

## SPECIAL SOLARI REPORT

### FBAR DEVELOPMENTS FOR INDIVIDUALS FOR THE 2013 TAX YEAR

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The requirements for individuals to file the Report of Foreign Bank and Financial Accounts (“FBAR”) have changed for the 2013 tax year. To remind readers, the FBAR for a calendar year is due the following June 30, and there is no provision for an extension. However, information about the same holdings is included in the annual income tax return that is due April 15. Also, taxpayers with specified foreign financial assets that exceed certain thresholds<sup>i</sup> must report those assets to the IRS on the [Form 8938](#), *Statement of Specified Foreign Financial Assets*, which is filed with the annual income tax return. A comparison of the FBAR and Form 8938 filing requirements can be found on the IRS website [link: <http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements>]. Note that included and excluded assets and amounts subject to reporting are in some cases different for purposes of the FBAR and the Form 8938.

#### **New FBAR Reporting Form**

On July 29, 2013, FINCen (the regulatory body within the Department of Treasury that has the authority to enforce the Bank Secrecy Act) replaced the old form TD F 90-22.1 (which in previous years was filed by mailing the form to the IRS Detroit computing center) with a new Form 114 that is filed online through a new FINCen e-filing website [link: <http://bsaefiling.fincen.treas.gov/main.html>]. FINCen refers to this website filing facility as the “BSA E-Filing.” The filer executes an e-filing of the online FBAR form on the secure website after establishing an account and receiving a user ID from FINCen [link: <http://bsaefiling.fincen.treas.gov/Enroll.html>]. FinCEN will not accept printed versions of the forms produced by BSA E-Filing.<sup>ii</sup>

If an individual prefers to have an attorney or accountant (CPA or enrolled agent) file the FBAR, it is the attorney or accountant who establishes the FINCen account (i.e., registers as a preparer filer) and the individual who has the obligation to report authorizes his or her agent by executing a Form 114a Record of Authorization to Electronically File FBARs [Link: <http://www.fincen.gov/forms/files/FBARE-FileAuth114aRecordSP.pdf>]. The Form 114a also must be executed by a husband or wife who authorizes his or her spouse to file the Form 114 for a jointly held foreign account. This authorization form is not filed with FINCen unless FINCen requests, but the individual required to file and the authorized preparer are required under 31 CFR 1010.430(d) [link: <http://www.law.cornell.edu/cfr/text/31/1010.430>] to keep a record copy for his or her files for five years. The Form 114a, like the FBAR, is a fill-in and print form using Adobe Reader.

#### **Summary of Who Must File FBAR and for What Assets (Not New This Year)**

In short summary of existing FBAR guidelines, an individual is required to file an FBAR under the following circumstances:

- (1) He or she is a resident or citizen of the US<sup>iii</sup> and holds a financial interest in (or signature authority over<sup>iv</sup>) assets in foreign financial institution accounts valued at in excess of \$10,000 (using end-of-year exchange rates) on an aggregate basis at any time during the filing year. The

filer may rely upon bona fide periodic account statements prepared in the ordinary course of business for determining maximum value of the assets during the year. The filing requirement exists even if the account(s) produced no income during the year.

- (2) As a general matter, an account is not a foreign account under the FBAR if it is maintained with a financial institution located in the United States. Holdings with US financial institutions in omnibus accounts maintained by global financial custodians generally do not have to be reported unless the customer has direct access to the assets held at a foreign financial institution.
- (3) Excepted from the FBAR filing requirements are:
  - a. Certain foreign financial accounts jointly owned by spouses<sup>v</sup>;
  - b. United States persons included in a consolidated FBAR;
  - c. Correspondent/nostro accounts maintained by banks and used solely for bank-to-bank settlement purposes;
  - d. Foreign financial accounts owned by a governmental entity or instrumentality or Indian tribe;
  - e. Accounts in a US military banking facility operated by a US financial institution designated to serve US government installations abroad
  - f. Foreign financial accounts owned by an international financial institution;
  - g. IRA owners and beneficiaries;
  - h. Participants in and beneficiaries of tax-qualified retirement plans;
  - i. Certain individuals with signature authority over, but no financial interest in, a foreign financial account;
  - j. Trust beneficiaries (but only if a U.S. person reports the account on an FBAR filed on behalf of the trust); and
  - k. Foreign financial accounts maintained on a United States military banking facility.
- (4) Reportable FBAR assets include:
  - a. Deposit and custodial accounts in foreign financial institutions
  - b. Financial accounts held at a foreign branch of a US financial institution
  - c. Foreign stock or securities held in a financial account in a foreign financial institution
  - d. Certain indirect interests in foreign financial assets
  - e. Foreign mutual funds
  - f. Foreign-issued insurance contracts and variable annuities that have cash values<sup>vi</sup>
- (5) Assets excluded from the FBAR reporting obligation are:
  - a. Foreign assets held in US mutual funds
  - b. Foreign stocks or other securities not held in financial accounts
  - c. Foreign partnership interests and real estate
  - d. Foreign currency, precious metals, jewelry, art and other collectibles held directly
  - e. Interests in foreign hedge funds and private equity funds
  - f. Social Security – type program benefits from foreign governments

