

Strafford

Presenting a live 110-minute teleconference with interactive Q&A

After the FBAR Overhaul: Foreign Account Reporting Enforcement

Preparing for IRS Exams, Potential Penalties, Administrative Appeals or Litigation

WEDNESDAY, NOVEMBER 16, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Steven Toscher, Principal, **Hochman Salkin Rettig Toscher & Perez**, Beverly Hills, Calif.

John Colvin, Partner, **Chicoine & Hallett**, Seattle

Caroline Ciruolo, Partner, **Rosenberg Martin & Greenberg**, Baltimore

For this program, attendees must listen to the audio over the telephone.

Please refer to the instructions emailed to the registrant for the dial-in information. Attendees can still view the presentation slides online. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

TD F 90-22.1(Rev. November 2011)
Department of the Treasury**REPORT OF FOREIGN BANK
AND FINANCIAL ACCOUNTS****Do NOT file with your Federal Tax Return**

OMB No. 1545-2038

1 This Report is for Calendar
Year Ended 12/31Do not use previous editions of
this formAmended **Part I Filer Information**

2 Type of Filer a <input type="checkbox"/> Individual b <input type="checkbox"/> Partnership c <input type="checkbox"/> Corporation d <input type="checkbox"/> Consolidated e <input type="checkbox"/> Fiduciary or Other—Enter type _____			
3 U.S. Taxpayer Identification Number If filer has no U.S. Identification Number complete Item 4.	4 Foreign identification (Complete only if item 3 is not applicable.) a Type: <input type="checkbox"/> Passport <input type="checkbox"/> Other _____ b Number _____ c Country of Issue _____		5 Individual's Date of Birth MM/DD/YYYY
6 Last Name or Organization Name	7 First Name	8 Middle Initial	
9 Address (Number, Street, and Apt. or Suite No.)			
10 City	11 State	12 Zip/Postal Code	13 Country
14 Does the filer have a financial interest in 25 or more financial accounts? <input type="checkbox"/> Yes If "Yes" enter total number of accounts _____ (If "Yes" is checked, do not complete Part II or Part III, but retain records of this information) <input type="checkbox"/> No			

Part II Information on Financial Account(s) Owned Separately

15 Maximum value of account during calendar year reported	16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below		
17 Name of Financial Institution in which account is held			
18 Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country

Signature

44 Filer Signature	45 Filer Title, if not reporting a personal account	46 Date (MM/DD/YYYY)
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File this form with: U.S. Department of the Treasury, P.O. Box 32621, Detroit, MI 48232-0621

This form should be used to report a financial interest in, signature authority, or other authority over one or more financial accounts in foreign countries, as required by the Department of the Treasury Regulations 31 CFR 1010.350 (formerly 31 CFR 103.24). No report is required if the aggregate value of the accounts did not exceed \$10,000. **See Instructions For Definitions.**

PRIVACY ACT AND PAPERWORK REDUCTION ACT NOTICE

Pursuant to the requirements of Public Law 93-579 (Privacy Act of 1974), notice is hereby given that the authority to collect information on TD F 90-22.1 in accordance with 5 USC 552a (e) is Public Law 91-508; 31 USC 5314; 5 USC 301; 31 CFR 1010.350 (formerly 31 CFR 103.24).

The principal purpose for collecting the information is to assure maintenance of reports where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. The information collected may be provided to those officers and employees of any constituent unit of the Department of the Treasury who have a need for the records in the performance of their duties. The records may be referred to any other department or agency of the United States upon the request of the head of such department or agency for use in a criminal, tax, or regulatory investigation or proceeding. The information collected may also be provided to appropriate state, local, and foreign law enforcement and regulatory personnel in the performance of their official duties. Disclosure of this information is mandatory. Civil and criminal penalties, including in certain circumstances a fine of not more than \$500,000 and imprisonment of not more than five years, are provided for failure to file a report, supply information, and for filing a false or fraudulent report. Disclosure of the Social Security number is mandatory. The authority to collect is 31 CFR 1010.350 (formerly 31 CFR 103.24). The Social Security number will be used as a means to identify the individual who files the report.

