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FBAR Is Not Going Away -- and the Filing Deadline is June 30

By Dennis Brager Published: 2015-06-01

U.S. persons, including citizens, and green card holders who have signatory authority over, or a financial interest in, foreign financial accounts with a combined balance over \$10,000 must file a Report of Foreign Bank and Financial Accounts, known as an “FBAR” on FINCEN Form 114 (formerly Form TD F 90-22.1).

FBAR has been extremely burdensome to treasury and finance professionals. Members of AFP’s Treasury Advisory Group complained repeatedly about it in their latest meeting in March, while other AFP members continue to seek advice on it.

No extension

The filing deadline for the FBAR is June 30, and no extensions are permitted. The form can only be filed electronically. Paper copies are not accepted. Although the filing requirements have been receiving a great deal of attention lately they are not new, contrary to popular opinion.

The penalties for failure to file the FBAR can be draconian. A “non-willful” failure to file is subject to a civil penalty equal to \$10,000 per year, per account. By way of example, if a corporation had 12 foreign accounts—perhaps four accounts for each of three foreign divisions, the amount of the penalty could reach \$120,000 per year. Since the statute of limitations for assessing a penalty for failure to file an FBAR is six years the total penalty would be \$720,000.

It gets worse.

If the IRS determines the failure to file is willful then the penalty escalates to the greater of \$100,000 or 50 percent of the balance in the account, per year. Under the previous scenario, if each of the 12 foreign accounts contained \$500,000 the penalty would be \$3 million per year, or a maximum penalty of \$18 million over a six-year period.

All of these penalties are civil penalties, but a willful failure to file an FBAR is also a criminal offense punishable by a fine of up to \$250,000 or five years in jail or both. In addition the government commonly charges both an FBAR violation, and the filing of a false tax return pursuant to Internal Revenue Code Section 7206(1). The tax return is false because, in most cases where there is an FBAR violation, the taxpayer will also have checked the “no” box on the tax return in response to the question of whether or not the taxpayer has a financial interest in, or signatory authority over a foreign financial account.

How to reduce penalties

Some courts have stated that taxpayers are deemed to know the contents of their tax returns, and therefore someone who signs a tax return without reading that statement is “willfully blind,” and thus subject to the highest levels of FBAR

penalties. Given this background, persons who discover belatedly that an FBAR has not been filed, or if filed was inaccurate, may wish to take advantage of one of several IRS programs that are available offering reduced penalties. These include the Offshore Voluntary Disclosure Program (OVDP), the “Streamlined Procedure,” and the Delinquent FBAR Submission Procedures.

There is no penalty imposed under the Delinquent FBAR Submission Procedure, but qualifying requires that all income was properly reported on the U.S. tax returns, and all tax paid on the income from the foreign financial accounts reported on the delinquent FBARs. Also the taxpayer cannot have previously been contacted regarding an income tax examination or a request for delinquent returns for the years for which the delinquent FBARs are submitted. The Streamlined Procedure is for those taxpayers who have unreported income, but who can certify that the failure to file the FBARs was not willful. Under the Streamlined Procedure the IRS imposes a one-time penalty of 5 percent of the highest balance in the foreign accounts over the previous six years (based upon end of year balances). It requires the filing of three years of amended returns, and is only available to individuals, and their estates—not entities.

The OVDP is for those who don’t qualify under the other programs. It requires the payment of a penalty of 27.5 percent of the highest balance in the foreign financial accounts at any time during the prior eight years. In addition, the taxpayer must file eight years of amended income tax returns, and pay the tax, interest, and a 20 percent accuracy penalty on the additional tax due. While this is a harsh result the alternative is to hope that the IRS doesn’t notice the missing FBARs, and deal with the consequences if it does.

An expanded version of this article is available at www.AFPonline.org/exchange. Dennis Brager is founder of Brager Tax Law Group, A PC.

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