November 16, 2009

The Honorable Michael F. Mundaca
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The Honorable Douglas H. Shulman
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Electronically sent to: Notice.Comments@irscounsel.treas.gov and regcomments@fincen.gov

RE: Comments on Filing Requirements for Reports of Foreign Bank and Financial Accounts (FBAR, Form TD F 90-22.1)

Dear Messrs. Mundaca, Shulman, Wilkins, Musher, Bradley, and El-Hindi, and Ms. Elfrey:

The American Institute of Certified Public Accountants (AICPA) is submitting comments on Notice 2009-62 regarding filing requirements for the Form TD F 90-22.1, Report of Foreign Bank and Financial Account (FBAR).

The AICPA is the national professional organization of certified public accountants comprised of approximately 360,000 members. Our members advise clients of federal, state and international tax matters, and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized business, as well as America's largest businesses.

General Comments

We thank the Internal Revenue Service (IRS) and the Department of Treasury (Treasury) for the various announcements[1] this year, providing FBAR form filing relief and extending the 2008 (and prior years) FBAR form due date for certain persons. We also appreciate the continuing dialogue we have had over the past several years with various government officials responsible for the FBAR form and the Voluntary Disclosure Initiative.

However, many of our members remain concerned about the potential breadth of the newly revised form, effective for the 2008 calendar year (i.e., filed starting on January 1, 2009), and are confused as to the specific application of the filing requirements to their clients' circumstances. Because of the substantial penalties potentially applicable to taxpayers who do not comply with the FBAR form filing requirements and the lack of regulations and written guidance (other than the form instructions), we request written guidance addressing the issues discussed below.

Specific Comments

Based on member feedback on the FBAR form over the past few years, the AICPA suggests the following (elaborations on each are contained later in the letter):

1. Taxpayers should be assured that until definitive FBAR regulations and rulings are issued, they can rely upon information on the IRS website, including FAQs and similar information, and Internal Revenue Code (IRC) definitions in complying with the FBAR form requirements.

2. The FBAR form should be considered timely filed when timely mailed (or e-filed), rather than when timely "received," similar to the "mailbox" rule for filing all tax and information returns.

3. The FBAR form due date should be changed from June 30 to October 15, or an automatic extension should be available for October 15 filing.

4. The FBAR form should continue to apply only to U.S. persons, but if it is decided that non-U.S. persons must file FBAR forms, such requirement should be adopted prospectively and with clear definitions.

5. An FBAR form filing requirement with respect to foreign accounts held by a trust should be imposed only on U.S. settlors/transferors and U.S. trustees of the trust. Also, any U.S. person who is considered to have control of the trust as a grantor under IRC section 679

[1] Announcement 2009-51 and IR-2009-58, released June 5, 2009; Notice 2009-62, released August 7, 2009; IR-2009-84, released September 21, 2009; "Frequently Asked Questions" (FAQs) on the Voluntary Disclosure Initiative, posted on the IRS website May 6, 2009, and modified July 31, 2009; additional FAQs added June 24, 2009, and August 25, 2009, FAQs on the FBAR form, posted on the IRS website March 13, 2009, and modified July 1, 2009; and the Voluntary Disclosure Initiative, announced March 26, 2009.

should be required to file an FBAR form if the trust has a foreign account. If it is nonetheless decided that additional reporting is required by foreign trust beneficiaries, only trust beneficiaries who receive a distribution from a foreign trust should be required to file an FBAR form, reporting the receipt of the distribution.

6. When Treasury and IRS clarify the rules regarding a comingled account for FBAR form filing purposes, we recommend the FBAR form filing requirement, if any, be limited to the current year and applied prospectively, rather than retroactively, and that no FBAR form reporting be required for foreign financial accounts owned by any comingled account that is itself an entity and a reportable financial account.

7. When Treasury and IRS clarify the rules regarding which taxpayers are considered to have signature authority over a foreign bank or financial account for FBAR form filing purposes, we recommend that the FBAR form filing requirement, if any, be limited to the current year and applied prospectively, rather than retroactively.

