



INSTITUTE OF INTERNATIONAL BANKERS

299 Park Avenue, 17th Floor
New York, N.Y. 10171
Telephone: (212) 421-1611
Facsimile: (212) 421-1119
www.iib.org

LAWRENCE R. UHLICK
Chief Executive Officer
E-mail: luhlick@iib.org

July 30, 2009

The Honorable Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: Suggestions to Improve Foreign Bank Account Reporting and Form TD F 90-22.1 in Response to Announcement 2009-51

Dear Commissioner Shulman:

The Institute of International Bankers ("Institute") appreciates the opportunity offered in Announcement 2009-51 to provide the Internal Revenue Service ("IRS") with comments on its recently revised Form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts" ("FBAR") (revised October 2008). The Institute fully supports the goal of the IRS to make changes to the FBAR filing requirements to augment the government's compliance objectives. However, the Institute respectfully submits that the IRS can achieve this compliance objective with less burden on both the IRS and the financial industry by modifying or clarifying some of the recent changes to the form and instructions, as well as the "Frequently Asked Questions" ("FAQs") revised on June 24, 2009.

The Institute's mission is to help resolve the many special legislative, regulatory and tax issues confronting **internationally headquartered** financial institutions that engage in banking, securities and/or insurance activities in the United States.



The Institute respectfully urges the IRS and Treasury to announce as soon as possible any relief affecting the upcoming September 23, 2009, filing deadline under FAQs 9 and 43. Many institutions have already begun gathering the voluminous records necessary to help their employees file FBARs concerning the institutions' foreign accounts. Any delay in alleviating this burden will result in considerable effort without apparent benefit to the government. In order for relief to be effective, it should be announced no later than August 24, 2009, *i.e.*, at least 30 days before the current deadline, if not sooner.

In brief, the Institute believes that the proposals provided in this letter will result in the IRS identifying the same number of foreign accounts of interest while preventing a flood of duplicative filings on the same accounts from hindering the government's law enforcement efforts. Likewise, the Institute notes with concern the potential burdens placed on financial institution employees that appear disproportionate or unrelated to any perceived compliance goal of the IRS. We urge the IRS to relieve this burden.

We provide first a brief summary of our proposals, followed by a more detailed discussion.

SUMMARY OF THE INSTITUTE'S PROPOSALS

As a preliminary comment, guidance relating to FBAR filing requirements has been sparse and generally informal, despite the substantial penalties for



failure to comply.¹ As a result, affected parties are left in the untenable position of trying to discern the intent of the IRS from form instructions, FAQs or public statements of IRS employees in order to comply responsibly. We believe the informality of the guidance, combined with the IRS's new emphasis on FBAR enforcement, has been a major contributor to the confusion expressed by many stakeholders this filing season. The Institute strongly recommends that the IRS and Treasury use the formal guidance tools at their disposal – including regulations and revenue procedures – to provide guidance on how to appropriately file the FBAR. Without such guidance, many affected filers will remain either unaware or confused as to their obligations, and the government's compliance objectives will correspondingly suffer.

That being said, the primary goal of the Institute's comments is to achieve pragmatic, and hopefully swift, modifications and clarifications to the FBAR instructions and FAQs to prevent burdening both the IRS and affected parties who have impending filing deadlines. We accordingly urge the IRS to adopt the following changes:

1. Broaden the exception to FBAR reporting for employees who have signature or other authority over, but no financial interest in, foreign financial accounts of their employers to include (a) groups whose foreign

¹ Non-willful violations are subject to a maximum penalty of \$10,000. See 31 USC § 5321(a)(5)(B). There is essentially no maximum penalty for willful violations; technically, the maximum is the greater of \$100,000 or 50% of the value of the account under 31 USC § 5321(a)(5)(C). A person who willfully fails to report an account worth \$100 million could be subjected to a penalty of up to \$50 million.



