**FBAR AND YOUR ESTATE PLAN**

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The Report of Foreign Bank and Financial Accounts (FBAR) requires “US Persons” who have financial interests in or signature authority over financial accounts maintained with institutions located outside the United States to report such accounts annually, if all such accounts total more than $10,000 US dollars in value at any time.  The trick is figuring out if you’re a “US Person”, whether you have “signature authority” in an account that’s in a foreign country and what the values of all those potential accounts are.

The FBAR is reported to the Treasury (not the IRS) not later than each June 30 – not with your income tax returns in April (though there is a separate requirement on your income tax returns to report foreign accounts).  There is no extension for filing the FBAR. The FBAR report used to be filed each year on a Treasure Form TD90-22.1, but it now must be filed electronically on a Financial Crimes and Enforcement Network (FinCEN) Form 114. Unlike US taxes, the penalties for failing to file an FBAR are based not on the amount of tax owed, but rather, on the highest balance in the accounts that were not reported. It doesn’t matter if no US taxes were owed on those accounts; penalties apply for non-reporting.  Several different people can have FBAR reporting requirements for the same foreign assets because it’s not related to who owns or has a tax liability for the income from the asset.

So, how does this new reporting requirement affect your estate planning? Estate planning documents are designed to name persons who can act for you if you are unable to handle your own affairs due to incapacity or death.  You now need to consider the assets over which you grant powers to any trustee, power of attorney agent, nominee, and conservator you name in your estate planning documents for their FBAR reporting requirements.

If any trust holds an interest in a foreign account, the trustee has signature authority over that foreign account and must report it. If you are a beneficiary of any trust held in a foreign country, the value of the trust assets – not your interest in that trust - must be reported.  Any stock you own on a foreign exchange, life insurance and annuities issued abroad are included.  Even online accounts that “function as a bank” and are located in a foreign country will require FBAR reporting (including FirePay, PokerStars and PartyPoker, according to a California District Court). Bitcoin exchange accounts are probably also included for FBAR reporting requirements, but the IRS and FinCEN have yet to confirm this.

Further, if you have a power of attorney or nominee agreement that provides an agent named therein to handle your financial affairs, that agent will have signing authority over all of your assets under those granted powers from the date you sign the document granting that power, whether or not the agent ever exercises his/her power.  This also applies to nominees, joint account holders, executors and conservators. Let’s look at a couple of examples:

1. A trust holds an account in a Mexican bank and it only held $5,000 US dollars (at its highest balance after you use the daily changing conversion rate for the currencies) but the Trustee also holds his own account in Mexico, jointly with his wife that has another $5,000 (computed the same way) in it. The Trustee must report both accounts on an FBAR because he has signing authority over both foreign accounts that have a total value of $10,000. Unless she has other foreign interests, the wife does not need to file an FBAR, because she only has signing authority over $5,000. Unless the beneficiaries have authority over other foreign assets, they will also not need to file an FBAR.
2. Mom and Dad name their adult son as their power of attorney agent for financial affairs, so he can pay their bills if something happens to them, and Mom and Dad own  Chinese stocks from a foreign stock exchange (not traded through a US brokerage account). Son has signature authority over the Chinese stocks, and must now aggregate that value (hopefully, Mom and Dad have shared information that with him) with any other foreign accounts or interests he may have authority over.
3. Sue and Dave are both beneficiaries of a trust that their parents created at their deaths in Germany where their parents lived. Sue and Dave receive only the income from the trust as the beneficiaries and report the income received each year on their income tax returns. Because the trust is held in Germany, their income interest in the trust forces the entire trust estate value to be included for FBAR reporting requirements for each of them.  It does not matter that neither Sue nor Dave are a trustee of the trust or whether either of them actually received any distributions during the year.
4. Jane is named as the executor for her father’s estate under his will and Dad was an officer and part owner of a foreign subsidiary of a US company. During his life, Dad’s position as an officer of a foreign company forced him to include the company’s foreign financial accounts in determining whether he must file an FBAR. Jane is not named as his power of attorney agent and has no authority over any of his accounts (foreign or otherwise) until her father dies. Once she is appointed as the executor of his estate after his death, she has a financial interest in those foreign stocks, because she can effectuate their sale or exchange as his executor, and may also have an interest in the stocks as his beneficiary. If Dad had to file an FBAR during his life, Jane most likely will need to file one as his executor.

Therefore, to comply with the FBAR reporting requirements, you must review all of your foreign financial accounts and securities holdings, your current and future trust assets and any powers you have given to your fiduciaries or that you hold, to determine if you and/or your trustee, power of attorney agent, nominee, executor, conservator or beneficiary needs to file the annual reports. This is a daunting task for US citizens, residents and taxpayers who we know are “US Persons” for the FBAR reporting requirements over their own assets.  By adding in “authority” over “financial accounts” it adds a burden on each family member to find out if they have been given legal authority in estate planning documents, what assets that authority relates to, and to compute the highest value of each such account in a foreign country each year.

Do not think this is something that you can ignore.  Eighty-seven-year-old Mr. Zwerner, who didn’t check the box on his income tax return saying he had a foreign account, and then failed to file an FBAR, was fined 50% of the highest account balance for each of the years he didn’t file an FBAR. He even tried to voluntarily report his foreign accounts twice and pay 27.5% penalties for up to eight years (yes, that’s 220% of the highest account value). But for Mr. Zwerner, the IRS said the voluntary compliance wasn’t done correctly, and that only protected him from “willful” violation penalties in the years he tried to settle.

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