

Professional Responsibility and the Report of Foreign Bank and Financial Accounts

There have been some questions about professional responsibility and the *Report of Foreign Bank and Financial Accounts* (FBAR). The FBAR, [Form TD F 90-22.1](#), is not a tax return. It is an information report required under the *Bank Secrecy Act* (BSA), 31 U.S.C. 5314, and related regulations under 31 C.F.R. § 1010.350. Related records are required under 31 C.F.R. 1010.420. The FBAR report, however, is referenced in U.S. tax returns. United States persons who have a financial interest in or signature authority or other authority over any financial account in a foreign country, if the aggregate value of these accounts exceeds \$10,000 at any time during the calendar year, must report their foreign accounts by (1) completing applicable sections of U.S. tax returns (boxes 7a and 7b on Form 1040 Schedule B, box 3 on Form 1041 “Other Information” section, box 10 on Form 1065 Schedule B, or boxes 6a and 6b on Form 1120 Schedule N), and (2) filing Form TD F 90-22.1. The above-mentioned boxes on tax returns request information about the existence of foreign financial accounts in which the filer of the tax return has a financial interest or over which the filer has signature or other authority. If the response to the leading question is yes, then the tax return filer is prompted to file an FBAR.

In April 2003, the authority to enforce the provisions of 31 U.S.C. 5314 and 31 C.F.R. §§ 1010.350 and 1010.420 was re-delegated from Financial Crimes Enforcement Network (FinCEN) to the Commissioner of the Internal Revenue Service (IRS) by means of a Memorandum of Agreement between FinCEN and IRS.¹ Section 1010.810(g) of 31 C.F.R. authorizes the IRS to: assess and collect civil penalties under 31 U.S.C. 5321 and 31 C.F.R. § 1010.820; investigate possible civil violations of these provisions; employ the summons authority of subpart I of 31 C.F.R. part 1010; issue administrative rulings under subpart G of 31 C.F.R. part 1010; and take any other action reasonably necessary for the enforcement of these and related provisions, including pursuit of injunctions.

Because some taxpayers used offshore accounts for intentional tax evasion, money laundering, or terrorist financing, the U.S. government has greatly increased both FBAR-related penalties and FBAR enforcement in recent years.² Prior to October 22, 2004, there was no penalty for a non-willful failure to file and the maximum civil penalty for willful violations was capped at \$100,000. In 2004, Congress amended 31 U.S.C. 5321(a)(5) to establish a penalty for non-willful violations, subject to a reasonable cause exception, and increased the penalty for willful violations.³ Currently, the maximum civil penalty is \$10,000 for each

¹ See 68 Fed. Reg. 26,489 (May 16, 2003) (codified at 31 C.F.R. § 1010.810). See also IRM 4.26.16.1(2) (July 1, 2008).

² See, e.g., Joint Committee on Taxation, JCS-5-05, *General Explanation of Tax Legislation Enacted in the 108th Cong.* 377-378 (May 2005).

³ The American Jobs Creation Act of 2004, Pub. L. No. 108-357, Title VIII, § 821(a), 118 Stat. 1586 (Oct. 22, 2004).

non-willful failure;⁴ and if the government establishes the failure was willful, the maximum penalty is the greater of \$100,000 or 50 percent of the balance of the undisclosed account each year.⁵ Thus, a U.S. person who failed to report foreign financial accounts on the FBAR form may be liable for FBAR penalties for willful failures continuing over a six-year period.⁶ Criminal penalties of up to \$500,000 and 10 years in prison may also apply.⁷ As a result of the increase in penalties and the increase in IRS FBAR enforcement, there has been increased interest in compliance.

We understand that some U.S. persons required to file FBARs may claim a reasonable cause defense against penalty impositions by blaming their preparers, on whom they reasonably relied, for failing to ask about the existence of a foreign bank account or to advise about the FBAR filing requirement. Consequently, some practitioners have expressed concerns about their duties and responsibilities under Circular 230 with respect to both the responses required in designated places on U.S. income tax returns (as described above) and the preparation and filing of the FBAR Form TD F 90-22.1.

Practitioners who prepare U.S. persons' Forms 1040, 1065, or 1120 series have a duty under Circular 230 to inquire of their clients with sufficient detail to prepare correct responses to the foreign bank and financial account 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. The level of due diligence required is addressed in Circular 230, section 10.22:

§10.22 Diligence as to accuracy.

Each attorney, certified public accountant, enrolled agent, or enrolled actuary shall exercise due diligence:

- a. In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;
- b. In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and
- c. In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.

Under Circular 230, section 10.34(d), a practitioner may generally rely, in good faith and without verification, on information furnished by a client. However, good faith reliance contemplates that a practitioner will make reasonable inquiries when a client provides information that implies possible participation in overseas

⁴ 31 U.S.C. §§ 5321(a)(5)(A)-(B).

⁵ 31 U.S.C. § 5321(a)(5)(C).

⁶ A six-year statute of limitations applies to the civil FBAR penalty. See 31 U.S.C. § 5321(b)(1).

⁷ 31 U.S.C. §§ 5321(a)(5)(C) and 5322; 31 C.F.R. § 1010.840(b).

transactions/accounts subject to FBAR requirements. A practitioner 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. The practitioner is also required by Circular 230, section 10.34(c), to advise a client of any potential penalties likely to apply to a position taken on a return the practitioner is preparing or on which she or he is advising. If a determination is made that there is one or more foreign bank or financial accounts to report in designated places on U.S. tax returns as discussed above, the practitioner is not obligated to prepare the FBAR form for the client unless the practitioner feels competent to do so and the client has agreed to this additional service. 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.

Additional inquiries about the FBAR filing requirements may be resolved by reading [FAQs Regarding Report of Foreign Bank and Financial Accounts \(FBAR\)](#). Specific questions and comments may be emailed to FBARquestions@irs.gov.