- parent companies are publicly traded in the U.S. or a treaty country; and
- (b) those regulated by any U.S. financial regulator.
2. Relieve the employee of a financial services firm, but not the firm itself, from an FBAR filing requirement when the firm has been authorized by its client to conduct business on its behalf through the client's foreign account. The client would also retain its FBAR filing obligation.
 3. Make the foregoing changes retroactive to all open years. At the very least, remove the requirement that an employee with no financial interest in an employer's foreign accounts (or in the foreign accounts of clients of the employer) must file his or her personal income tax returns (or the income tax returns of his or her employer or client) along with any delinquent FBARs by the September 23, 2009, deadline in order to avoid penalties.
 4. Broaden the circumstances in which groups of related entities may make consolidated FBAR reports, as opposed to each entity filing separate reports on the same accounts.
 5. Revert to the definition of "U.S. person" in the July 2000 version of the FBAR form instructions, given the confusion that has arisen from the definition used in the October 2008 version.



DETAILED DISCUSSION

The Institute offers its comments on behalf of its membership. Founded in 1966, the Institute is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking/financial institutions from almost 40 countries around the world. Collectively, the U.S. branches, agencies, banking subsidiaries, securities affiliates and other operations of internationally headquartered banks have almost \$5 trillion in total assets, of which approximately \$2.6 trillion are banking assets, representing by one measure approximately 22% of the U.S. banking market. Overall, these operations conduct business in all 50 states and employ over 250,000 Americans.

1. Broaden the Exception for Employees Who Have Signature Authority Over an Employer’s Accounts.

The current instructions often call for the same account to be reported on more than one FBAR. For instance, a U.S. person who owns an account and a second U.S. person who merely has signature authority over the account both must report the account. Both persons are required by regulation to maintain records of the accounts for five years and make those records available for inspection “at all times.”² The instructions eliminate some duplicative filings and recordkeeping by providing exceptions, but those exceptions are too narrow

² See 31 CFR § 103.32.



given the limited value of extra filings and the time and expense required for submitters to prepare, and the government to process, those filings.

One set of exceptions concerns filings by employees for accounts owned by their employers and in which the employees have no financial interest. The current instructions provide that an employee need not file an FBAR for such an account if the employee works for a domestic corporation (or a subsidiary of such a corporation) that is listed on a U.S. national exchange or has both assets exceeding \$10 million and 500 or more shareholders, provided an officer of the parent company notifies the employee that the account has been reported. This relief is available to U.S. persons who are employees of both domestic and foreign subsidiaries of such U.S. parent companies.

In addition, employees of a bank currently examined by Federal bank supervisory agencies for soundness and safety need not file for accounts maintained by the bank. We believe this exception covers foreign accounts maintained by U.S. branches and agencies of foreign banks since such a U.S. branch or agency of a foreign bank is within the definition of a “bank” as that term is used for FBAR purposes³ and is subject to regular examination for soundness

³ See 31 C.F.R. § 103.11(c) (“Bank [means] [e]ach agent, agency, branch or office within the United States of any person doing business in one or more of the capacities listed below: . . . (8) A bank organized under foreign law”).



and safety by a Federal bank supervisory agency,⁴ but it would be helpful if the government would confirm this.

While helpful, these exceptions do not reach many situations where both the risk to the government and the value of filings by both the employer and the employee are low. For example, U.S. operations that are ultimately controlled by a corporation whose stock is traded on a foreign exchange are subject to similar audits and controls as the foreign subsidiaries of U.S. public companies.

Accordingly, we believe it makes sense – and certainly would be more consistent with U.S. obligations under trade agreements and tax treaties not to discriminate against foreign-based companies – to extend the same relief to U.S. employees of foreign publicly traded groups as is currently available to employees of foreign subsidiaries of U.S. publicly traded groups. To avoid questions about the legitimacy of some foreign markets, the instructions could limit this exception to companies traded in the U.S. and/or on a stock exchange recognized in a tax treaty.

In addition, Federal bank supervision should not be the only trigger for excepting employees of non-public companies from filing FBARs. Financial services companies are subject to supervision by a number of Federal agencies. For example, broker-dealers and investment advisers are supervised by the

⁴ See, e.g., 12 C.F.R. § 211.26(c)(1) and the Federal Reserve Board's Examination Manual for Branches and Agencies of Foreign Banking Organizations § 2002.1.



Securities and Exchange Commission, and futures commission merchants are regulated by the Commodity Futures Trading Commission. We propose that employees of regulated financial services firms be allowed to qualify for the relief currently extended to employees of federally supervised banks. Also, the relief for employees should not be limited to accounts maintained by the supervised entity, but also to accounts maintained by that entity's subsidiaries and affiliates.

