax return about foreign accounts (for example, the questions about foreign accounts on Form 1040 Schedule B) and by filing an FBAR.

The FBAR is a calendar year report and must be filed on or before June 30 of the year following the calendar year being reported. Effective July 1, 2013, the FBAR must be filed electronically through FinCEN's BSA E-Filing System. The FBAR is not filed with a federal tax return. A filing extension, granted by the IRS to file an income tax return, does not extend the time to file an FBAR. There is no provision to request an extension of time to file an FBAR.

A person required to file an FBAR who fails to properly file a complete and correct FBAR may be subject to a civil penalty not to exceed \$10,000 per violation for nonwillful violations that are not due to reasonable cause. For willful violations, the penalty may be the greater of \$100,000 or 50% of the balance in the account at the time of the violation, for each violation. For guidance when circumstances such as natural disasters prevent the timely filing of an FBAR, see FinCEN guidance, FIN-2013-G002 (June 24, 2013).

### *U.S. Taxpayers Holding Foreign Financial Assets May Also Need to File Form 8938*

Taxpayers with specified foreign financial assets that exceed certain thresholds must report those assets to the IRS on Form 8938, *Statement of Specified Foreign Financial Assets*, which is filed with an income tax return. The new Form 8938 filing requirement is in addition to the FBAR filing requirement. A chart providing a comparison of Form 8938 and FBAR requirements may be accessed on the IRS Foreign Account Tax Compliance Act web page.

### *Offshore Voluntary Disclosure Program*

On Jan 9, 2012, the IRS reopened the Offshore Voluntary Disclosure Program following continued interest from taxpayers and tax practitioners after the closure of the 2011 and 2009 programs. This program offers people with unreported taxable income from offshore financial accounts or other foreign assets another opportunity to resolve their tax and information reporting obligations, including the FBAR. Although the program does not have a closing date, the IRS may end the program at a later time.

For non-resident U.S. taxpayers presenting a low compliance risk, the IRS implemented new streamlined filing compliance procedures effective September 1, 2012. The procedures are designed for non-resident U.S. citizens, including but not limited to dual citizens, residing outside the U.S. since January 1, 2009, and who have not filed U.S. income tax and information returns. The procedures require the filing of delinquent income tax and information returns for the past three years and the filing of delinquent FBARs for the past six years. For qualifying filers, reviews of submissions are expedited

and the IRS will not assert penalties or pursue follow-up actions. When filing delinquent FBARs on the BSA E-File System, participants can annotate that the filing is in relation to either the Streamlined Filing Compliance Procedures or the OVDP. For more information go to Instructions for New Streamlined Filing Compliance Procedures for Non-Resident, Non-Filer U.S. Taxpayers.

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If you have any questions, please feel free to contact your Seiler professional at (650) 365-4646 or email [info@seiler.com](mailto:info@seiler.com). We would be happy to discuss appropriate courses of action for your particular circumstance.

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#### **Silicon Valley Office**

Three Lagoon Drive, Suite 400  
Redwood City, CA 94065  
Main: 650.365.4646  
[info@seiler.com](mailto:info@seiler.com)

#### **San Francisco Office**

220 Montgomery Street, Suite 300  
San Francisco, CA 94104  
Main: 415.392.2123  
[info@seiler.com](mailto:info@seiler.com)

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