



US TAX ALERT

US TAX ALERT is a commentary on topics of current interest – usually topics relating to recent changes in tax law, new IRS administrative practices or current interpretations arising from tax cases. Professional advice should be obtained before acting on any of this information.

US PERSONS – REPORTING NON US FINANCIAL ACCOUNTS NEW AND TOUGHER REPORTING

The US Annual Report of Foreign Bank and Financial Accounts (FBAR returns) is reported on form TDF 90-22.1. It must be filed by United States *persons* which includes individuals who are US citizens, green card holders or US residents and may include others. The information reported on the form is recorded on the database of the United States Financial Crime Enforcement Network to counteract terrorism, money laundering and tax avoidance. **Filing is required by a US person who has a financial interest in or signature authority over foreign (non US) financial accounts.**

The reporting in this **US TAX ALERT** is more extensive than normal given the many new and intricate provisions of the legislation recently revised and the very serious penalties. Much of the instructions to the FBAR return have been reported verbatim.

Penalties

The FBAR return is due June 30 each year and no filing extension is allowed. The penalties for non – wilful violation are up to US \$10,000 and for wilful violation the greater of \$10,000 or 50% of the balance in the accounts at the time of the offense. Criminal penalties can also be assessed. The penalties section of the FBAR instructions reads in part as follows:

*A person who is required to file an FBAR and fails to properly file may be subject to a civil penalty not to exceed \$10,000. **If there is reasonable cause for the failure and the balance in the account is properly reported, no penalty will be imposed.***

For those who have not filed FBAR returns for past years a claim that they had no knowledge of the FBAR reporting (if that is the case) on indication that they claimed all income from financial accounts on their tax returns will probably reduce the possibility of penalties.

US Person, Joint Accounts and Spouses

The general instructions for the FBAR return indicate that the following persons must file:

A United States person that has a financial interest in or signature authority over foreign financial accounts must file an FBAR if the aggregate value of the foreign financial accounts exceeds \$10,000 at any time during the calendar year.

The FBAR return must be filed by a United States person which means:

United States citizens; United States 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.

If a US Citizen living in Canada and married to a Canadian and is a joint owner of their spouse's investments and/or bank accounts, they must report these account interests— even if they don't have enough income to file a US personal tax return. With respect to spouses, the FBAR instructions state the following:

The spouse of an individual who files an FBAR is not required to file a separate FBAR if the following conditions are met: 1) all the financial accounts that the non-filing spouse is required to report are jointly owned with the filing spouse; 2) the filing spouse reports the jointly owned accounts on a timely filed FBAR; and 3) both spouses sign the FBAR in Item 44. Otherwise, both spouses are required to file separate FBARs, and each spouse must report the entire value of the jointly owned accounts.

Financial Accounts in a Foreign Country

The meaning of a *financial account* in a foreign country includes all accounts in geographical areas outside the United States. The definition of an *account* is very broad as follows:

A financial account includes, but is not limited to, a securities, brokerage, savings, demand, checking, deposit, time deposit, or other account maintained with a financial institution (or other person performing the services of a financial institution). A financial account also includes a commodity futures or options account, and insurance policy with a cash value (such as a whole life insurance policy), and annuity policy with a cash value, and shares in a mutual fund or similar pooled fund (i.e., a fund that is available to the general public with a regular net asset value determination and regular redemptions).

A Foreign financial account is a financial account located outside of the United States. For example, an account maintained with a branch of a United States bank that is physically located outside of the United States is a foreign financial account. An account maintained with a branch of a foreign bank that is physically located in the United States is not a foreign financial account.

A financial account would pick up RRSP's, RESP's, RRIF's, RDSPs, TFSA's and insurance policies with a cash surrender value (to be reported by the policy holder).

Financial Interest or Signature Authority over an Account

What is so frightening about this US legislation is how far it reaches. It not only covers ownership and joint ownership of accounts but also includes accounts where you simply have signing authority (say you are treasurer of a local charity, hold a power of attorney or are an executor of an estate).

