



## FBAR Reporting Requirements

Who is subject to the Report of Foreign Bank and Financial Accounts (FBAR) requirements and what types of accounts have to be reported?

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Generally, any United States (U.S.) person who has an ownership interest in, or signatory authority or other authority over, a financial account (or several accounts) in a foreign country with an aggregate value in excess of \$10,000 at any time during the calendar year must file a Form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts" (commonly referred to as an FBAR), reporting certain information with respect to that account by June 30 of the subsequent year. A taxpayer is so instructed to file the FBAR under the instructions to Schedule B of Form 1040. Failure to file an FBAR is subject to both civil and criminal penalties. The only guidance provided by the IRS to potential filers on who is required to file and what information is required in an FBAR is the FBAR instructions, FAQs posted to the Internal Revenue Service (IRS) Web site, and public statements of IRS employees. As a result, the lack of guidance has led to much confusion over the breadth of the reporting requirements and the definition of the terms, "United States person," "financial interest," "signatory authority or other authority" and "foreign financial account."

### Bank Secrecy Action of 1970

The enactment of the Bank Secrecy Act of 1970 to address the use by U.S. persons of financial institutions in certain foreign bank secrecy jurisdictions for illegal purposes empowered the Secretary of Treasury to require reports of U.S. persons with a certain relationships to foreign financial accounts. Under the Bank Secrecy Act authority, regulations were issued establishing a reporting requirement for U.S. persons who have a "financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country," but not defining any of those terms. The principal guidance to the FBAR filing requirements consists of the instructions to the FBAR form itself.

### FBAR Instructions — U.S. Person

In October 2008, the IRS revised the instructions to the FBAR broadening the definitions of "United States person," "financial interest" and "financial account." The 2008 instructions define "United States person" as a "citizen or resident of the United States, or a person in and doing business in the United States." In addition, the 2008 instructions incorporated 31 C.F.R. 103.11(z) into the definition of "person" thereby including in the definition any United States individual, incorporated or unincorporated entity or group and all entities cognizable as legal personalities.

A U.S. person is defined under the IRC in Section 7701(a)(30) as a U.S. citizen, U.S. resident, U.S. entity, trust or estate. A U.S. resident includes any person who meets the substantial physical presence test of Section

7701(b)(3). Because a U.S. person for FBAR filing purposes includes a person in and doing business in the United States (without regard to the substantial physical presence test rules), a nonresident alien may be a U.S. person under the definition in the FBAR instructions required to file an FBAR, even though not a U.S. person under Sec. 7701(b)(3). While it is unclear whether the definition of U.S. person in the instructions includes a U.S. disregarded entity, the Treasury has taken the position that disregarded entities were included under the prior definition of U.S. person in the instructions.

In response to the confusion over the definition of U.S. person in the 2008 instructions, the IRS issued Announcement 2009-51 providing that taxpayers required to file FBARs by June 30, 2009, may rely upon the prior instructions defining a U.S. person as either a citizen or resident of the U.S., a domestic partnership, domestic corporation or domestic estate or trust.

### Financial Interest

The instructions provide that a U.S. person has a "financial interest" in an account in which that person is the owner of a record or holds legal title to that account, regardless of whether the account is maintained for his or her benefit or in which such person is acting as an agent, nominee, attorney or in some other capacity on behalf of a U.S. person. A more than 50-percent interest in the shares or voting power of a domestic corporation or in the capital or profits of a domestic partnership that holds legal title to or is the owner of record of, a foreign financial account constitutes a "financial interest" in such account. A U.S. beneficiary of a trust that is the owner of record or holder of legal title of a foreign financial account will be a U.S. person if the U.S. beneficiary "either has a present beneficial interest, either directly or indirectly, in more than 50 percent of the assets or receives more than 50 percent of the current income." However, there is no guidance as to how a discretionary beneficiary is to be treated, or whether the income referred to is trust accounting income or taxable income or how potential appointees of limited powers of appointment are to be treated.

### Signature Authority or Other Authority Over the Account

The ability to control the disposition of assets of an account by delivery of a document containing his or her signature (or with co-signing authority) to the bank or other person with whom the account is maintained, constitutes "signature authority" over the account. "Other authority" over an account is a power comparable to signature authority over an account, either directly or indirectly, through an agent, nominee or attorney. The power to direct

how an account is invested, but not disbursed, is not an "other authority."

### Financial Account

The most controversial change to the instructions was to the definition of "financial account." The change made to the definition of "financial account" was the addition of the parenthetical "(including mutual funds)" in reference to an account in which assets are held in a commingled fund and in which the account holder holds an equity interest. The amendment also explicitly excluded from the meaning of "financial account" individual bonds, notes or stock certificates not held in a financial account and certain unsecured loans.

### Commingled Funds-Hedge and Private Equity Funds

The absence of any definition of "mutual fund" in the FBAR instructions gave rise to speculation that the term covered foreign private equity and hedge funds. During a June, 2009 conference IRS officials commented that the parenthetical term encompassed investments in foreign hedge funds and foreign private equity funds and that this position was not new but was a position not "emphasized by the IRS in the past."

### Notice 2009-62

In response to the confusion created by these remarks the IRS issued Notice 2009-62, which extended the filing date for 2008 and earlier year FBARs to June 30, 2010, with respect to persons with only signatory authority over a foreign financial account and with respect to persons with a financial interest or signature authority over a foreign commingled fund. In addition, the Treasury announced that it was intending to issue regulations with respect to the filing requirements of those person with respect to those foreign financial accounts and solicited comments concerning when an interest in a foreign entity should be subject to FBAR reporting; whether an FBAR should be required where the filing would be duplicative of other reporting; and when a person with only signature authority over a foreign financial account should be relieved of filing an FBAR.

### Conclusion

Currently there exists confusion and a lack of guidance as to some of the key definitions with respect to FBARs. Until these problem areas are cleared up by regulations, taxpayers should file an FBAR if they fall anywhere close to the definitions in the instructions.

## About the Author

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