# FBAR Filing Deadline: October 15, 2018

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If you are required to file a Foreign Bank Account Report ("FBAR") with respect to 2017, it must be filed electronically with the U.S. Treasury Department on or before **October 15, 2018**. This deadline cannot be extended.

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Every U.S. person (including both individuals and entities, as discussed below) that had a financial interest in, or signature or other authority over, one or more foreign financial accounts during 2017 must electronically file an "FBAR" with the U.S. Treasury Department if the aggregate value of such foreign financial accounts exceeded USD $10,000 at any time during 2017. "FBAR" refers to the U.S. Financial Crimes Enforcement Network ("FinCEN") Form 114 (Report of Foreign Bank and Financial Accounts).

The FBAR filing obligation is separate and distinct from IRS Form 8938 (Statement of Specified Foreign Financial Assets) which, if applicable, must be completed and filed with U.S. federal income tax returns.

The following definitions apply for purposes of the FBAR filing requirements:

## U.S. Person

A "U.S. person" for FBAR purposes means any (1) U.S. citizen or resident (including a resident alien), (2) entity (including, but not limited to, a corporation, partnership or limited liability company) created or organized in the United States, and (3) trust or estate formed under the laws of the United States. Entities and trusts that are disregarded for federal income tax purposes are not disregarded for FBAR purposes and, therefore, may be required to file an FBAR.

## Foreign Financial Account

Only "foreign financial accounts" are reportable on the FBAR. A foreign financial account is a financial account that is maintained outside the United States. For this purpose, "the United States" includes the states, the District of Columbia, territories and possessions of the United States, and certain Native American lands. A financial account maintained with a foreign branch of a U.S. financial institution is a foreign financial account for FBAR purposes. In contrast, a financial account maintained with a U.S. branch of a foreign financial institution is not a foreign financial account for FBAR purposes.

What constitutes a foreign financial account for FBAR purposes can be surprising as the definition of "financial account" goes well beyond foreign bank accounts. A financial account for FBAR purposes generally includes any savings deposit, demand deposit, checking, securities, security derivatives, debit card, prepaid credit card and any other financial instrument account, including certain insurance or annuity policies and pension funds. For this purpose, a financial account also includes an account with a mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions. In addition, the IRS takes the position, and one court has agreed, that even online gambling accounts held through offshore websites constitute foreign financial accounts for FBAR purposes. An equity interest in a hedge fund, private equity fund or other private investment fund is not, however, currently considered to be a financial account.

## Financial Interest

For FBAR purposes, a U.S. person has a "financial interest" in every foreign financial account for which such U.S. person is the owner of record or holds legal title, regardless of whether the account is maintained for such U.S. person's benefit or for the benefit of another.

In addition, for this purpose, a U.S. person has a "financial interest" in foreign financial accounts owned by entities (domestic or foreign) if such U.S. person owns, directly or indirectly: (a) in the case of a corporation, more than 50% of the voting power or the total value of the shares of such corporation; (b) in the case of a partnership, a more than 50% interest in the profits or capital of such partnership; or (c) in the case of other types of entities, more than 50% of the voting power or the total value of the equity or assets, or a more than 50% interest in the profits of, such other entities.

Similarly, if a U.S. person holds a present beneficial interest in more than 50% of the current income or assets of a trust that holds a foreign financial account, such U.S. person has a "financial interest" in such foreign financial account of the trust for FBAR purposes. A U.S. person with a remainder interest in a trust, however, is not within the scope of the FBAR rules.

## Signature or Other Authority

"Signature or other authority" is the authority of an individual (alone or in conjunction with another individual) to control the disposition of assets held in a foreign financial account by direct communication (whether in writing or otherwise) to the financial institution that maintains the foreign financial account.

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If an FBAR is required, the following generally describes the procedural requirements and the consequences of non-compliance:

## Filing

The FBAR must be filed electronically through FinCEN's Bank Secrecy Act E-Filing System on or before October 15, 2018. There is no paper filing option. The online form and instructions may be found here.

The spouse of an individual who files an FBAR is not required to file a separate FBAR if all of the foreign financial accounts that the non-filing spouse is required to report are jointly owned with the filing spouse and the filing spouse reports the jointly owned accounts on his or her FBAR. If jointly filing, both individuals also should complete and sign FinCEN Form 114a, Record of Authorization to Electronically File FBARs, which allows only one spouse to electronically sign a single FBAR for both individuals. This form is kept for the individuals' records and is not sent to FinCEN. If spouses file FBARs separately, then each spouse must report the entire value of the jointly-owned accounts on his or her FBAR.

A U.S. person deemed to have a financial interest in a foreign financial account of an entity, pursuant to the look-through rules described above, is required to file an FBAR with respect to such foreign financial account, unless, in the case of a trust, the trust, trustee or agent of the trust is a U.S. person and files an FBAR disclosing the trust's foreign financial accounts.

A U.S. individual who has signature authority over, but no financial interest in, a foreign financial account generally must file an FBAR with respect to such account, except in certain circumstances where the foreign financial account in question is owned by an entity subject to special treatment under the FBAR rules (including, for example, a publicly-traded entity or a financial institution that is registered with and examined by the Securities and Exchange Commission or the Commodity Futures Trading Commission), and the individual is an officer or employee of such entity.

## Penalties for Non-Compliance

In general, failure to timely and properly file an FBAR may expose a U.S. person to a civil penalty of up to USD $10,000. Willful violations of FBAR filing obligations may expose a U.S. person to an increased civil penalty of up to the greater of USD $100,000 or 50% of the aggregate value of the U.S. person's foreign financial accounts at the time of the violation. In addition, willful violations may be subject to criminal penalties.

## Correcting Past Filing Delinquencies

A U.S. person who has failed to timely or properly file an FBAR in the past may be able to correct such failure and mitigate or eliminate any applicable penalties through special programs currently administered by the Treasury Department. Taxpayers in this situation should

consult with their Foley Hoag lawyer or tax advisor to discuss any available options.

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