The estimated average burden associated with this collection of information is 75 minutes per respondent or record keeper, depending on individual circumstances. Comments regarding the accuracy of this burden estimate, and suggestions for reducing the burden should be directed to the Internal Revenue Service, Bank Secrecy Act Policy, 5000 Ellin Road C-3-242, Lanham MD 20706.

Part II Continued—Information on Financial Account(s) Owned Separately

Form TD F 90-22.1

Page Number

____ of ____

Complete a Separate Block for Each Account Owned Separately

This side can be copied as many times as necessary in order to provide information on all accounts.

1 Filing for calendar year ____ _		3-4 Check appropriate Identification Number <input type="checkbox"/> Taxpayer Identification Number <input type="checkbox"/> Foreign Identification Number Enter identification number here:		6 Last Name or Organization Name	
15 Maximum value of account during calendar year reported			16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below		
17 Name of Financial Institution in which account is held					
18 Account number or other designation		19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country		
15 Maximum value of account during calendar year reported			16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below		
17 Name of Financial Institution in which account is held					
18 Account number or other designation		19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country		
15 Maximum value of account during calendar year reported			16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below		
17 Name of Financial Institution in which account is held					
18 Account number or other designation		19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country		
15 Maximum value of account during calendar year reported			16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below		
17 Name of Financial Institution in which account is held					
18 Account number or other designation		19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country		
15 Maximum value of account during calendar year reported			16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below		
17 Name of Financial Institution in which account is held					
18 Account number or other designation		19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country		
15 Maximum value of account during calendar year reported			16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below		
17 Name of Financial Institution in which account is held					
18 Account number or other designation		19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country		
15 Maximum value of account during calendar year reported			16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below		
17 Name of Financial Institution in which account is held					
18 Account number or other designation		19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country		

Part III Information on Financial Account(s) Owned Jointly**Form TD F 90-22.1****Complete a Separate Block for Each Account Owned Jointly**

Page Number

____ of ____

This side can be copied as many times as necessary in order to provide information on all accounts.

1	Filing for calendar year ____ _	3-4	Check appropriate Identification Number <input type="checkbox"/> Taxpayer Identification Number <input type="checkbox"/> Foreign Identification Number Enter identification number here:	6	Last Name or Organization Name	
15	Maximum value of account during calendar year reported			16	Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
17	Name of Financial Institution in which account is held					
18	Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held				
20	City	21 State, if known	22 Zip/Postal Code, if known	23 Country		
24	Number of joint owners for this account	25 Taxpayer Identification Number of principal joint owner, if known. See instructions.				
26	Last Name or Organization Name of principal joint owner		27 First Name of principal joint owner, if known		28 Middle initial, if known	
29	Address (Number, Street, Suite or Apartment) of principal joint owner, if known					
30	City, if known	31 State, if known	32 Zip/Postal Code, if known	33 Country, if known		
15	Maximum value of account during calendar year reported			16	Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
17	Name of Financial Institution in which account is held					
18	Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held				
20	City	21 State, if known	22 Zip/Postal Code, if known	23 Country		
24	Number of joint owners for this account	25 Taxpayer Identification Number of principal joint owner, if known. See instructions.				
26	Last Name or Organization Name of principal joint owner		27 First Name of principal joint owner, if known		28 Middle initial, if known	
29	Address (Number, Street, Suite or Apartment) of principal joint owner, if known					
30	City, if known	31 State, if known	32 Zip/Postal Code, if known	33 Country, if known		
15	Maximum value of account during calendar year reported			16	Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
17	Name of Financial Institution in which account is held					
18	Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held				
20	City	21 State, if known	22 Zip/Postal Code, if known	23 Country		
24	Number of joint owners for this account	25 Taxpayer Identification Number of principal joint owner, if known. See instructions.				
26	Last Name or Organization Name of principal joint owner		27 First Name of principal joint owner, if known		28 Middle initial, if known	
29	Address (Number, Street, Suite or Apartment) of principal joint owner, if known					
30	City, if known	31 State, if known	32 Zip/Postal Code, if known	33 Country, if known		
15	Maximum value of account during calendar year reported			16	Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
17	Name of Financial Institution in which account is held					
18	Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held				
20	City	21 State, if known	22 Zip/Postal Code, if known	23 Country		
24	Number of joint owners for this account	25 Taxpayer Identification Number of principal joint owner, if known. See instructions.				
26	Last Name or Organization Name of principal joint owner		27 First Name of principal joint owner, if known		28 Middle initial, if known	
29	Address (Number, Street, Suite or Apartment) of principal joint owner, if known					
30	City, if known	31 State, if known	32 Zip/Postal Code, if known	33 Country, if known		

