

FBAR Update: Mastering FinCen Form 114, New Deadlines, Extension, Penalty Resolution and Waiver Provisions

THURSDAY, FEBRUARY 4, 2016, 1:00-2:50 pm Eastern

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FBAR Update

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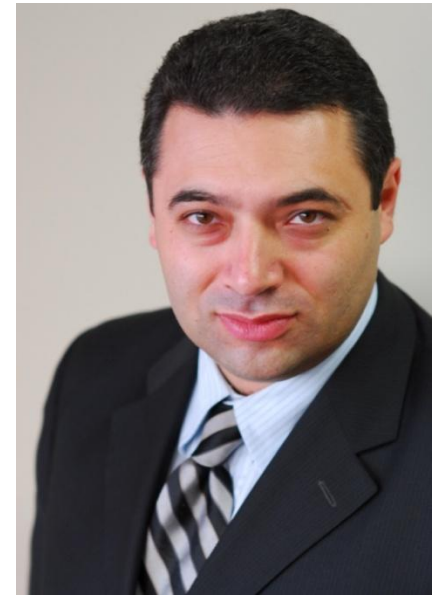
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FBAR FILING REQUIREMENTS



Background Of The Report Of Foreign Bank And Financial Accounts (FBAR)

- ▶ Bank Secrecy Act of 1970 requires U.S. persons to file reports and keep certain records of information about their foreign accounts.
- ▶ Authority to enforce FBAR reporting and record keeping requirements was delegated to FinCEN, a bureau of the Treasury Department.
- ▶ In April 2003, FinCEN delegated the civil enforcement authority of FBARs to the IRS.
 - IRS can impose civil penalties.
 - IRS was tasked with revising FBAR form and instructions.
- ▶ FinCen Form 114, Report of Foreign Bank and Financial Accounts (FBAR), is now in effect and must be filed electronically.

FBAR Final Regulations

- ▶ On February 24, 2011, the Treasury Department published final FBAR regulations.
- ▶ 31 C.F.R. § 1010
- ▶ Final FBAR Regulations became effective March 28, 2011, and apply to FBARs required to be filed for the tax year 2010, due on 6/30/2011, subsequent years, as well as any FBARs for prior years which were deferred.

Who and When Must File An FBAR?

- ▶ Each U.S. person who has a financial interest in or signature or other authority over a foreign financial account must make a report of those relationships on an FBAR for each calendar year during any part of which the aggregate value of all the accounts exceeded \$10,000.
- ▶ For tax years prior to 2016, the FBAR due date on or before June 30 of the succeeding year. There was no extension available for filing an FBAR.
- ▶ Beginning with the 2016 tax year (due in 2017), the filing deadline for the FBAR will be April 15th, with a six-month extension until October 15th available upon request. available for filing an FBAR.
- ▶ Under the new laws, the FBAR filing deadline for US taxpayers residing abroad will be automatically extended until June 15th, with an additional four-month extension available until October 15th. The law does not provide another two-month extension until December 15th.

Key Definitions for FBAR

U.S. person

- United States person means
 - 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.

- The federal tax treatment of an entity does not determine whether the entity has an FBAR filing requirement. For example, a disregarded entity for purposes of income taxes, must file an FBAR, if otherwise required to do so. Similarly, a trust for which the trust income, deductions, or credits are taken into account by another person, must file an FBAR, if otherwise required to do so.

Key Definitions (Continued)

▶ Financial account

- A financial account includes any bank, securities, securities derivatives or other financial instrument accounts. The term includes any *savings, demand, checking, deposit or other account maintained with a financial institution or other person engaged in the business of a financial institution.*
- A financial account also includes a commodity futures or options account, an insurance policy with a cash value (e.g., a whole life insurance policy), an annuity policy with a cash value, and shares in a mutual fund or similar pooled fund with a regular net asset value determination and regular redemptions.
- Offshore hedge funds and private equity funds which are not offered to the public will not constitute financial accounts reportable on FBARs..
- Individual bonds, notes or stock certificates; and safe deposit boxes are not defined as financial accounts.

Key Definitions (Continued)

▶ Financial interest

- U.S. person has a financial interest in each financial account where such 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.

- U.S. person deemed to have a financial interest over financial accounts if the owner of record or holder of legal title is:
 - A person acting as an agent, nominee, attorney or in some other capacity on behalf of the U.S. person;
 - A corporation in which the U.S. person owns directly or indirectly more than 50% of the total value of shares of stock, or more than 50% of the voting power for all shares of stock;
 - A partnership in which the U.S. person owns more than 50% of the profits or the capital of the partnership;
 - A trust in which the U.S. person either has a present beneficial interest in more than 50% of the assets or receives more than 50% of the current income.

Key Definitions (Continued)

- ▶ Signature authority
 - A U.S. person has account signature authority if that person can control the disposition of money or other property in the account by direct communication (whether in writing or otherwise) to the bank or other financial institution that maintains the financial account.
- ▶ Other authority
 - Where a U.S. person can exercise power that is comparable to signature authority over an account by communication with the bank

Exceptions to FBAR Requirements

- ▶ There are filing exceptions for the following United States persons or foreign financial accounts:
 - **Certain foreign financial accounts jointly owned by spouses;**
 - Financial accounts required to be reported are jointly owned;
 - One spouse reports them on timely filed FBAR;
 - Both spouses sign the FBAR
 - **Consolidated FBAR;**
 - If an entity is named in a consolidated FBAR filed by a greater than 50% owner of such entity, then it is not required to file a separate FBAR.
 - **Correspondent/Nostro Account;**
 - Correspondent/Nostro account maintained by banks and used solely for bank-to-bank settlements are not required to be reported.