8. Regarding delinquent FBAR forms, Treasury and IRS should provide guidance and relief regarding their filing, including reasonable cause for waiver of penalties. Guidance and relief are needed (consistent with FAQ# 9, posted on the IRS website on May 6, 2009) for those who reported all their income and paid all their taxes on the foreign accounts, but did not file FBAR forms, as well as for those with unreported income and taxes due who also did not file FBAR forms.

9. The IRS Office of Professional Responsibility (OPR) should work with the tax practitioner community in formulating more comprehensive guidance for FBAR form purposes before the practitioner due diligence guidance under Circular 230 goes into effect.

Each of the above comments is explained in further detail below.

1. Taxpayers should be assured that, until definitive FBAR regulations and rulings are issued, they can rely upon information on the IRS website, including FAQs and similar information, and IRC definitions in complying with the FBAR form requirements.

   If information on the IRS website is deleted or superseded prior to the issuance of more formal guidance, taxpayers should not be penalized for relying on information on the IRS website at the time they, or their advisors, access it.

   IRS and Treasury should establish a clear procedure for requesting FBAR form rulings (authorized by 31 C.F.R. section 103.56(g)) that is similar to the existing ruling process/procedures for requesting tax private letter rulings (PLRs) from the IRS, and the IRS should release sanitized FBAR form rulings similar to what is done with tax PLRs.

Also, IRS and Treasury should use terms and definitions from the IRC with which taxpayers and practitioners already are familiar rather than developing a new set of definitions for FBAR form purposes.

2. The FBAR form should be considered timely filed when timely mailed (or e-filed), rather than when timely "received," similar to the "mailbox" rule for filing all tax and information returns.

If the "mailbox" rule is not adopted for FBAR form purposes, all IRS websites (and websites of U.S. embassies and consulates), publications, instructions, responses, and references to the filing of an FBAR form should be clarified to say "received by" rather than "filed by" or "mailed by." The "received by" rule, as it currently stands, is a trap for the unwary since it differs from the filing requirements that apply to all tax and information return filing rules.

IRS and Treasury should allow and encourage taxpayers to efile the FBAR form.

A grace period of at least 10 days should continue to apply for FBAR form filings because there is no tax due.

We recommend proof of timely filing include: (1) hand-delivery of the FBAR form with receipt of a date stamp at an IRS district office, and (2) use of USPS certified receipts or other proof of mailing alternatives available for tax forms.

We also suggest that a street address and phone number (rather than just the current P.O. Box) be added to the instructions to enable a taxpayer (including a non-resident of the U.S.) to use an overnight delivery service to deliver the FBAR form to the IRS.

3. The FBAR form due date should be changed from June 30 to October 15, or an automatic extension should be available for October 15 filing.

Taxpayers with the financial resources to purchase offshore investments or business interests are very likely to request an extension of time to file their income tax returns. Complete filing information from foreign sources is rarely available until mid-summer or later. As a result, the amount and details of offshore accounts are often not known until after June 30.

Taxpayers often do not have all the information (such as Schedules K-1 and footnotes thereto) that may be needed to complete the FBAR form by June 30. Many investors do not receive their Schedules K-1 until well after June 30 (many are received in September). Furthermore, if a taxpayer's investment advisor purchases a foreign investment, such as a hedge fund, on behalf of the taxpayer, the investor may not be aware of this except to the extent that a short entry is included on a monthly statement. People who utilize investment advisors typically have multiple accounts, and each

account has a monthly statement that can run tens of pages. The investor may, therefore, have no idea of the new investment in the foreign hedge fund and the taxpayer's tax preparer may not be made aware of this until receipt of the Schedule K-1 for the initial year of investment, which will in many cases be well after June 30.