As an aside, we note that while the public company exception requires that employees be notified by an officer of the parent company in order to avoid filing on their own, the bank exception does not. It is not clear what purpose is served by the notification requirement, and such requirement can become quite burdensome when there are numerous employees and accounts. Accordingly, the IRS should consider whether notification is necessary under the public company exception.

Finally, the IRS should consider allowing an employer to include in its FBAR filing accounts that it technically may not have to include in order to relieve an employee of an FBAR filing obligation. For instance, an employee of a U.S. subsidiary of a publicly traded foreign company may have signature authority over a foreign financial account of a foreign sister company. Under current rules, the U.S. subsidiary may have no obligation to file, but the employee does. There is no apparent reason to burden the employee with the filing requirement when signing on the account is just part of the employee's job, and it is difficult to imagine an employer allowing an employee to keep copies of the records the



employee needs to satisfy the recordkeeping requirements. We suspect that this result was unintended. Accordingly, in such circumstances, the U.S. subsidiary should be entitled to elect to include that account in its FBAR filing and, if it does so, the employee should be relieved of the obligation to file an FBAR and maintain records.

2. Clarify That an Employee Need Not Report Accounts Owned by Clients of an Employer.

Related to the previous point, it is not unusual for a client of a financial institution to request that the institution conduct the client's transactions using the client's foreign financial accounts. Take, for example, a foreign client of a foreign bank who travels to the U.S. for an extended stay. The client may have his personal bills for expenses in his home country (e.g., electric bills, phone bills) temporarily re-directed to the U.S. branch of the bank, with instructions to pay these bills as they come due. Because the bills typically must be paid in the client's home-country currency, an employee of the U.S. branch would cause the payment to be made from the client's account in the home country. Under current rules, the employee who authorized the payment may have signature or other authority over the client's foreign financial account (but would not have any financial interest) and, as a result, may be required to file an FBAR under the current instructions.

Another example occurs in trading activities. One reading of the current instructions is that a securities trader working outside of the U.S. that can cause a securities trade to be settled into a foreign client-owned securities account



could be deemed to have signature or other authority over that account, as could the individuals in the operations area of the institution who actually process the transfer of securities and cash. If the trader or operations personnel are U.S. persons, they would have an obligation to file an FBAR. We would anticipate that, if the IRS does not make an exception for this very common fact pattern, U.S. persons working abroad will be passed over for trading desk and operations positions or terminated from the positions that they currently occupy.

As noted above, it is unfair to burden rank-and-file employees with FBAR filings and record-keeping requirements for simply doing their jobs. In addition, employees of a large institution with many clients may have a profusion of accounts to report, each of which would require the employee to maintain records for five years. Moreover, to the extent the clients are U.S. citizens or residents, the accounts already should be reported on FBARs by those clients.

We request that the IRS modify the rules so that the employer, not the employee, has “signature or other authority” over a client’s foreign financial accounts in the circumstances described above.⁵

⁵ Headliner Volume 265 (published April 2, 2009, last reviewed June 30, 2009), entitled “FBAR Reporting by Persons with Only Signature Authority or Other Comparable Authority,” informally extends the “abbreviated” filing for those who have 25 or more accounts to report to those filers who merely have signature or other authority over those accounts, rather than a financial interest in them. The Headliner notes that filers must maintain records of all foreign financial accounts, including those covered by an abbreviated filing, for five years and produce those records on demand. We ask that the filing method in the Headliner be permanently incorporated into the FBAR form and instructions.



3. Make the Foregoing Changes Retroactive, or Modify the FAQ to Allow Employees to File Late FBARs and Avoid Penalties Without Providing Copies of Tax Returns.

We explain in parts 1 and 2 above why filings by employees for accounts owned or serviced by their employers and the associated recordkeeping requirements are both duplicative and burdensome. The same rationale applies to filings by such employees for prior years, and the Institute accordingly urges the IRS and Treasury to provide the relief outlined above in parts 1 and 2 to all prior years as well.