Exceptions to FBAR Filing (Contd.)

- Foreign financial accounts owned by a government entity;
 - A foreign financial account of any governmental entity of the U.S. is not required to be reported. Includes the States, the District of Columbia, all United States territories and possessions, and the Indian lands. Also includes a college or university owned by, or operated, by a governmental entity.
- Foreign financial accounts owned by an international financial institution;

Exceptions to FBAR Filing (Contd.)

- IRA owners and beneficiaries;
- Participants in and beneficiaries of tax-qualified retirement plans, which hold foreign accounts on behalf of a plan;
- Trust beneficiaries, but only if a U.S. person reports the account on an FBAR filed on behalf of the trust;
 - If the trust, trustee of the trust, or the agent of the trust:
 - (1) is a United States person; and
 - (2) filed an FBAR disclosing the trust's foreign financial account.
- Foreign financial accounts maintained on a United States military installation abroad.

Exceptions to FBAR Filing (Contd.)

- ▶ **Exceptions that apply for officers and employees of entities with signature or other authority, and no financial interest in the account, for an account owned directly by that entity.**
 - An officer or employee of a **publicly held entity**, whether foreign or domestic, with a class of equity securities, listed on any U.S. national securities exchange;
 - An officer or employee of a U.S. subsidiary of a U.S. entity with a class of securities **listed on a U.S. national securities exchange** if the subsidiary is included in a consolidated report filed by the U.S. parent;
 - An officer or employee of a bank that is examined by federal authorities;
 - An officer or employee of an entity that has a class of securities registered (or American depository receipts in respect of equity securities registered) under section 12(g) of the Securities Exchange Act;
 - An officer or employee of a financial institution that is registered with and examined by the Securities and Exchange Commission or Commodity Futures Trading Commission; and
 - An officer or employee of 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.

Information to Be Reported on FBAR Form

Part I

- ▶ Type of Filer (Individual, Partnership, corporation, Consolidated, Fiduciary)
- ▶ U.S. Taxpayer Identification Number (SSN or EIN)
- ▶ Foreign Identification, if necessary (Passport or Foreign TIN)
- ▶ Date of Birth for Individuals
- ▶ Name or Organization Name
- ▶ Address
- ▶ Whether the filer has a financial interest or signature authority in 25 or more accounts (if Yes, then Parts II, III or IV are not necessary).

FBAR Information – Continued

Part II – Financial Accounts Owner Separately

- ▶ Maximum Account Value (check the box, if unknown)
- ▶ Type of Account (Bank, Securities, Other)
- ▶ Financial Institution Name and Address
- ▶ Account Number or Other Designation

FBAR Information – Continued

Part III – Financial Accounts Owner Jointly

- ▶ Same bank and account information as required in Part II, plus
- ▶ Information about Principal Joint Owner
 - Name or Organization Name
 - Taxpayer ID and Type
 - Address of Principal Joint Owner

FBAR Information – Continued

- ▶ **Part IV – Financial Accounts Where Filer Has Signature Authority but No Financial Interest**
 - Account Information (value, type of account, account number, bank name and address)
 - Owner Information (name, address, Tax ID)
 - Filer’s Title with the Owner of Account
- ▶ **Part V – Accounts Where Filing Consolidated Report**
 - Account Information (value, type of account, account number, bank name and address)
 - Owner Information (name, address, Tax ID)

Form 8938

Statement of Specified Foreign Financial Assets

For tax years beginning after March 18, 2010 (i.e. 2011), certain individuals must file Form 8938, Statement of Specified Foreign Financial Assets

Form 8938 Must be Filed by Specified Individuals:

- A U.S. citizen;
- A Resident Alien;
- A Nonresident Alien Who Makes Election to Be Treated as Resident Alien;
- A Resident of Certain U.S. Possessions;

Specified Foreign Financial Assets

- Financial Accounts (any depository or custodial account maintained by a foreign financial institution);
- Assets Held for Investment (stock by foreign corporation; interest in foreign partnership; debt issue by a foreign person; interest in foreign trust or estate; options; swaps)

Form 8938 Overview

Filing Thresholds

Form 8938 is required if the total value of the SFAs for the tax year is:

- Unmarried Taxpayer Living in the U.S.: more than \$50,000 on the last day of the tax year or more than \$75,000 any time during the tax year;
- Married Taxpayers Filing Joint Return and Living in the U.S.: more than \$100,000 on the last day of the tax year or more than \$150,000 at any time during the tax year;
- Married Taxpayers Filing Separate Return and Living in the U.S.: more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the tax year;
- Taxpayers Living Abroad and Not Filing Joint Returns: more than \$200,000 on the last day of the tax year or more than \$300,000 at any time during the tax year;
- Married Taxpayers Filing Joint Return and Living Abroad: more than \$400,000 on the last day of the tax year or more than \$600,000 at any time during the tax year;

Structure of Form 8938

- ▶ Form 8938 consists of four parts:
- ▶ **Part I** is for financial accounts, such as a deposit or custodial account with a financial institution.
- ▶ **Part II** is for other types of financial assets, such as stocks, bonds and other financial instruments.
- ▶ Form 8938 has room for just one asset in Part I and Part II. Taxpayers may use as many Forms 8938 as needed to report their foreign financial assets.
- ▶ **Part III** is a summary showing where income from the foreign financial assets is reported elsewhere on the tax return.
- ▶ **Part IV** is a summary for certain types of financial assets excepted from reporting on Form 8938 because that information is reported elsewhere on the tax return.

