

# Foreign Financial Accounts – Do you Have a Filing Requirement?

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In 1970, the Bank Secrecy Act was passed which authorized the Department of the Treasury to require U.S. persons to report certain transactions with foreign financial institutions. Until recently, taxpayers' compliance with the requirements and the Department of the Treasury's interest in enforcing the requirements have not been a priority. Beginning in the 1990s, the Department of Treasury began to focus its resources on U.S. taxpayers' financial activities in foreign jurisdictions. The penalties for failing to file or filing incorrect information can be substantial regardless of whether the failure was willful or inadvertent. Therefore, it is important to review what the reporting requirements are and who is required to report the information.

The Treasury regulations state that every U.S. person, who has a financial interest in or signature authority, or other authority over any financial accounts, including bank, securities, or other types of financial accounts in a foreign country, must report that relationship with the Department of the Treasury if the aggregate value of these accounts exceeds \$10,000 at any time during the calendar year. The information is reported on Form TD F 90-22.1, which is due on or before June 30 of the succeeding year. Note that the report cannot be extended past the original due date regardless of whether the U.S. person's income tax return has been extended.

## General Definitions

- The term U.S. person means any citizen or resident of the United States, any domestic partnership, any domestic corporation and any domestic trust or estate.
- Financial accounts generally include any bank, securities, securities derivatives or other financial instrument accounts. Such accounts generally include any accounts in which the assets are held in a commingled fund, and

the account holder has an equity interest in the fund. Also included are savings, demand, checking, deposit, or any other account maintained with a financial institution or other person engaged in similar activities.

- Any location outside of the United States, Guam, Puerto Rico, and the Virgin Islands is considered a foreign country.

A U.S. person has a financial interest in a foreign account if such person is the owner of record or has legal title, whether the account is maintained for his or her benefit or for the benefit of others including non-U.S. persons. If an account is owned jointly or is owned by several different people, each of those persons has a financial interest in the account.

A U.S. person also has a financial interest in each foreign account for which 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. Also included, is a corporation in which the U.S. person owns directly or indirectly more than 50% of the total value of shares of stocks as well as a partnership in which the U.S. person owns an interest in more than 50% of the profits. It is important to monitor start-up funds because ownership is typically concentrated with a few initial investors. A financial interest is also present if the U.S. person has an interest in a trust where they either have a present beneficial interest in more than 50% of the assets or from which such person receives more than 50% of the current income.

A U.S. person is also required to report any foreign financial account over which they have signature authority. A person has signature authority over an account if such person can control the disposition of money or other property in it by delivery of a document containing his or her signature, or his or her signature and that of one or more other persons, to the bank or other person with whom the account is maintained. Authority also exists if the person can exercise comparable power over an account by direct communication to the bank or other person with whom the account is maintained either orally or by some other means.

An individual or fund owning a brokerage account in a foreign jurisdiction is an example of financial interest in a foreign account that would likely necessitate the filing of Form TD F 90-22.1. Many domestic fund advisors sponsor both a domestic fund and a foreign fund, either a feeder fund or a

stand-alone fund. It is not unusual for certain employees of the domestic advisor to have the authorization to transfer cash of the foreign fund held in foreign institutions, which generally constitutes signature authority over a foreign financial account. Employees with such authorization should review their Form TD F 90-22.1 filing obligations.

### **Exceptions**

There are three exceptions to the reporting of financial accounts. An officer or employee of a bank which is subject to the supervision of the Comptroller of Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, or the Federal Deposit Insurance Corporation need not report he or she has signature authority over a foreign financial account maintained by the bank, if the officer or employee has no personal financial interest in the account.

The second exception is an officer or employee of a domestic corporation which has its equity securities listed on a national exchange, or which has assets exceeding \$10 million and 500 or more shareholders of record, unless the officer has a financial interest in the account. The officer or employee must also have been notified in writing by the chief financial officer that the corporation has filed a current TD F 90-22.1 report that includes the account.

The third exception is a U.S. person does not need to report any account maintained with a branch, agency, or other office of a foreign bank or other institution that is located in the United States, Guam, Puerto Rico, and the Virgin Islands. A U.S. person is required to report any accounts that are located in a foreign country even if it is held at an affiliate of a United States bank or other financial institution.

### **Consolidated Reporting**

A corporation which owns directly or indirectly more than a 50% interest in one or more other entities will be permitted to file a consolidated report on behalf of itself and such other entities, provided that a list of the other entities accompanies the report. An authorized person of the parent company should sign the report.

If the group of entities covered in a consolidated report has a financial interest in more than 25 foreign accounts, the reporting corporation need only note that fact on the form.

The reporting corporation is required to provide detailed information regarding each account when requested by the Department of Treasury.

### **Failure to File Penalties**

If a U.S. person is required to file a Form TD F 90-22.1 and fails to do so, a fine of up to \$10,000 may be imposed. The fine may be waived if the violation was due to reasonable cause and the account was properly reported on the person's income tax return.

In the case of willful violations, or for persons who willfully cause any violation of the reporting requirement, the \$10,000 maximum penalty may be increased to the greater of (i) \$100,000, or (ii) 50% of either the amount of the transaction or the balance in the account at the time of the violation. The reasonable cause exception applying to non-willful violations does not apply to violations that are willful.

### **Other Reporting Requirements**

In addition to filing Form TD F 90-22.1, a taxpayer, including individuals, corporations and partnerships, is required to disclose on their U.S. income tax return that they own an interest in or have signature authority over a foreign financial account.

The purpose of this article was to provide a general overview of the reporting requirements associated with a U.S. person's ownership in, or signature authority over, a foreign financial account. Due to the general lack of guidance in this area, we recommend that you consult a tax advisor with experience in Form TD F 90-22.1 to assist you with your particular facts and circumstances.

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