Part IV Information on Financial Account(s) Where Filer has Signature Authority but No Financial Interest in the Account(s)

Form TD F 90-22.1

Page Number

____ of ____

Complete a Separate Block for Each Account

This side can be copied as many times as necessary in order to provide information on all accounts.

1 Filing for calendar year ____ _	3-4 Check appropriate Identification Number <input type="checkbox"/> Taxpayer Identification Number <input type="checkbox"/> Foreign Identification Number Enter identification number here:	6 Last Name or Organization Name	
15 Maximum value of account during calendar year reported		16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
17 Name of Financial Institution in which account is held			
18 Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country
34 Last Name or Organization Name of Account Owner			35 Taxpayer Identification Number of Account Owner
36 First Name	37 Middle initial	38 Address (Number, Street, and Apt. or Suite No.)	
39 City	40 State	41 Zip/Postal Code	42 Country
43 Filer's Title with this Owner			
15 Maximum value of account during calendar year reported		16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
17 Name of Financial Institution in which account is held			
18 Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country
34 Last Name or Organization Name of Account Owner			35 Taxpayer Identification Number of Account Owner
36 First Name	37 Middle initial	38 Address (Number, Street, and Apt. or Suite No.)	
39 City	40 State	41 Zip/Postal Code	42 Country
43 Filer's Title with this Owner			
15 Maximum value of account during calendar year reported		16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
17 Name of Financial Institution in which account is held			
18 Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country
34 Last Name or Organization Name of Account Owner			35 Taxpayer Identification Number of Account Owner
36 First Name	37 Middle initial	38 Address (Number, Street, and Apt. or Suite No.)	
39 City	40 State	41 Zip/Postal Code	42 Country
43 Filer's Title with this Owner			
15 Maximum value of account during calendar year reported		16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
17 Name of Financial Institution in which account is held			
18 Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country
34 Last Name or Organization Name of Account Owner			35 Taxpayer Identification Number of Account Owner
36 First Name	37 Middle initial	38 Address (Number, Street, and Apt. or Suite No.)	
39 City	40 State	41 Zip/Postal Code	42 Country
43 Filer's Title with this Owner			

Part V Information on Financial Account(s) Where the Filer is Filing a Consolidated Report

Form TD F 90-22.1

Page Number

___ of ___

Complete a Separate Block for Each Account

This side can be copied as many times as necessary in order to provide information on all accounts.

1 Filing for calendar year ____	3-4 Check appropriate Identification Number <input type="checkbox"/> Taxpayer Identification Number <input type="checkbox"/> Foreign Identification Number Enter identification number here:	6 Last Name or Organization Name	
15 Maximum value of account during calendar year reported		16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
17 Name of Financial Institution in which account is held			
18 Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country
34 Corporate Name of Account Owner			35 Taxpayer Identification Number of Account Owner
38 Address (Number, Street, and Apt. or Suite No.)			
39 City	40 State	41 Zip/Postal Code	42 Country
15 Maximum value of account during calendar year reported		16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
17 Name of Financial Institution in which account is held			
18 Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country
34 Corporate Name of Account Owner			35 Taxpayer Identification Number of Account Owner
38 Address (Number, Street, and Apt. or Suite No.)			
39 City	40 State	41 Zip/Postal Code	42 Country
15 Maximum value of account during calendar year reported		16 Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
17 Name of Financial Institution in which account is held			
18 Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country
34 Corporate Name of Account Owner			35 Taxpayer Identification Number of Account Owner
38 Address (Number, Street, and Apt. or Suite No.)			
39 City	40 State	41 Zip/Postal Code	42 Country

General Instructions

Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (the "FBAR"), is used to report a financial interest in or signature authority over a foreign financial account. The FBAR must be **received** by the Department of the Treasury on or before **June 30th** of the year immediately following the calendar year being reported. The June 30th filing date may not be extended.