Few taxpayers understand the full scope of the phrase "foreign financial account" or the concept of indirect (constructive) ownership. Thus, they are unlikely to inform their tax preparer of their need to file the FBAR form or to provide all information necessary to file by June 30. Because the definition of a foreign financial account is a complex determination, especially if indirect ownership is involved, preparers are more likely to discover that there is indirect ownership of a foreign financial account when they are preparing the income tax return for the individual later in the year. For example, an individual may own a controlled foreign corporation (CFC) that might have a foreign bank account; however, the individual generally files the Form 1040 after June 30 because of Schedules K-1 that are not yet received or the inability to obtain the CFC information for the individual's Form 5471 by June 30. The tax practitioner might not even be aware of the CFC or be in a position to inform the client of the need to file an FBAR form until well after June 30.

No other tax form is due on June 30, so many taxpayers are not aware of, or accustomed to, the need to provide their tax preparers with information by this June 30 due date. In addition, taxpayers are not accustomed to having a filing requirement for which there is no extension. It also takes a lot of time for many taxpayers to gather the information required to prepare the FBAR form. For the above reasons, and in light of the potentially significant penalties involved, the FBAR form due date should be on or after October 15 to conform to the extended due date for the vast majority of individuals. This would also ensure that the FBAR form due date is after the extended filing deadline for calendar year-end entities, so most taxpayers will have reviewed their prior calendar year filing requirements and disclosures to ensure that complete and accurate FBAR forms are filed rather than having to file late or amended FBAR forms due to Schedules K-1 received after June 30.

4. <u>The FBAR form should continue to apply only to U.S. persons, but if it is decided that non-U.S. persons must file FBAR forms, such requirement should be adopted prospectively and with clear definitions</u>.

The policy provided in Announcement 2009-51, adopting for 2008 and prior-year FBAR form filings the definition of "in and doing business in the U.S." that was provided in the pre-October 2008 instructions for the FBAR form, should be adopted for 2009 FBAR form filings and all future years. The FBAR form should not apply to those meeting the IRC section 7701(b) definition of a non-U.S. person. Special elections to be treated as a U.S. person for non-FBAR form purposes and treaty-based return filings should not require an FBAR form filing.

Despite our urging to restrict FBAR forms to U.S. persons, if Treasury and IRS decide to require non-U.S. persons to file FBAR forms, we encourage careful thought and clear definitions, and that such treatment be adopted only prospectively.

5. An FBAR form filing requirement with respect to foreign accounts held by a trust should be imposed only on U.S. settlors/transferors and U.S. trustees of the trust. Also, any U.S. person who is considered to have control of the trust as a grantor under IRC section 679 should be required to file an FBAR form if the trust has a foreign account. If it is nonetheless decided that additional reporting is required by foreign trust beneficiaries, only trust beneficiaries who receive a distribution from a foreign trust should be required to file an FBAR form, reporting the receipt of the distribution.

Beneficiaries of a foreign or domestic trust should not be required to file an FBAR form. Beneficiaries will in most cases not have access to a trust's foreign account information. Beneficiaries often are not aware of, or able to calculate, their percent interest in trust current income and assets (and the trustees may not share that information) so it is often difficult or impossible for many beneficiaries to complete an accurate, timely, and complete FBAR form. In some instances, a U.S. person may not even be aware he or she is a beneficiary of a trust until a distribution is made. Form 3520 is required to be filed by U.S. persons receiving distributions from foreign trusts. Likewise, beneficiaries who receive a distribution from a domestic trust will receive a Form 1041, Schedule K-1 and are required to include any income arising from the distribution on their individual income tax return. Therefore, beneficiaries already are required to report any distributions, and income included in such distributions, from trusts. A U.S. settlor or transferor or a U.S. trustee to a trust which owns a foreign bank account is much more likely to have access to and knowledge of the trust's assets than the beneficiary.

If it is nonetheless decided that additional reporting is required by foreign trust beneficiaries, despite our recommendation and concerns mentioned above, only beneficiaries who receive a distribution from a foreign trust should be required to file an FBAR form, reporting the receipt of the distribution. This provides reporting when there is income involved and is easier and simpler to administer and with which to comply. If there is no distribution from the trust, an FBAR form should not be required unless the person is considered to have control of the trust as a grantor under IRC section 679.

