



THE HILL

Are you FBAR compliant?

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For investors overwhelmed by the recent changes to foreign reporting, consider the following as a basic guide to FBAR requirements.

FBAR is an information return that must be filed if any U.S. person has a financial interest or has signature or other authority over foreign financial accounts with an aggregate value exceeding \$10,000 at any time during the calendar year. For taxpayers reaching this threshold, they must file a Financial Crimes Enforcement Network (FinCEN) Form 114 (“FBAR.”) Remember there are also other obligations on tax forms to disclose foreign holdings.

A few important things to consider when filing:

- a) All FBAR filings must be submitted by June 30th every calendar year to report accounts maintained the previous year.
- b) As of July 1, 2013, all filings must be submitted electronically. Mandatory e-filing is available through the BSA E-Filing System at <http://bsaefiling.fincen.treas.gov/main.html>.
- c) A new form was introduced, FinCEN Form 114a, Record of Authorization to Electronically File FBAR, **to authorize a third party to file on your behalf and when filing a joint FBAR form** (this is of particular importance for a jointly owned account).

The following are a few thresholds to consider:

A **U.S. person** is a citizen or resident of the United States or entities including corporations, partnerships, limited liability corporations and trusts organized under the laws of the United States, any State, the District of Columbia and Territories and Possessions of the United States, or Indian Tribes. The definition of a citizen or

resident includes individuals who pass either the Green Card Test or the Substantial Presence Test.

For FBAR to apply, the accounts must be tied back to a “U.S. person” through either **financial interest** or through **signature or other authority**.

Financial interest in an account can be deemed in different ways:

- 1. If a U.S. person is the owner of record or holds legal title over the account.*
- 2. If someone else holds title for the benefit of a U.S. person, such as an agent, nominee or other representative.*
- 3. If a U.S. person owns directly or indirectly more than a 50 percent interest in an entity that owns the foreign account. This applies when the U.S. person holds either voting power, total value of shares or capital, or interest in profits.*
- 4. If a U.S. person is the trust grantor and has an ownership interest in the trust for U.S. Federal tax purposes.*
- 5. If a U.S. person has a present beneficial interest in more than 50 percent of the trust assets or receives more than 50 percent of the current income.*

Signature or other authority exists when the individual (or individuals) can control disposition of the account assets (either alone or in conjunction with another) by direct communication, either written or oral, with the foreign financial agency.

If your assets exist outside of the United States your assets would be considered foreign and are subject to FBAR reporting. The key thing to remember is that the physical location of the account governs if it is foreign, not the nationality of the bank itself. For example, an account invested in a branch of an American bank located outside of the U.S. is foreign. An account invested in a branch of a foreign bank located within the U.S. is not considered foreign.

In addition to the conditions defining a foreign account, only certain types of accounts meet the triggers requiring FBAR reporting. These include accounts with a person involved in the banking business or in the business of accepting deposits as a financial agency, securities or brokerage accounts, insurance and annuity policies with a cash value, accounts with a broker or dealer for futures or options in any commodity subject to the rules of a commodity exchange or association, and mutual funds (or similar pooled funds) that issues shares available to the general public and that have a regular net asset value determination and regular redemptions.

While we have reviewed basic FBAR definitions and requirements, the rules are complex and there are few exceptions with regards to filings. In general, exceptions may apply when an individual has signature or other authority over foreign financial accounts owned by five categories of entities subject to specific types of U.S. federal regulation.

The penalty for failure to file a complete and accurate FBAR or to keep the required records is severe. A non-willful violation can be punished with a civil penalty of up to \$10,000 per violation. For willful violations, the punishment is the greater of \$100,000 or 50 percent of the balance in the account at the time of the violation.

Given the complexities of the FBAR reporting rules and the recent changes to foreign reporting, misinterpretation may happen. In my time at the IRS, I have seen firsthand the importance of a qualified third

party consultant in navigating IRS waters. With the focus on foreign reporting, now is the perfect time to seek additional counsel to ensure your offshore investments are protected.



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