Form 8938 – Taxpayer Identification

- ▶ Name or Names on Return
- ▶ SSN or Tax Identification Number
- ▶ Tax Year
- ▶ Type of Taxpayer
 - Specified Individual (Married Filing Jointly or Other)
 - Specified Domestic Entity
 - For now, only specified individuals are required to file Form 8938. Upon issuance of regulations, FATCA may require reporting by specified domestic entities.

Form 8938, Part I

Foreign Deposit and Custodial Account

- ▶ Type of Account: Deposit or Custodial
- ▶ Account Number
- ▶ Check the box if the account was opened or closed during the tax year
- ▶ Check the box if account is owned jointly with spouse
- ▶ Check the box if no tax item reported in Part III of Form 8938 with respect to this account

Form 8938, Part I – Continued

- ▶ Maximum Value of the Account During Tax Year (in \$ U.S.)
- ▶ Answer if you used a foreign currency exchange rate to provide the maximum value
- ▶ If “Yes”, then identify the foreign currency in which account is maintained, identify the foreign exchange rate, and identify the source for the exchange rate if it is not from US Treasury Financial Management Service
- ▶ Name and mailing address of financial institution

Form 8938, Part II – Other Foreign Assts

- ▶ Description of Asset;
- ▶ ID or Other Designation;
- ▶ If asset is acquired during the tax year, then list the date;
- ▶ If asset is disposed of during the tax year, state the date;
- ▶ Check the box if asset is jointly owned with spouse;
- ▶ Check the box if no tax item is reported for this asset;
- ▶ Check the value range. If more than \$200K, provide specific value
- ▶ Answer if you used a foreign currency exchange rate, if “Yes”, then identify the foreign currency in which account is maintained, identify the foreign exchange rate, and identify the source for the exchange rate if it is not from US Treasury Financial Management Service.

Form 8938, Part II – Continued

- ▶ If the asset reported on line 1 of part II is stock of a foreign entity or an interest in a foreign entity, report:
 - Name of the entity;
 - Type of the entity (corporation; partnership; trust estate)
 - Check if it is a Passive Foreign Investment Company (PFIC);
 - Mailing address of the entity;
- ▶ If the asset reported on line of Part II is not stock or an interest in a foreign entity, report:
 - Name of issuer or counterparty (if more than one issuer or counterparty, attach additional pages for each one);
 - Type of issuer or counterparty (individual; partnership; corporation; trust; estate);
 - Identify issuer or counterparty as a U.S. or Foreign Person;
 - Mailing address of issuer or counterparty;

Part III - Summary of Tax Items Attributable to Specified Foreign Financial Assets

- ▶ Part III of Form 8938 required taxpayers to enter the total income, gain or loss, deductions, ore credits for specified foreign financial assets, and the schedule, form, or return on which the item is reported.
- ▶ Tax Items attributable to Foreign Assets reported in Part I and Part II of the form should be reported separately.
- ▶ Information for the following items must be reported separately:
 - Interest;
 - Dividends;
 - Royalties;
 - Gains of losses;
 - Deductions;
 - Credits.
- ▶ Note: if no tax item is reported with respect to a specified asset, box in line 3d should be checked in Part I or Part II of the Form.

Part IV

Excepted Specified Foreign Financial Assets

- ▶ If certain assets were reported on other tax forms for the same tax year, they may be excepted from reporting on Form 8938. Exception applies to assets reported on:
 - Form 3520 (Return to Report Transactions with Foreign Trusts and Receipts of Foreign Gifts)
 - Form 3520-A (Annual Information Return of Foreign Trust with U.S. Owner)
 - Form 5471 (Information Return with Respect to CFC)
 - Form 8621 (Information Return of a PFIC or QEF Shareholder)
 - Form 8865 (Return with Respect to Foreign Partnerships)
 - Form 8891 (Information Return for Beneficiaries of Canadian Registered Retirement Plans)
- ▶ If a foreign asset was disclosed in one of these forms, identify this form in Part IV and provide the number of forms filed.

Electronic Filing of FBAR

- Effective July 1, 2013, all FBARs must be filed electronically.
- Electronic filing is mandatory.
- Delinquent FBARs filed after June 30, 2013, must be filed electronically.
- FinCEN Form 114.
- Form 114a, Record of Authorization to Electronically File FBARs, is signed by taxpayer(s) and authorizes practitioner to file FBARs on behalf of taxpayer(s).
- Bank Secrecy Act E-Filing System:
<http://bsaefiling.fincen.treas.gov/main.html>
- BSA E-Filer Registration: <http://bsaefiling.fincen.treas.gov/Enroll.html>
 - Identify Organization's Point of Contact
 - Fill out and Submit the Supervisory User Application form
 - Obtain User ID and Authorization
 - Download the Formvs Viewer

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APPLICABLE PENALTIES

FBAR - Civil Penalties (Post-2004)

- Non-willful - \$10,000 per each non-willful failure to file (31 U.S.C. § 5321(a)(5)(B))
- Willful failure to file or retain required records - greater of \$100,000 or 50% of the balance in the account (31 U.S.C. § 5321(a)(5)(C))

Form 8938 Penalties

Failure to File Penalty - § 6038D(d)

- If a Form 8938 is not filed by the due date, a \$10,000 penalty may be imposed. If the taxpayer is notified by IRS and fails to correct, an additional \$10,000/month (up to \$50,000) may be imposed.
- Reasonable cause exception applies - IRC §6038D(g)

Form 8938 Penalties

New Component Of Accuracy-Related Penalty: “Undisclosed Foreign Financial Asset Understatement” (§6662(b)(7) and (j))

- 40% penalty
- Applies to portion of understatement attributable to an undisclosed foreign financial asset
- Applies to disclosures required by §6038D (foreign financial assets)

Observations: Form 8938 Penalties

- Gives IRS assessment and collection remedies unavailable for FBAR penalties (lien and levy available for these Title 26 penalties)
- Could create a bias within the IRS to impose these new penalties, perhaps in lieu of FBAR penalties
- Imposes lesser burden of proof than willful FBAR penalty
- Creates a duplicate penalty regime for the non-disclosure of foreign assets

Observations: Form 8938 Penalties (Cont.)