In all cases, U.S. settlers/transferors, and trustees of trusts with a foreign account should be required to file an FBAR form.

6. When Treasury and IRS clarify the rules regarding a comingled account for FBAR form filing purposes, we recommend the FBAR form filing requirement, if any, be limited to the current year and applied prospectively, rather than retroactively, and that no FBAR form reporting be required for foreign financial accounts owned by any comingled account that is itself an entity and a reportable financial account.

We appreciate the IRS Notice 2009-62 delay until June 30, 2010, for the FBAR form filing for the 2008 and prior-year calendar year FBAR form filings for persons with signature authority over, but no financial interest in, a foreign financial account, and for persons with a financial interest in, or signature authority over, a foreign comingled fund. We note that both issues continue to concern our members.

It would be extremely difficult and an administrative burden for taxpayers to go back multiple years and research whether an account would have required an FBAR form filing and gather the information required. The new definitions and clarifications should apply only prospectively.

We also suggest that when taxpayers own an interest in a foreign pooled investment account that is an entity, such as a mutual fund or hedge fund that is itself a reportable financial account for FBAR form purposes, guidance clarify that FBAR form reporting is not required with respect to any financial accounts owned by the foreign pooled investment account.

7. When Treasury and IRS clarify the rules regarding which taxpayers are considered to have signature authority over a foreign bank or financial account for FBAR form filing purposes, we recommend that the FBAR form filing requirement, if any, be limited to the current year and applied prospectively, rather than retroactively.

   The signature authority requirement has created significant uncertainty and concern for entities who have assigned various rights over customers' accounts to employees within their organizations. Guidance on this should be limited to the current year and applied prospectively, rather than retroactively.

8. Regarding delinquent FBAR forms, Treasury and IRS should provide guidance and relief regarding their filing, including reasonable cause for waiver of penalties. Guidance and relief are needed (consistent with FAQ# 9, posted on the IRS website on May 6, 2009) for those who reported all their income and paid all their taxes on the foreign accounts, but did not file FBAR forms, as well as for those with unreported income and taxes due who also did not file FBAR forms.

   The Voluntary Disclosure Initiative served its purpose in bringing more taxpayers into the system. We encourage IRS and Treasury to continue that program and work with taxpayers to increase compliance in this area without unnecessarily harsh civil or criminal penalties for coming forward. We also request an extension of the relief provided by the IRS in FAQ #9 regarding delinquent FBAR forms when all income was reported and taxes paid. Finally, we urge the IRS and Treasury to provide an adjustment of the penalty when the amount of unpaid tax on the previously unreported income from the foreign bank account is less than the penalty.

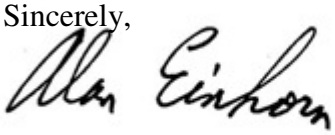
9. The IRS Office of Professional Responsibility (OPR) should work with the tax practitioner community in formulating more comprehensive guidance for FBAR form purposes before the practitioner due diligence guidance under Circular 230 goes into effect.

   Although we appreciate the importance of due diligence in preparing tax and information returns, in view of the significant open questions and lack of clear definitions in the FBAR form context, in combination with the potentially onerous penalties involved, we recommend that OPR work with the tax practitioner community in formulating more comprehensive guidance before the due diligence guidance goes into effect.

* * * * *

We welcome the opportunity to further discuss our comments with you or others at the IRS and Treasury. Please contact Neil A.J. Sullivan, Chair of the AICPA FBAR Task Force, at (914) 713-0503, or neilsullivan@att.net; Ron Dabrowski, Chair of the International Tax Technical Resource Panel, at (202) 533-4274, or rdabrowski@kpmg.com; Michelle Koroghlanian, AICPA Technical Manager, at (202) 434-9268, or mkoroghlanian@aicpa.org; or Eileen R. Sherr, AICPA Senior Technical Manager, at (202) 434-9256, or esherr@aicpa.org.

Sincerely,



Alan R. Einhorn
Chair, AICPA Tax Executive Committee

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