Who Must File an FBAR. A United States person that has a financial interest in or signature authority over foreign financial accounts must file an FBAR if the aggregate value of the foreign financial accounts exceeds \$10,000 at any time during the calendar year. See General Definitions, to determine who is a United States person.

General Definitions

Financial Account. A financial account includes, but is not limited to, a securities, brokerage, savings, demand, checking, deposit, time deposit, or other account maintained with a financial institution (or other person performing the services of a financial institution). A financial account also includes a commodity futures or options account, an insurance policy with a cash value (such as a whole life insurance policy), an annuity policy with a cash value, and shares in a mutual fund or similar pooled fund (i.e., a fund that is available to the general public with a regular net asset value determination and regular redemptions).

Foreign Financial Account. A foreign financial account is a financial account located outside of the United States. For example, an account maintained with a branch of a United States bank that is physically located outside of the United States is a foreign financial account. An account maintained with a branch of a foreign bank that is physically located in the United States is not a foreign financial account.

Financial Interest. A United States person has a financial interest in a foreign financial account for which:

- (1) the United States person is the owner of record or holder of legal title, regardless of whether the account is maintained for the benefit of the United States person or for the benefit of another person; or
- (2) the owner of record or holder of legal title is one of the following:
 - (a) An agent, nominee, attorney, or a person acting in some other capacity on behalf of the United States person with respect to the account;
 - (b) A corporation in which the United States person owns directly or indirectly: (i) more than 50 percent of the total value of shares of stock or (ii) more than 50 percent of the voting power of all shares of stock;
 - (c) A partnership in which the United States person owns directly or indirectly: (i) an interest in more than 50 percent of the partnership's profits (e.g., distributive share of partnership income taking into account any special allocation agreement) or (ii) an interest in more than 50 percent of the partnership capital;
 - (d) A trust of which the United States person: (i) is the trust grantor and (ii) has an ownership interest in the trust for United States federal tax purposes. See 26 U.S.C. sections 671-679 to determine if a grantor has an ownership interest in a trust;
 - (e) A trust in which the United States person has a greater than 50 percent present beneficial interest in the assets or income of the trust for the calendar year; or
 - (f) Any other entity in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of equity interest or assets, or interest in profits.

Person. A person means an individual and legal entities including, but not limited to, a limited liability company, corporation, partnership, trust, and estate.

Signature Authority. Signature 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 bank or other financial institution that maintains the financial account. See Exceptions, Signature Authority.

United States. For FBAR purposes, the United States includes the States, the District of Columbia, all United States territories and possessions (e.g., American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the United States Virgin Islands), and the Indian lands as defined in the Indian Gaming Regulatory Act. References to the laws of the United States include the laws of the United States federal government and the laws of all places listed in this definition.

United States Person. United States person means United States citizens; United States residents; entities, including but not limited to, corporations, partnerships, or limited liability companies created or organized in the United States or under the laws of the United States; and trusts or estates formed under the laws of the United States.

Note. The federal tax treatment of an entity does not determine whether the entity has an FBAR filing requirement. For example, an entity that is disregarded for purposes of Title 26 of the United States Code must file an FBAR, if otherwise required to do so. Similarly, a trust for which the trust income, deductions, or credits are taken into account by another person for purposes of Title 26 of the United States Code must file an FBAR, if otherwise required to do so.

United States Resident. A United States resident is an alien residing in the United States. To determine if the filer is a resident of the United States apply the residency tests in 26 U.S.C. section 7701(b). When applying the residency tests, use the definition of United States in these instructions.

Exceptions

Certain Accounts Jointly Owned by Spouses. The spouse of an individual who files an FBAR is not required to file a separate FBAR if the following conditions are met: (1) all the financial accounts that the non-filing spouse is required to report are jointly owned with the filing spouse; (2) the filing spouse reports the jointly owned accounts on a timely filed FBAR; and (3) both spouses sign the FBAR in Item 44. See Explanations for Specific Items, Part III, Items 25-33. Otherwise, both spouses are required to file separate FBARs, and each spouse must report the entire value of the jointly owned accounts.