- The six-year SOL for omission of income gives the IRS a new tool in situations in which small amounts of income (more than \$5,000) from foreign assets has been omitted.
- Historically, a six-year SOL was reserved for the most egregious situations (25% omissions).

WILLFULNESS

- Guidance on willfulness
 - IRM examples of willful (IRM 4.26.16.4.5.3.8)
 - Chief Counsel Office Memorandum (CCA 200603026)
 - Judicial considerations
 - ***U.S. v. Williams***
489 Fed. App. 655 (4th Cir., 2012)
 - ***U.S. v. McBride***
908 F. Supp. 2d 1186 (U.S. Dist. Ct. of Utah, Cent. Div., 2012)
 - ***U.S. v. Zwerner***
Case No. 13-22082-CIV, Feb. 18, 2014 (S.D. Florida)
 - ***U.S. v. Moore***
Case No. C13-2063RAJ (W.D. Washington)

“Willfulness” Defined

“Willfulness” is shown by the person’s knowledge of the reporting requirements and conscious choice not to comply with the requirements.

The person needs to know he has an FBAR reporting requirement.
If a person has that knowledge, then the only intent needed to constitute a willful violation of the requirement is a conscious choice to not file the FBAR or to file a false FBAR. (IRM 4.26.16.4.5.3)

Williams: A Civil FBAR Case

Willfulness requires “a voluntary intentional violation of a known legal duty.” IRM 4.26.16.4.5.3 (07-01-2008). The court accepted that Williams may have not known about the FBAR reporting requirements. However, the court found that Williams was willfully ignorant of the FBAR obligations, and therefore he was willful under the statute.

The court used terms such as “willful blindness,” “actions establish reckless conduct,” and “conscious effort to avoid learning about reporting requirements.”

Showed willfulness from inferential conduct

Willfulness Considerations

- Was there knowledge of a reporting requirement?
- Was there a conscious choice not to file the FBAR?
- How does someone provide the requisite “specific reasons” confirming that they did not know of the FBAR filing requirements?
- Was there a conscious effort to avoid learning about the FBAR reporting and recordkeeping requirements - “Willful Blindness” ?
- Was the account disclosed to the preparer? Did the preparer ask? Was the preparer qualified? Was the preparer paid?
- Source of funds held in the foreign account - inherited/gift vs unreported income

Willfulness Considerations (Cont.)

- Account funds used as collateral for loans?
- Account activity - deposits and withdrawals, debit cards, cash, etc.
- Transfers to other foreign institutions? Is account closed?
- U.S. passport used to open the account (dual citizens)?
- Reasons account not held in name of the TP
- Indications of intention to conceal existence of the account - title to the account in a Lichtenstein foundation, Panamanian corporation, shell offshore entity, trust or nominee (including under a numbered, fictitious name or alias) or similar entity?
- Advised to open the account by professional advisor or others
- “Hold mail” instructions to bank? Fee paid for hold mail service?
- Is the bank in a historical “tax haven” country? Any business or historical connection with country?
- Account originally was opened by TP or others on behalf of TP?
- Claim of mere signatory authority vs. beneficial/financial interest
- Form W-9 not provided to foreign financial institution
- Frequency of meetings and correspondence with account representatives

Willfulness Considerations (Cont.)

- Previously filed FBARs ? Previously filed FBARs but omitted account(s)
 - Previously reported income from foreign account?
 - Perceived degree of financial / business sophistication and education of the taxpayer
 - US filing/reporting compliance history? Foreign compliance history?
 - Action taken upon discovery of duty to file/report?
 - Received advice not to file/report to the US?
 - Stated reason for non-filing/reporting?
 - Birthplace? Non-US resident? How/why US Citizenship obtained?
 - Physical and mental health of TP
-
- **Further questions often lay within the responses to each of the foregoing questions**

New IRS Interim Guidance re FBAR Penalties

- Applicable to non-OVDP / Streamlined Procedures cases
- Examiners to use “best judgment”
- Willful penalties mostly limited to 50%, single year (not to exceed 100% of high account value)
- Non-willful penalties mostly limited to \$10,000 per open year, regardless of number of unreported accounts
- Review applicability of IRS Internal Revenue Manual mitigation provisions - IRM 4.26.16.4.7

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RELEVANT IRS REGULATION AND GUIDANCE DEVELOPMENTS

OPTIONS FOR TAXPAYERS WITH UNDISCLOSED FOREIGN FINANCIAL ASSETS

- 2014 Offshore Voluntary Disclosure Program
- Streamlined Filing Compliance Procedures
- Delinquent FBAR Submission Procedures
- Delinquent International Information Return Submission Procedures

2014 OFFSHORE VOLUNTARY DISCLOSURE PROGRAM

IR-2014-73 (June 18, 2014)

- Indefinite term, subject to change at any time
 - Effect of John Doe Summons or 18 USC 3506 ?
 - Letter from foreign institution?
 - Letter from foreign tax administrator?
- Eight years of amended returns and FBARs for which the due date has passed (N/A fully compliant tax years)
- After preliminary acceptance - 90 days to submit OVDP application & pay taxes, interest & accuracy-related penalties
 - If applicable - delinquency & failure-to-pay penalties
 - Misc. Title 26 Offshore Penalty equal to **27.5%** of highest year end balance in account in last eight years (or **50%** for listed banks).
 - Separate checks for each year and Offshore Penalty
- IRS Criminal Investigation Division to screen all cases

