AMERICAN BANKERS ASSOCIATION

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October 6, 2009

By electronic submission.

Mr. Douglas Shulman
Commissioner of Internal Revenue
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20044

Re: Report of Foreign Bank and Financial Accounts (FBAR); Form TD F 90-22.1; Notice 2009-62 (August 7, 2009).

Dear Commissioner Shulman:

The American Bankers Association[1] (ABA) appreciates the opportunity to comment on the Report of Foreign Bank and Financial Accounts (FBAR). As fiduciaries and custodians with signature or other authority over "foreign financial accounts," ABA members would like clarification as to their responsibilities in filing FBARs. Bank trust departments serve as trustees and investment managers for accounts that contain entities Internal Revenue Service (IRS) officials have recently and informally characterized as covered accounts subject to reporting.[2]

ABA commends the IRS for recognizing the confusion over FBAR reporting obligations and suspending the reporting deadline until June 30, 2010, for (1) persons with signature authority over, but no financial interest in, a foreign financial account, and (2) persons with a financial interest in, or signature authority over, a foreign commingled fund.[3] We also greatly appreciate the Department of the Treasury's intention to issue regulations clarifying the FBAR reporting requirements for the aforementioned persons. Given the significant consequences of incorrect or unnecessary FBAR filing, ABA member institutions believe that changes to the form instructions be made open to public comment before they are implemented and not simply through the periodic Paperwork Reduction Act review.

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[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.6 trillion in assets and employ over 2 million men and women.

[2] During a June 12, 2009, telephone conference hosted by the American Bar Association and the American Institute of Certified Public Accountants, IRS officials indicated that offshore hedge funds and private equity funds may fall within the definition of "foreign financial accounts."

[3] IRS Notice 2009-62.

In addition, ABA appreciates that Notice 2009-62 (II)(B) does not appear to require filers seeking relief to submit previous tax return filings in addition to the FBAR. Bank trustees and investment managers are concerned about the excessive expense and re-submission of up to hundreds of pages of tax return filings for 2008 and prior years. We are also concerned that the filings made under this procedure do afford the same confidential treatment given to general tax filings under Internal Revenue Code 6103. In order to clear any confusion, we ask that the IRS explicitly state that these tax returns are not required to be filed in addition to the FBAR under the relief prescribed in Notice 2009-62.

FBAR Reporting Requirements and Recent Revisions to the Instructions

Under 31 CFR 103.24, the Department of the Treasury requires "each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country" to file a FBAR with the IRS for that year in which the account was held. If a person has a financial interest in more than twenty-five accounts, the person "need only note that fact on the form."

The form's instructions provide some guidance on the reporting requirements, defining the terms "U.S. person," "financial account," "account in a foreign country," "financial interest," and "signature or other authority over an account." The form also provides reporting exceptions to officers and employees of banks that are examined by federal bank regulators that have signature or other authority over a foreign financial account, but no financial interest in the account.[4] Generally, any U.S. person, including banks acting as trustee or investment manager, must file a FBAR for all foreign financial accounts if the aggregate value of accounts is more than ten thousand dollars during the calendar year. The IRS must receive this report by June 30 of the following year.

In October 2008, the IRS amended the definition of "financial account" in the FBAR instructions to add among other things the parenthetical term "including mutual funds." The amendments also explicitly excluded from the meaning of the "financial account" individual bonds, notes, or stock certificates not held in a financial account and certain unsecured loans. The definition now reads in part: "This term includes any bank, securities, securities derivatives or other financial instruments accounts. Such accounts generally also encompass any accounts in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund (including mutual funds)."

During the June 12 telephone conference hosted by the American Bar Association and American Institute for Certified Public Accounts, IRS officials expanded on the reach of the parenthetical term noted above to encompass investments in hedge funds and private equity funds. The changes to the form instructions coupled with these remarks led to considerable confusion with potential FBAR filers. In reaction, the IRS suspended filing of the FBAR until September 23, 2009, and then later in Notice 2009-62 suspended filing until June 30, 2010.

[4] This exception is also available to employees and officers of a publicly-traded corporation that have signature or other authority over an account, but no financial interest in the account.

FBAR Definitions

After the statements made during the June 12 conference call, bank trust departments are understandably confused as to what constitutes a covered "foreign financial account." The instructions refer to "accounts" with a commingled fund including mutual funds. However, traditionally the IRS and FBAR filers did not interpret the meaning of "commingled funds" to include offshore hedge funds and offshore private equity funds.

Some of the questions that need to be answered are: Exactly what types of mutual funds are subject to reporting? If an offshore mutual fund is publicly traded, must one's interest still be reported? What would constitute an offshore hedge fund or offshore private equity fund? If the hedge fund is organized in a foreign country, but managed in the United States, is it still a foreign account? For such funds, determining the "geographical location of the account" can be difficult.

Indeed, ABA believes that reporting on offshore hedge funds is not necessary under the FBAR. Hedge funds often have lengthy "lock up" periods during which investors may not redeem their shares. Such a situation is not ripe for money laundering or tax evasion, particularly when the income from these investments is already properly reported by the U.S. person or the bank.