#### **Miscellaneous Additional Information about FBAR and Filers**

The three types of reportable accounts in a foreign financial institution under FBAR regulations are a bank account, a securities account, and an “other financial account.” A bank account includes a savings deposit, demand deposit, checking or other account maintained with a person in the business of banking and includes a certificate of deposit. Note that a bank vault does not appear to be an “account” for this purpose. A securities account is defined an account with a person engaged in the business of buying, selling, trading or holding stock or other securities. According to the FBAR regulations [link: <http://www.gpo.gov/fdsys/pkg/FR-2011-02-24/pdf/2011-4048.pdf>], the term “other financial account” includes:

- An account with a person in the business of accepting deposits as a financial agency
- An account with person that acts as a broker or dealer for futures or options transactions in any commodity on or subject to the rules of a commodity exchange or association
- An account with a mutual fund or similar pooled fund that issues shares available to the general public that have a regular net asset value determination and regular redemptions

The interest in a foreign financial account that must be reported on the FBAR is ownership of record or legal title to the account, whether the interest is held for the record or title holder’s benefit or for the benefit of others. If the account is maintained in the name of more than one person, each US person in whose name the account is held has a financial interest in the account for FBAR purposes. A US person also has a reportable financial interest in an account where the owner of record or legal title holder is one of the following:

- A person acting on behalf of the US person, such as an attorney, agent or nominee
- A corporation in which the US person holds directly or indirectly more than 50% of the voting power or total value of shares, a partnership in which the US person holds a direct or indirect interest of more than 50% of the profits or capital or any other entity (other than a trust) in which the US person holds more than 50% of voting power, value of equity, assets or interest in profits
- A trust if the US person is the settlor and holds an interest for US tax purposes or a trust if the US person holds more than a 50% present beneficial interest in assets or current income

A United States person having a financial interest in 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the FBAR, but will be required to provide detailed information concerning each account upon request.

In order to prevent technical compliance that is intended to evade the purposes of the FBAR reporting requirement, FBAR regulations also provide that a US person who causes an entity to be created for a purpose of evading the FBAR reporting requirement would have a financial interest in any bank, securities, or other financial account in a foreign country for which the entity is the owner of record or holder of legal title.

### **Penalties for Failure to File**

Civil violations of the FBAR statute are handled by the IRS, whereas criminal violations are within the jurisdiction of Treasury. Penalties for willful violations of FBAR requirements can be stiff, particularly for violations by domestic financial institutions and other businesses and their management and owners. According to the statute [link: <http://www.law.cornell.edu/uscode/text/31/5321>], the maximum civil penalty per willful violation is the greater of \$100,000 or 50% of the maximum value of the offshore accounts (but not more than the value of the accounts). The maximum penalty for non-willful violations is \$10,000. According to a recent *Fortune* [link: <http://finance.fortune.cnn.com/2014/01/09/irs-offshore-accounts/>] article, however, since 2011, the IRS's position has been to treat virtually all delinquent filings as willful and to assess draconian penalties that appear to be more severe (as a percentage of tax owed) for those in the bottom 10% in value (with average account balances of \$44,885) and for taxpayers who are not represented by professionals in negotiations with the IRS.

An Offshore Voluntary Disclosure Program [link: <http://www.irs.gov/uac/2012-Offshore-Voluntary-Disclosure-Program>] in 2009 and 2011 was revived in 2012 and continues, although the IRS emphasizes that it may be discontinued in the future. IRS guidance says that this program offers people with unreported taxable income from offshore financial accounts or other foreign assets another opportunity to resolve their delinquent tax and information reporting obligations, including the FBAR. In this amnesty program, the taxpayer who voluntarily reports the FBAR filing delinquency has the option to continue in the program or opt out and be subject to a tax return audit. Reportedly, those who opt out and are audited, on average, are subject to lower penalties than those who continue in the "amnesty" program (whose penalties may amount to as much as 600% of the tax originally owed). According to the *Fortune* article, tax lawyers report an increase in so-called "quiet disclosures." Thus, in fear of high penalties, some taxpayers, upon discovering their violation, merely file FBARs and amended tax returns for the years in question, pay the taxes as if they had filed on time and hope that their failure to timely file and report will not be discovered by the IRS.

Also, there is streamlined reporting available for US persons (including dual citizens) living abroad since 2009 who have not previously filed required US income and information returns. [link: <http://www.irs.gov/uac/Instructions-for-New-Streamlined-Filing-Compliance-Procedures-for-Non-Resident-Non-Filer-US-Taxpayers>] Under this procedure, a qualified individual must file delinquent FBARs for the last six years and delinquent income tax and information returns for the last three years. No penalties are assessed or further action taken for qualified filers who take advantage of this program.