2014 OFFSHORE VOLUNTARY DISCLOSURE PROGRAM

Submission Documents (OVDP FAQ #25)

- Offshore Voluntary Disclosure Letter (Form 14457) and
- Attachment to Voluntary Disclosure Letter (Form 14454)
- Foreign Account and Asset Statement (Form 14452)
- Penalty Computation worksheet (Form 14453)
- Power of Attorney for OVDP - includes authorization for analogous acts for Report of Foreign Bank and Financial Accounts (FBAR) matters

Streamlined Filing Compliance Procedures (SFCP)

Non-Resident & Residents

(Updated 10/09/14)

- Does not provide protection from criminal prosecution if the IRS and DOJ determine that the taxpayer's particular circumstances warrant such prosecution
- Once a taxpayer makes a submission under either Streamlined Procedure, OVDP is no longer available
- Once a taxpayer makes a submission under the OVDP after July 1, 2014, the Streamlined Procedures are no longer available
- Returns submitted under the streamlined procedures “may” be subject to IRS examination, additional civil penalties, and even criminal liability, if appropriate (**IRS will “spot check” returns**)
- Taxpayer needs to certify that they understand that non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law.

Streamlined Filing Compliance Procedures Non-Resident Defined

- **U.S. Persons** - In any one or more of the most recent three years for which the U.S. tax return due date (or properly applied for extended due date) has passed the person did not have a U.S. abode and the individual was physically outside the United States for at least 330 full days (See FAQ #1 re SFOP Non-Resident)
- **Non-U.S. Persons** - in any one or more of the last three years for which the U.S. tax return due date (or properly applied for extended due date) has passed, the individual did not meet the substantial presence test of IRC section 7701(b)(3)
- **Joint Return Filers** - both spouses must meet the applicable non-residency requirement

Streamlined Filing Compliance Procedures

Non-Resident Procedures

- File delinquent or amended tax returns, together with all required information returns (e.g., Forms 3520, 5471, and 8938) for each of the **3 most recent years** for which the U.S. tax return due date (or properly applied for extended due date) has passed
- For each of the most recent **6 years** for which the FBAR due date has passed, **electronically** file any delinquent FBARs (FinCEN Form 114, previously Form TD F 90-22.1)
- **Pay** the full amount of tax and interest due when submitting the foregoing delinquent or amended returns

Streamlined Filing Compliance Procedures

Non-Resident Procedures

- Complete and sign a **Certification by U.S. Person Residing Outside of the U.S.** certifying, under penalties of perjury:
 - eligibility for the Streamlined Foreign Offshore Procedures;
 - that all required FBARs have now been filed
 - statement why the failure to report all income, pay all tax, and submit all required information returns, including FBARs, **resulted from non-willful conduct**

Streamlined Filing Compliance Procedures

Non-Resident Procedures

- **NO** failure-to-file, failure-to-pay penalties, accuracy-related penalties, information return penalties, or FBAR penalties will be applicable to the information set forth on the returns submitted
- **UNLESS** a subsequent examination of such returns results in a determination that the original tax noncompliance was fraudulent and/or that the FBAR violation was willful
- If the IRS determines an additional tax deficiency for a return submitted, the IRS may assert applicable additions to tax and penalties relating to that additional deficiency
- **Retroactive relief** for failure to timely elect income deferral on certain retirement and savings plans where deferral is permitted by the applicable treaty

Streamlined Filing Compliance Procedures

Resident Eligibility

- **Fail to meet the applicable non-residency requirement** described above (for joint return filers, one or both of the spouses must fail to meet the applicable non-residency requirement)
- **Previously filed a U.S. tax return** (if required) for each of the most recent **3 years** for which the U.S. tax return due date (or properly applied for extended due date) has passed
- Failed to report gross income from a foreign financial asset and pay tax as required by U.S. law, and may have failed to file an FBAR (FinCEN Form 114, previously Form TD F 90-22.1) and/or one or more international information returns (e.g., Forms 3520, 3520-A, 5471, 5472, 8938, 926, and 8621) with respect to the foreign financial asset, and such failures resulted from non-willful conduct

Streamlined Filing Compliance Procedures

Resident Procedures

- For each of the most recent **3 years** for which the U.S. tax return due date (or properly applied for extended due date) has passed (the “covered tax return period”), **file amended tax returns, together with all required information returns** (e.g., Forms 3520, 3520-A, 5471, 5472, 8938, 926, and 8621)
- For each of the most recent **6 years** for which the FBAR due date has passed (the “covered FBAR period”), **electronically file any delinquent FBARs** (FinCEN Form 114, previously Form TD F 90-22.1)
- Pay the full amount of tax, interest and a **5% miscellaneous offshore penalty** (based on highest aggregate year end balance/value of foreign financial assets - defined as assets required to be reported on an FBAR or Form 8938 or, if reported, the gross income from such asset was not reported)

Streamlined Filing Compliance Procedures

Resident Procedures (Cont.)