Responsibilities of Trusts, Trustees, and Trust Beneficiaries

Domestic trusts as U.S. persons must file a FBAR if they hold a covered foreign financial account. However, in certain cases, the filing requirements are not very clear. For example, with respect to a "grantor type trust,"[5] who is responsible for filing the FBAR, the trustee, the grantor, or both? Similarly, who must file a FBAR with respect to an individual retirement accounts (IRA), the IRA account owner or the financial institution? Furthermore, must a U.S. bank file a FBAR for a foreign trust that has no U.S. persons as beneficiaries?

Under the form's instructions, a trust beneficiary may have a reportable "financial interest" in a covered account if the beneficiary has a "present beneficiary interest, either directly or indirectly, in more than 50 percent of the assets" or "receives more than 50 percent of the current income" of the trust. In determining "financial interest" in a trust account, what is the definition of "income" received by the beneficiary? Does it mean trust accounting income or net income under federal tax laws? Trustees as fiduciaries must understand this term to determine whether they must alert beneficiaries to their filing responsibilities.

The filing responsibilities of discretionary trust beneficiaries are equally confusing. In this case, the trustee has discretion to distribute the income and assets of a trust based on the trust document. For purposes of the "present beneficial interest" test, how should the trustee determine whether a discretionary trust beneficiary meets the 50 percent threshold? One year, based on circumstances, the trustee may distribute more than 50 percent of the income of the trust, but in other years, based on changed circumstances, the beneficiary may receive a negligible amount or may not receive any distributions.

Considering that the information about the foreign account is already reported by the trustee, ABA recommends that the IRS eliminate the need for the beneficiary having to file a FBAR

[5] Internal Revenue Code Sections 671 – 677.

on the same foreign account regardless of the beneficial interest of the beneficiary. This would avoid duplicate filing about the same foreign account and will help trustees to concentrate in obtaining the necessary information to file on behalf of the trust instead of having to communicate to the beneficiary the need also to file an FBAR. If the IRS is interested in identifying trust beneficiaries of trusts that hold financial interest in foreign accounts, the Form 90-22.01 could be changed to request information on these beneficiaries when the net accounting income is required to be distributed or the trust is treated as a grantor trust for income tax purposes.

Concerns with Prior Year Filings

ABA strongly believes that the recent changes to the form instructions, as well as the informal comments made about the meaning of "financial account," if formally adopted by the IRS after notice and comment, should not be applied retroactively to the past five calendar years. Filing such reports on past years would constitute an unreasonable burden on bank filers. This information is not easy to retrieve and in some cases, if a covered fund is closed or no longer held by the bank, nearly impossible to obtain. In fact, it will require a manual identification process, where the trustee must review the names on the CUSIPs held in each account for some indication that it is a foreign account. Given the lack of clarity with the definition of foreign account, we urge the IRS to give some relief where the bank trustees have made reasonable efforts to identify covered accounts.

In addition, if a trust has been terminated, the trustee may be barred from filing on behalf of the trust under state law. In these cases, the IRS should provide relief for filing FBARs for past years.

Consolidated Bank Reporting and Electronic Filing

For the sake of administrative ease and to reduce duplicative filings, ABA respectfully requests that the IRS consider creating a consolidated filing exception for banks acting as trustee or investment manager over an account that contains a foreign financial account. Under such a filing exception, the bank need not file on behalf of the individual trust or other account, but only collectively for all accounts when acting as trustee or investment manager. Such an exception would eliminate redundant and burdensome reporting on the individual account level, and would provide significant relief to bank trust departments. The information on each individual account would be available to the IRS upon request.

At a minimum, ABA urges the IRS to allow electronic filing of the FBAR. With potentially thousands of accounts to report, such reporting with paper submissions would be a great administrative burden. Banks, as some of the largest filers of tax information returns, are already equipped to handle electronic filings.

Exception for Bank Employees

ABA requests that the IRS expand the bank officer and employee exception for FBAR reporting to officers and employees of other regulated and examined financial institutions, including state-chartered non-depository trust companies and registered investment advisers. Trust companies, like bank trust departments, act as fiduciaries to trust and other accounts that may contain foreign financial accounts. In the spirit of reducing unnecessary FBAR reports, ABA

believes that employees of these highly regulated and examined financial institutions need not report on their fiduciary activities when already reporting on behalf of the account as trustee or investment manager.

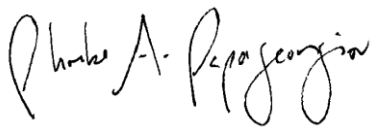
Certain Tax-Exempt Entities

Lastly, ABA recommends that the IRS carve out pension plans or 401(k) plans from FBAR reporting. These plans are highly regulated and supervised by banking regulators, as well as the Department of Labor, the IRS, or relevant state regulators. Therefore, for the sake of regulatory and administrative relief, we ask that the IRS exempt these plans from FBAR reporting obligations.

Conclusion

In conclusion, ABA appreciates this opportunity to offer comments on the FBAR form and instructions. We look forward to commenting on proposed regulations governing the FBAR filing. These regulations will be of great help to our member banks so that they can fulfill their reporting obligations correctly, completely, consistently, and in a timely manner. Should you have any questions or comments with respect to the issues raised in this letter, please do not hesitate to call the undersigned at (202) 663-5053.

Sincerely,



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