The instructions to the FBAR return indicate that a United States person has a financial interest in a foreign financial account if certain conditions exist:

United States person has a financial interest in a foreign financial account for which:

- 1. The United States person is the owner of record or holder of legal title, regardless of whether the account is maintained for the benefit of the United States person or for the benefit of another person; or*
- 2. The owner of record or holder of legal titles is one of the following:*

- a. *An agent, nominee, attorney, or a person acting in some other capacity on behalf of the United States person with respect to the account;*
- b. *The corporation in which the United States person owns directly or indirectly (i) more than 50 percent of the total value of shares of stock or (ii) more than 50 percent of the voting power of all shares of stock;*
- c. *A partnership in which the United States person owns directly or indirectly: (i) and interest in more than 50 percent of the partnerships' profits (e.g., distributive share of partnership income taking into account any special allocation agreement) or (ii) an interest in more than 50 percent of the partnership capital;*
- d. *A trust of which the United States person: (i) is the trust grantor and (ii) has an ownership interest in the trust for United States federal tax purposes;*
- e. *A trust in which the United States person has a greater than 50 percent present beneficial interest in the assets or income of the trust for the calendar year; or*
- f. *Any other entity in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of equity interest or assets, or interest in profits.*

You have a signature authority over an account if you meet the following test:

Signature authority is the authority of an individual (alone or in conjunction with another individual) to control the disposition of assets held in a foreign financial account by direct communication (whether in writing or otherwise) to the bank or other financial institution that maintains the financial account.

It is obvious that any account for which you are acting as a trustee or hold a power of attorney would be included.

Filing Deadline

Filing deadline details taken from the TDF return guide are as follows:

The FBAR is an annual report and must be received by the Department of the Treasury on or before June 30th of the year following the calendar year being reported.

The FBAR may be hand delivered to any local office of the Internal Revenue Service for forwarding to the department of the treasury, Detroit, MI. The FBAR may also be delivered to the Internal Revenue Service's tax attaches located in United States embassies and consulates for forwarding to the Department of the Treasury. The FBAR is not considered filed until it is received by the Department of the Treasury in Detroit, MI.

There is no extension of time available for filing and FBAR. Extensions of time to file federal tax returns do not extend the time for filing and FBAR. If a delinquent FBAR is file, attach a statement explaining the reason for the late filing.

Record Keeping

Persons required to file an FBAR must retain records that contain the name in which each account is maintained, the number or other designation of the account, the name and address of the foreign financial institution that maintains the account, the type of account, and the maximum account value of each account during the reporting period. The records must be retained for a period of 5 years from June 30th of the year following the calendar year reported and must be available for inspection as provided by law. Retaining a copy of the filed FBAR can help to satisfy the record keeping requirements.

Information to Report on FBAR Return

Until 2008 you simply had to report the maximum value of accounts within a range. Starting in 2009 you must report the exact maximum value in foreign accounts. It is a mystery how US individuals are going to get this information say on an account that is owned by someone else and they are only a signing officer. The following information is required for *each* account:

- ◆ Maximum value in the year
- ◆ Type of account (bank, securities, other)
- ◆ Name of financial institution
- ◆ Account number
- ◆ Mailing address of institution

Forms Completion

The FBAR return has a series of schedules attached to it requiring details of each account in each of the following categories:

- ◆ Part II – Accounts owned separately
- ◆ Part III – Accounts owned jointly
- ◆ Part IV – Accounts where the filer has signature or other authorization but no financial interest
- ◆ Part V –Accounts where filer is filing a consolidated report.

Summing Up

Recent regulations contain significant details not included in this report, so if you are in doubt about reporting certain accounts more investigation may be required.

The onerous penalties are obviously compelling to make US *persons* file this report. Penalties apply whether the form is not filed for non-wilful or wilful reasons. Many US persons living in Canada treat lightly the fact that they don't file US income tax returns. Carelessness about not filing the FBAR return can be far more serious.

J. E. Arbuckle Financial Services Inc.
30 Dupont St. E., Suite 205, Waterloo, Ontario N2J 2G9
Phone: 519-884-7087 Fax: 519-884-5741
Email: jea@personalwealthstrategies.net
www.personalwealthstrategies.net