- Complete and sign a **Certification by U.S. Person Residing in the U.S.** certifying, under penalties of perjury:
 - eligibility for the Streamlined Domestic Offshore Procedures
 - that all required FBARs have now been filed
 - that the failure to report all income, pay all tax, and submit all required information returns, including FBARs, resulted from non-willful conduct; and
- - that the 5% misc. offshore penalty amount is accurate
- If the IRS determines an additional tax deficiency for a return submitted, the IRS may assert applicable additions to tax and penalties relating to that additional deficiency

Streamlined Filing Compliance Procedures

Effect of Resident Procedures

- Pay a Title 26 miscellaneous offshore penalty equal to 5% of the highest aggregate year-end balance/value of the foreign financial assets (FFA) that are subject to the miscellaneous offshore penalty during the years in the covered tax return period (3 years) and the covered FBAR period (6 years)
 - FFA is subject to the 5% penalty in a given year in the covered FBAR period if the asset should have been, but was not, reported on an FBAR (FinCEN Form 114) for that year (See FAQs of 10/8/14)
 - FFA is subject to the 5% penalty in a given year in the covered tax return period if the asset:
 - should have been, but was not, reported on a Form 8938 for that year, or
 - was properly reported for that year, but gross income in respect of the asset was not reported in that year

Streamlined Filing Compliance Procedures Effect of Resident Procedures

- **NO** accuracy-related penalties, information return penalties, or FBAR penalties will be applicable to the information set forth on the returns submitted
- **UNLESS** a subsequent examination of such returns results in a determination that the original tax noncompliance was fraudulent and/or that the FBAR violation was willful
- If the IRS determines an additional tax deficiency for a return submitted, the IRS may assert applicable additions to tax and penalties relating to that additional deficiency
- Retroactive relief for failure to timely elect income deferral on certain retirement and savings plans where deferral is permitted by the applicable treaty

Delinquent FBAR Submission Procedures

(Updated 10/09/14)

- **Taxpayers who do not need the OVDP or the SFCPs**
 - have not filed a required FBAR(FinCEN Form 114, previously Form TD F 90-22.1),
 - have **reasonable cause** for not timely filing the information returns,
 - are not under a civil examination or a criminal investigation by the IRS, and
 - have not already been contacted by the IRS about the delinquent FBARs
- **Should electronically file the delinquent FBARs** according to the FBAR instructions and include a statement explaining why the FBARs are filed late -select the reason for filing late on the cover page of the electronic form
- **No Penalty** will be applied for the failure to file the delinquent FBARs if taxpayer properly reported on U.S. tax returns, and paid all tax on, the income from the foreign financial accounts reported on the delinquent FBARs and has not previously been contacted regarding an income tax examination or a request for delinquent returns for the years for which the delinquent FBARs are submitted
- May be selected for audit through the existing audit selection processes that are in place for any tax or information returns

Delinquent International Information Return Submission Procedures

(Updated 10/09/14)

- **Taxpayers who do not need the OVDP or the SFCPs**
 - have not filed one or more required international information returns,
 - have **reasonable cause** for not timely filing the information returns,
 - are not under a civil examination or a criminal investigation by the IRS, &
 - not yet contacted by the IRS about the delinquent information returns
 - *even if some unreported income* (FAQ#1 - Oct 8, 2014)
- **File the delinquent information returns with a statement of all facts establishing reasonable cause for the failure to file**
 - delinquent Forms 3520 and 3520-A should be filed according to the applicable instructions for those forms
 - All other delinquent international information returns (5471's, etc.) should be attached to an amended return and filed according to the applicable instructions for the amended return
- May be selected for audit through the existing audit selection processes that are in place for any tax or information returns

OFFSHORE VOLUNTARY DISCLOSURES

Now What?

- Taxpayers with previously undisclosed interests in foreign financial accounts **MUST** get into compliance -
 - If unreported tax incidental & strong reasonable cause - consider delinquent FBAR or international information return procedures
 - If unreported tax a bit more than incidental & not strong on reasonable cause- consider OVDP or Streamlined procedures
- Waiting to determine whether civil penalties will be more reasonable is not a viable option
- Civil penalties may not seem reasonable - but will likely be less than if the taxpayer is contacted by IRS before coming into compliance
- Criminal prosecutions of taxpayers previously undisclosed interests in foreign financial accounts and assets will continue

OFFSHORE VOLUNTARY DISCLOSURES

Now What?

- The vast majority of 50,000+ taxpayers participating in the 2009, 2011, 2012 and 2014+ IRS Offshore Voluntary Disclosure programs previously filed returns prepared by preparers - preparers the IRS might believe were complicit in the non-compliance or possibly less than diligent in preparing the original returns
- Practitioners must exercise due diligence re preparation of returns and documents and in determining the correctness of representations to the client and to the IRS - CIR 230 §10.22

Professional Responsibility and the FBAR

- U.S. persons required to file FBARs may claim a reasonable cause defense against penalties by blaming their preparers, on whom they reasonably relied, for failing to ask about the existence of a foreign bank account or to advise re the FBAR filing requirement
- **Per OPR** - Practitioners who prepare U.S. persons' Forms 1040, 1065, or 1120 series have a Cir 230 duty to inquire with sufficient detail to prepare correct responses to the FBAR questions on Form 1040 Schedule B, in box 3 on Form 1041 "Other Information" section, on Form 1065 Schedule B, or on Form 1120 Schedule N.
 - **Cir 230 §10.22** - Diligence as to accuracy
 - **Cir 230 §10.34(c)** - Notwithstanding the lack of obligation to prepare the FBAR, the practitioner does have an affirmative obligation to advise the client of the need to file the FBAR form and the consequences of failing to do so
 - **Cir 230 §10.34(d)** - May reply on information provided by the client in good faith. However, a practitioner may not ignore the implications of any information provided to or actually known by the practitioner. If the information furnished by the client appears to be incorrect, inconsistent with other known facts, or incomplete, the practitioner is required to make further inquiry

FBAR Voluntary Disclosure Program Update

ANDREOZZI • BLUESTEIN
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PARTNER

Current Foreign Bank Account Reporting Programs

- The Domestic Streamlined Filing Compliance Program
- The Offshore Streamlined Filing Compliance Program
- The OVDP Program

Domestic Streamlined Program

QUALIFICATIONS:

- Taxpayer previously filed a US tax return for each of the 3 years for which due date has passed
- Taxpayer failed to report gross income from a foreign financial asset and pay tax as required
- Taxpayer may have failed to file an FBAR and/or one or more international information returns
- Such failures resulted from *Non-Willful conduct*

Domestic Streamlined Program

PROCEDURES:

- Submit complete and accurate amended income tax returns for 3 most recent years
- Submit complete and accurate Forms 114 for 6 most recent years
- Complete & sign Form 14654
“Certification by US Person Residing in the US”
- Submit payment of all tax due on returns plus statutory interest
- Pay the Title 26 miscellaneous offshore penalty (5% of Highest Annual Aggregate Account Value of all Foreign Accounts)
- IRS will give *no closing agreement*

Domestic Streamlined Program

Potential Pitfalls with Domestic Program

- Pay IRS 5% penalty up front
 - Problems with up-front payment
 - Penalty application to assets not associated with tax avoidance/unreported income
- Certify that you're "*non-willful*"
 - Form 14654
 - No guidance on factors to include to support forms
- Then IRS might audit you to determine whether you're willful
- And if IRS says you're willful it will prosecute you for lying

Foreign Streamlined Program

QUALIFICATIONS:

- Taxpayer is not a U.S. resident (must meet the applicable non-residency requirements)
- Taxpayer failed to report gross income from a foreign financial asset and pay tax as required
- Taxpayer may have failed to file an FBAR and/or one or more international information returns
- Such failures resulted from Non-Willful conduct

Foreign Streamlined Program

NON-RESIDENCY REQUIREMENT:

- US Citizens or Lawful Permanent Residents (“green card holders”) meet requirement if;
 - Did not have a US abode and
 - Were physically outside the US for at least 330 full days
- For Non-Citizens or Non-Residents:
 - Did not meet the Substantial Presence Test

Foreign Streamlined Program

Procedures:

- Submit complete and accurate delinquent or amended returns for most recent 3 years
- Complete & sign Form 14653 “Certification by US Person Residing Outside the US”
- Submit payment of all tax due on returns plus statutory interest
- File 6 years of FBARs

Noteworthy Streamlined Program Issues

- People Who Don't Qualify for SFOP But Should
 - “Snowbirds”
 - “Accidental Americans”
 - Green Card Holders
- Carefully choose programs for these clients
- May be better candidates for OVDP/opt-out
- Social Security Numbers

2014 OVDP Program

Qualifications:

- IRS did not initiate a civil examination for any year under the submission
- Taxpayer's name was not submitted to the IRS by the foreign financial institution
- Taxpayer must pass IRS Criminal Investigation Division Pre-clearance Procedure

2014 OVDP Program

PROCEDURES:

- Three steps: Pre-Clearance Request; Preliminary Submission; Full Submission
- Submit original/amended income tax returns and FBARs for 8 most recent years
- Pay 27.5% Title 26 miscellaneous offshore penalty
- Pay Title 26 accuracy, failure-to-file and/or failure-to-pay penalties
- Pay all tax due on returns plus statutory interest
- Submit Taxpayer Account Summary with Penalty Calculation
- Complete Foreign Account or Asset Statement for each Asset
- Complete Offshore Voluntary Disclosure Letter
- Provide copies of all foreign financial account statements
- Submit all International informational filings (if applicable)

2014 OVDP Program

- The 50% “Super Penalty”
 - Foreign Financial Facilitators List
 - If one account on list, penalty for all accounts
- PFIC Computations
 - Very costly proposition
 - Ask agent to use discretion in requiring comps.
- Reasonable Cause Briefs/Analyses
- Taxpayer Interviews

Delinquent FBAR & International Information Return Submission Procedures

Available for taxpayers with no unreported income to report but who

1. Have not filed an FBAR (Form 114 or TD F 90-22.1)
2. Have not filed one or more International Information returns
3. Are not under civil examination or a criminal investigation by the IRS, and
4. Have not already been contacted by the IRS about delinquent FBARs
5. Have reasonable cause for the failure to file

Statute Extensions

- Title 31 and Title 26
- IRS seeks overly broad extensions
- Must be reviewed carefully
- Restrict extensions if opting out
- Make sure to protect for refunds
- Ask the Agent for consideration of possibly time-barred claims within the 8-year submission period for OVDP.

FBAR Update: The Latest Developments in Criminal and Civil Enforcement

Presented by:

Matthew D. Lee
Blank Rome LLP

Why the Focus on International Tax Compliance?

- IRS/DOJ have intense focus on curtailing offshore tax avoidance
 - U.S. Tax Gap: \$450 billion
 - U.S. Senate PSI Report (2/26/14): Offshore tax schemes cause \$150 billion in lost tax revenue per year
- How?
 - Using “carrot and stick” approach

The Carrot: Voluntary Disclosure Programs

- 2014 Offshore Voluntary Disclosure Program (OVDP) which follows highly successful 2009, 2011, and 2012 amnesty programs
 - Provides participating taxpayers with amnesty from criminal prosecution by filing of amended tax returns and payment of taxes, interest, and penalties
 - 54,000 voluntary disclosures since 2009 (versus 100 annually under traditional voluntary disclosure program)
 - Over \$8 billion in additional revenue collected to date
- Streamlined Filing Compliance Procedures for non-willful taxpayers