If, however, the IRS and Treasury determine that the relief requested in parts 1 and 2 should apply only prospectively, we believe most employees will seek penalty relief under FAQ 9. At a minimum, the IRS and Treasury should address the shortcomings apparent in the procedures for penalty relief outlined in FAQ 9.

FAQ 9 concerns, in part, those who “only recently learned that I should have been filing FBARs in prior years to . . . report the fact that I have signature authority over bank accounts owned by my employer.” FAQ 9 states that the voluntary disclosure program described in the rest of the FAQ is intended to cover taxpayers who failed to report income. Other persons are directed to instead file the delinquent FBARs and an explanatory statement, “together with copies of tax returns for all relevant years,” by September 23, 2009. FAQ 9 concludes, “The IRS will not impose a penalty for the failure to file the FBARs.”



The IRS has clarified in FAQ 43 that 2008 FBAR filings may be filed by September 23, 2009, if the filer paid all 2008 taxes, recently learned of the obligation to file FBARs, and had insufficient time to gather the necessary information prior to the June 30, 2009, deadline.

It is unclear in FAQ 9 if the “tax returns” that an employee must file with any delinquent FBAR filings to avoid penalties are the employee’s personal income tax returns or the income tax returns of its employer (or even, in the case of a client account described in Part 2, the tax returns of the employer’s client). This lack of clarity likely results from the FAQ being primarily designed to address the conditions for penalty relief that would apply for an individual who failed to file FBARs in the past but is claiming that it included any income from the foreign account on its personal tax return. In that instance, there is a logical reason for the IRS to request such individuals to submit copies to their returns to prove that they included any applicable income.

By contrast, the personal income tax returns of an employee with signature authority over its employer’s (or employer’s client’s) account are simply irrelevant since such returns would never include any income earned on the bank account of its employer or the employer’s client. Likewise, such employees are unlikely to have access to their employer’s tax returns (let alone the employer’s clients’ tax returns) to supply them with their FBAR filings. It should also be noted that the annual income tax returns for financial institutions can be voluminous and of doubtful value to the IRS as a part of such a remedial FBAR



filing. Accordingly, the Institute respectfully requests that the requirement to provide copies of tax returns be eliminated by clarifying that the tax return requirements in FAQs 9 and 43 do not apply to employees with the kind of signature authority described in Parts 1 and 2.⁶

Finally, FAQ 9 explicitly refers to “bank accounts,” but we believe the IRS did not intend to limit the penalty relief and procedures of FAQ 9 to only those accounts. The IRS should clarify that it meant for FAQ 9 to cover all foreign financial accounts.

4. Make Consolidated Reports More Widely Available.

The Institute applauds efforts by the IRS to avoid duplicative reporting by allowing groups of entities to file consolidated reports. The current instructions allow a corporation that owns, directly or indirectly, more than a 50 percent interest in one or more other entities required to file an FBAR to file a consolidated report on behalf of itself and such other entities. Typically such a corporation would have to report a controlled entity’s accounts anyway because it is deemed to have a “financial interest” in those accounts. The controlled entity also would have an obligation to file in the absence of a consolidated report.

⁶ We note that the New York State Bar Association’s letter of July 17, 2009, points out that those submitting tax returns for FBAR purposes may be unwittingly waiving the privacy protections of IRC § 6103. The uncertainty on this issue is another reason to eliminate the requirement to submit tax returns with delinquent FBARs when circumstances indicate a very low probability of underreported income.



The Institute urges the IRS to consider broadening the consolidated reporting approach in the following circumstances to reduce the cost of administration without sacrificing information:

- Clarify that the entities included in a consolidated report may be any kind of entity – corporation, partnership, limited liability company, etc. While the instructions use the word “entity” to describe a member of a consolidated filing group, the form itself asks for the “Corporate Name of Account Holder.” This creates confusion. It appears that the FBAR may have been trying to incorporate concepts from the consolidated corporate income tax return regime, but the analogy is imperfect. While there are certainly good reasons to exclude non-corporations from consolidated income tax returns (because all members must be taxed in the same way, as corporations), we see no good reason to exclude partnerships, limited liability companies and other entity types from FBAR consolidated reports. To the contrary, the reduction in compliance costs that results from consolidated FBARs argues strongly in favor of allowing various types of entities to file them.
- Allow parent entities that are not corporations to file consolidated reports on behalf of their groups. For instance, a partnership that wholly owns several corporations should be able to file a consolidated report for itself and its subsidiaries. Again, while there are some parallels to be drawn between consolidated FBAR reports and consolidated income tax returns,



we see no reason to limit consolidated FBARs to groups headed by corporations, and the cost savings could be substantial if such reports are permitted.