Consolidated FBAR. If a United States person that is an entity is named in a consolidated FBAR filed by a greater than 50 percent owner, such entity is not required to file a separate FBAR. See Explanations for Specific Items, Part V.

Correspondent/Nostro Account. Correspondent or nostro accounts (which are maintained by banks and used solely for bank-to-bank settlements) are not required to be reported.

Governmental Entity. A foreign financial account of any governmental entity of the United States (as defined above) is not required to be reported by any person. For purposes of this form, governmental entity includes a college or university that is an agency of, an instrumentality of, owned by, or operated by a governmental entity. For purposes of this form, governmental entity also includes an employee retirement or welfare benefit plan of a governmental entity.

International Financial Institution. A foreign financial account of any international financial institution (if the United States government is a member) is not required to be reported by any person.

IRA Owners and Beneficiaries. An owner or beneficiary of an IRA is not required to report a foreign financial account held in the IRA.

Participants in and Beneficiaries of Tax-Qualified Retirement Plans. A participant in or beneficiary of a retirement plan described in Internal Revenue Code section 401(a), 403(a), or 403(b) is not required to report a foreign financial account held by or on behalf of the retirement plan.

Signature Authority. Individuals who have signature authority over, but no financial interest in, a foreign financial account are not required to report the account in the following situations:

(1) An officer or employee of a bank that is examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Administration is not required to report signature authority over a foreign financial account owned or maintained by the bank.

(2) An officer or employee of a financial institution that is registered with and examined by the Securities and Exchange Commission or Commodity Futures Trading Commission is not required to report signature authority over a foreign financial account owned or maintained by the financial institution.

(3) An officer or employee of an Authorized Service Provider is not required to report signature authority over a foreign financial account that is owned or maintained by an investment company that is registered with the Securities and Exchange Commission. Authorized Service Provider means an entity that is registered with and examined by the Securities and Exchange Commission and provides services to an investment company registered under the Investment Company Act of 1940.

(4) An officer or employee of an entity that has a class of equity securities listed (or American depository receipts listed) on any United States national securities exchange is not required to report signature authority over a foreign financial account of such entity.

(5) An officer or employee of a United States subsidiary is not required to report signature authority over a foreign financial account of the subsidiary if its United States parent has a class of equity securities listed on any United States national securities exchange and the subsidiary is included in a consolidated FBAR report of the United States parent.

(6) An officer or employee of an entity that has a class of equity securities registered (or American depository receipts in respect of equity securities registered) under section 12(g) of the Securities Exchange Act is not required to report signature authority over a foreign financial account of such entity.

Trust Beneficiaries. A trust beneficiary with a financial interest described in section (2)(e) of the financial interest definition is not required to report the trust's foreign financial accounts on an FBAR if the trust, trustee of the trust, or agent of the trust: (1) is a United States person and (2) files an FBAR disclosing the trust's foreign financial accounts.

United States Military Banking Facility. A financial account maintained with a financial institution located on a United States military installation is not required to be reported, even if that military installation is outside of the United States.

Filing Information

When and Where to File. The FBAR is an annual report and must be received by the Department of the Treasury on or before June 30th of the year following the calendar year being reported. Do Not file with federal income tax return.

File by mailing to:

Department of the Treasury
Post Office Box 32621
Detroit, MI 48232-0621

If an express delivery service is used, file by mailing to:

IRS Enterprise Computing Center
ATTN: CTR Operations Mailroom, 4th Floor
985 Michigan Avenue
Detroit, MI 48226

The FBAR may be hand delivered to any local office of the Internal Revenue Service for forwarding to the Department of the Treasury, Detroit, MI. The FBAR may also be delivered to the Internal Revenue Service's tax attaches located in United States embassies and consulates for forwarding to the Department of the Treasury, Detroit, MI. The FBAR is not considered filed until it is received by the Department of the Treasury in Detroit, MI.

No Extension of Time to File. There is no extension of time available for filing an FBAR. Extensions of time to file federal tax returns do NOT extend the time for filing an FBAR. If a delinquent FBAR is filed, attach a statement explaining the reason for the late filing.