### **How to Get FBAR Assistance**

Call 866-270-0733 (toll free in US) or 313-234-6146 M-F 8AM – 4:30PM EST. Email [FBARquestions@irs.gov](mailto:FBARquestions@irs.gov). Filers living abroad may obtain assistance at US embassies and consulates. The US has full-time permanent staff to assist with the FBAR in four embassies/consulates: in Frankfurt, London, Beijing and Paris. These embassies and consulates are also available by telephone.

### **LINKS**

"FinCEN Amends BSA Regs on FBAR Filings" (2/25/11), <https://solari.com/blog/fincen-amends-bsa-regs-on-fbar-filings/>

“FBAR Forms Due June 30!” (6/6/10), <https://solari.com/blog/foreign-bank-and-financial-accounts-fbar-2010/>

“Update – Foreign Financial Accounts: June 30 Filing Requirement for Individuals,” (6/29/09) <https://solari.com/blog/update-foreign-financial-accounts-june-30-filing-requirement-for-individuals/>

“Foreign Financial Accounts: June 30 Filing Requirement for Individuals,” (6/24/09) <https://solari.com/blog/foreign-financial-accounts/>

Main IRS link on FBAR: <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Report-of-Foreign-Bank-and-Financial-Accounts-FBAR>

“OFFSHORE VOLUNTARY DISCLOSURE: The IRS Offshore Voluntary Disclosure Program Disproportionately Burdens Those Who Made Honest Mistakes,” [Taxpayer Advocate Service — 2013 Annual Report to Congress — Volume One, Most Serious Problems (MSP) #22] <http://www.taxpayeradvocate.irs.gov/userfiles/file/2013FullReport/OFFSHORE-VOLUNTARY-DISCLOSURE-The-IRS-Offshore-Voluntary-Disclosure-Program-Disproportionately-Burdens-Those-Who-Make-Honest-Mistakes.pdf>

“IRS Top Cop Says the Agency Is Too Hard on Tax Dodgers,” *Fortune*, (January 14, 2014) <http://finance.fortune.cnn.com/2014/01/09/irs-offshore-accounts/>

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<sup>i</sup> \$50,000 on the last day of the tax year or \$75,000 at any time during the year, with higher thresholds for married taxpayers filing jointly and US citizens living abroad.

<sup>ii</sup> Adobe Reader software is required. The platform for use of Adobe Reader with BSA E-Filing forms is Windows XP Professional with Service Pack 2 or 3, Windows 7 Service Pack 1 or later, or Windows 8. Adobe Reader system requirements include Internet Explorer 8 or higher, Internet Explorer 8.0 or

<sup>ii</sup> Adobe Reader software is required. The platform for use of Adobe Reader with BSA E-Filing forms is Windows XP Professional with Service Pack 2 or 3, Windows 7 Service Pack 1 or later, or Windows 8. Adobe Reader system requirements include Internet Explorer 8 or higher, Internet Explorer 8.0 or higher, FireFox 19.0.2 or higher, and Chrome 25 or higher. While other web browsers and other versions of Windows may be supported, they have not been specifically tested with BSA E-Filing and therefore are not officially supported. Other systems requirements can be found here [[http://bsaefiling.fincen.treas.gov/Why\\_use\\_BSA\\_004.html](http://bsaefiling.fincen.treas.gov/Why_use_BSA_004.html)]. At least for this filing year, you cannot file online using the Apple platform. Since paper filings are no longer accepted, presumably, an Apple-platform-only user will be forced to borrow a PC or pay a professional filer to file his or her FBAR.

<sup>iii</sup> For this purpose, “US” includes 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. Note that this is a Bank Secrecy Act definition, not an IRS definition. Note also that a permanent legal resident of the US who elects under a tax treaty to be taxed as a nonresident still must file the FBAR and a US citizen living abroad and married to a non-citizen is required to file as to qualifying assets jointly held with the non-citizen spouse.

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<sup>iv</sup> Note that in FINCen Notice 2103-1 [link: [http://www.fincen.gov/forms/files/FBAR%20Notice%20re%20Extended%20Filing%20Date%20%28532-2013%29\\_editSig.pdf](http://www.fincen.gov/forms/files/FBAR%20Notice%20re%20Extended%20Filing%20Date%20%28532-2013%29_editSig.pdf)] FINCen has 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.

<sup>v</sup> This exception is provided in IRS FBAR guidance. The author was not able to find reference to this in the final FBAR regulations. Comments accompanying the regulations state that a US person with a joint interest with his or her non-US citizen spouse in a reportable foreign financial account must report the account.

<sup>vi</sup> In the case of annuities and insurance policies, the obligation to file the FBAR rests with the policy holder and not the beneficiary.

**Disclaimer:** Nothing on The Solari Report should be taken as individual investment advice. Anyone seeking investment advice for his or her personal financial situation is advised to seek out a qualified advisor or advisors and provide as much information as possible to the advisor in order that such advisor can take into account all relevant circumstances, objectives, and risks before rendering an opinion as to the appropriate investment strategy.