- Allow a limited partnership or limited liability company to be included in the consolidated report if the parent directly or indirectly acts as the general partner or managing member, regardless of the parent's percentage of ownership.
- Clarify that if the parent who files a consolidated report comes within the "public company" or "bank/regulated institution" exceptions described above, employees of entities included in the consolidated report would not have to file their own FBARs.

5. Clarify the Definition of "United States Person."

The instructions to the October 2008 version of the FBAR form define "United States person" to mean "a citizen or resident of the United States, or a person in and doing business in the United States." The vagueness of the phrase "in and doing business in the United States" contrasts sharply with the clarity of the definition of U.S. person used on the July 2000 version of the form: "(1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust."

Although Announcement 2009-51 allows the use of the July 2000 definition of "United States person," it specifically states that this relief "applies



only with respect to FBARs due on June 30, 2009.” Accordingly, unless the government takes further action, persons who are “in and doing business in” the U.S. during 2009 will have an FBAR filing obligation.

There is no formal guidance concerning what constitutes being “in and doing business in the United States.” A FAQ on the IRS website states that whether a person is “in and doing business in the United States” is “based on an analysis of the facts and circumstances of each case.”⁷ The FAQ provides no citation to authority, but states that a person who “sporadically” or “only occasionally” does business in the U.S. is not a U.S. person.⁸ The FAQ also says that a foreign person who is a partner in a domestic partnership is not considered to be “in and doing business in the United States.”⁹

The legal basis for these results is far from clear. There appear to be no cases construing the phrase “in and doing business in the United States,” which seems to be unique to FBAR jurisprudence. The phrase is in the statute that authorizes the FBAR; it is clear, however, that the Secretary of the Treasury has the authority to define a class of persons as “exempt from a requirement under this section or a regulation under this section”.¹⁰ Thus, as was the case for many years prior to 2008, the Secretary has the authority to exclude persons who are

⁷ <http://apps.qai.irs.gov/businesses/small/article/0,,id=210252,00.html>

⁸ Id.

⁹ Id.

¹⁰ 31 USC § 5314(a), (b)(1).



not U.S. persons in the ordinary sense of the word, but who are technically “in and doing business in the United States,” from the requirement to file FBARs.

Given the very substantial penalties for failure to file an FBAR, the lack of formal guidance (or even guiding principles), and the likelihood that foreign persons may be unfamiliar with this unintuitive definition of “U.S. person,” we strongly recommend that the instructions revert to the July 2000 definition of U.S. person.

CONCLUSION

We believe the foregoing suggestions will greatly improve the administration of FBAR requirements while substantially lowering the burden on those who might otherwise be required to file the form. We would be happy to meet with IRS staff to discuss our comments. In the meantime, if you have any questions, please contact the undersigned (luhlick@iib.org) or the Institute’s General Counsel Richard Coffman (rcoffman@iib.org) at 212-421-1611 or John Staples (202-783-1500; jstaples@bsmlegal.com) or Jonathan Jackel (202-783-1500; jjackel@bsmlegal.com) of Burt, Staples, & Maner, LLP, who assisted the Institute in the preparation of this submission.

Very truly yours,

A handwritten signature in black ink that reads 'Lawrence R. Uhlick'.

Lawrence R. Uhlick
Chief Executive Officer

cc: Clarissa C. Potter
Acting Chief Counsel



James H. Freis
Director, Financial Crimes Enforcement Network

J. Richard Harvey, Jr.
Senior Advisor to the Commissioner

Deborah A. Butler
Associate Chief Counsel, Procedure and Administration

Adrienne Mikolashek
Office of Associate Chief Counsel (Procedure and Administration)

CC:PA:LPD:PR (Announcement 2009-51)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

CC:PA:LPD:PR (Announcement 2009-51) (via hand delivery)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue N.W.
Washington, DC.

notice.comments@irscounsel.treas.gov