The Stick: Unprecedented Enforcement

- “Those who underestimate the ability of the United States to pursue offshore tax evasion do so at their own peril.” (DOJ Tax January 29, 2016)
- “Today’s agreements reflect the Tax Division’s continued progress towards reaching appropriate resolutions with the banks that self-reported and voluntarily entered the Swiss Bank Program. The department is currently investigating accountholders, bank employees, and other facilitators and institutions based on information supplied by various sources, including the banks participating in this Program. ***Our message is clear – there is no safe haven.***” (DOJ Tax May 29, 2015)
- “These four additional bank agreements signal a change in terrain for offshore banking. No longer is it safe to hide money offshore and expect that it will not be discovered. IRS CI Special Agents will continue to follow the money to find those who circumvent the offshore disclosure laws and hold them accountable.” (IRS-CI May 29, 2015)

Enforcement Efforts to Date

- UBS Deferred Prosecution Agreement (Feb. 2009)
- Approximately 117 individual account holders have been criminally charged to date
 - 90 guilty pleas
 - 12 convictions following trial
 - 5 fugitives from justice
- More than 50 “facilitators” have been charged
 - 12 guilty pleas
 - 2 convictions following trial
 - 23 fugitives from justice

Enforcement Actions Against Banks

- Bank Leumi (Israel) – December 2014; deferred prosecution agreement. \$270 million penalty and turnover of more than 1,500 names of account holders.
- Credit Suisse (Switzerland) – May 2014; guilty plea. \$2.6 billion penalty.
- LLB-Vaduz (Liechtenstein) – July 2013; non-prosecution agreement. \$23 million penalty.
- Wegelin Bank (Switzerland) – January 2013; guilty plea. \$58 million penalty and \$16.2 million forfeiture.

Use of “John Doe” Summonses

- Used to obtain information about U.S. taxpayers through correspondent accounts
- To date, such summonses have been issued for bank account information in Switzerland, India, the Bahamas, Barbados, Belize, the Cayman Islands, Guernsey, Hong Kong, Malta, and the United Kingdom

Swiss Bank Program

- More than 100 Swiss Banks enrolled as of December 31, 2013
- 80 Swiss banks reached resolutions with U.S. government as of January 2016
- Over \$1.3 billion in penalties paid by participating banks
- In exchange for non-prosecution agreement, participating banks:
 - made a complete disclosure of their cross-border activities,
 - provided detailed information on accounts in which U.S. taxpayers have a direct or indirect interest,
 - are cooperating in treaty requests for account information
 - are providing detailed information as to other banks that transferred funds into secret accounts or that accepted funds when secret accounts were closed
 - must cooperate in any related criminal and civil proceedings
 - pay financial penalty, which could be mitigated with proof that the U.S. taxpayer declared the account or the U.S. taxpayer came into a voluntary disclosure program at the bank's urging.

United States v. Zwerner Jury Verdict

May 28, 2014

- Zwerner failed to file FBARs for Swiss bank account with balance of \$1.4 million
- Jury found Zwerner liable for willfully failing to file FBARs for 2004, 2005, and 2006
- Potential penalty: 50% of balance of account for each year (total 150% penalty)
- Even though he filled out a tax organizer provided by his accountant, every year, Zwerner answered “no” to questions asking whether “you have an interest in or signature authority over a financial account in a foreign country, such as a bank account, securities account or other financial account” and whether “you have any foreign income or pay any foreign taxes.”

FATCA and the End of Tax Havens & Banking Secrecy

- Anti-tax evasion law passed by Congress in 2010
- Became fully effective July 1, 2014
- Requires foreign financial institutions (FFIs) to annually disclose account information regarding U.S. customers or face 30% withholding tax/penalty on U.S.-source payments
- Despite some initial controversy, FATCA has been largely embraced globally
- More than 165,000 FFIs have registered with IRS to become “FATCA-compliant”
- More than 110 countries have agreed to bi-lateral treaties (IGAs) to fully implement FATCA

United States v. Robert Bandfield

- Superseding Indictment filed July 31, 2015 (E.D.N.Y)
- Individuals and offshore entities charged with securities fraud and money laundering involving an offshore “pump and dump” securities scheme
- Paragraph 21 of indictment alleges that the defendant “defraud[ed] the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the IRS in the ascertainment, computation, assessment and collection of revenue, specifically federal income taxes under, inter alia, FATCA; and . . . laundering money by facilitating financial transactions to and from the United States, which transactions involve proceeds of fraud in the sale of securities;”

U.S. v. Bandfield, continued

- Undercover operation where an undercover agent from the United States was able to obtain formation of offshore international business corporations;
- Paragraph 28 alleges that one of the defendants suggested to the undercover agent that he could circumvent “the IRS’s reporting requirements by having a nominee sign IRS Forms W-8BEN for the Undercover Agent’s IBCs and LLCs.”
- Paragraph 30 alleges that one defendant reported to the undercover agent that a corporate structure, i.e. “this ‘slick’ structure was designed to counter U.S. President Barack Obama’s new laws, a reference to FATCA.”

Civil Enforcement Efforts

- Required records doctrine
 - DOJ has successfully challenged motions to quash grand jury subpoenas in criminal cases and obtained orders enforcing summonses in civil cases.
 - “At this point, the message is clear: taxpayers are required to maintain foreign records and produce them upon request.”
- Civil audits of individual taxpayers with offshore assets
 - Unreported income from offshore accounts/assets
 - FBARs
 - Other information returns (3520, 3520-A, 5471, etc.)

What's Next?

- DOJ and IRS mining data provided from multiple sources:
 - OVDP
 - Swiss Bank Program
 - Grand jury subpoenas and John Doe summonses
 - Treaty requests
 - Whistleblowers
 - Cooperators
 - FATCA reporting
- DOJ and IRS following leads in many countries:
 - Belize, the British Virgin Islands, the Cayman Islands, the Cook Islands, India, Israel, Liechtenstein, Luxembourg, the Marshall Islands, Panama, and others