Amending a Previously Filed FBAR. To amend a filed FBAR, check the "Amended" box in the upper right hand corner of the first page of the FBAR. Complete the form in its entirety and include the amended information. Do not attach a copy of the original FBAR. An amendment should not be made until at least 120 calendar days after the original FBAR is filed.

Record Keeping Requirements. Persons required to file an FBAR must retain records that contain the name in which each account is maintained, the number or other designation of the account, the name and address of the foreign financial institution that maintains the account, the type of account, and the maximum account value of each account during the reporting period. The records must be retained for a

period of 5 years from June 30th of the year following the calendar year reported and must be available for inspection as provided by law. Retaining a copy of the filed FBAR can help to satisfy the record keeping requirements.

An officer or employee who files an FBAR to report signature authority over an employer's foreign financial account is not required to personally retain records regarding these accounts.

Questions. For questions regarding the FBAR, contact the Detroit Computing Center Hotline at 1-800-800-2877, option 2.

Explanations for Specific Items

Part I – Filer Information

Item 1. The FBAR is an annual report. Enter the calendar year being reported. If amending a previously filed FBAR, check the "Amended" box.

Item 2. Check the box that describes the filer. Check only one box. Individuals reporting only signature authority, check box "a". If filing a consolidated FBAR, check box "d". To determine if a consolidated FBAR can be filed, see Part V. If the type of filer is not listed in boxes "a" through "c", check box "e", and enter the type of filer. Persons that should check box "e" include, but are not limited to, trusts, estates, limited liability companies, and tax-exempt entities (even if the entity is organized as a corporation). A disregarded entity must check box "e", and enter the type of entity followed by "(D.E.)". For example, a limited liability company that is disregarded for United States federal tax purposes would enter "limited liability company (D.E.)".

Item 3. Provide the filer's United States taxpayer identification number. Generally, this is the filer's United States social security number (SSN), United States individual taxpayer identification number (ITIN), or employer identification number (EIN). Throughout the FBAR, numbers should be entered with no spaces, dashes, or other punctuation. If the filer does NOT have a United States taxpayer identification number, complete Item 4.

Item 4. Complete Item 4 only if the filer does NOT have a United States taxpayer identification number. Item 4 requires the filer to provide information from an official foreign government document to verify the filer's nationality or residence. Enter the document number followed by the country of issuance, check the appropriate type of document, and if "other" is checked, provide the type of document.

Item 5. If the filer is an individual, enter the filer's date of birth, using the month, day, and year convention.

Items 9, 10, 11, 12, and 13. Enter the filer's address. An individual residing in the United States must enter the street address of the individual's United States residence, not a post office box. An individual residing outside the United States must enter the individual's United States mailing address. If the individual does not have a United States mailing address, the individual must enter a foreign residence address. An entity must enter its United States mailing address. If the entity does not have a United States mailing address, the entity must enter its foreign mailing address.

Item 14. If the filer has a financial interest in 25 or more foreign financial accounts, check "Yes" and enter the number of accounts. Do not complete Part II or Part III of the FBAR. If filing a consolidated FBAR, only complete Part V, Items 34-42, for each United States entity included in the consolidated FBAR.

Note. If the filer has signature authority over 25 or more foreign financial accounts, only complete Part IV, Items 34-43, for each person for which the filer has signature authority, and check "No" in Part I, Item 14.

Filers must comply with applicable recording keeping requirements. See Record Keeping Requirements.

Part II – Information on Financial Account(s) Owned Separately

Enter information in the applicable parts of the form only. Number the pages used, and mail only those pages. If there is not enough space to provide all account information, copy and complete additional pages of the required Part as necessary. Do not use any attachments unless otherwise specified in the instructions.

Item 15. Determining Maximum Account Value.

Step 1. Determine the maximum value of each account (in the currency of that account) during the calendar year being reported. The maximum value of an account is a reasonable approximation of the greatest value of currency or nonmonetary assets in the account during the calendar year. Periodic account statements may be relied on to determine the maximum value of the account, provided that the statements fairly reflect the maximum account value during the calendar year. For Item 15, if the filer had a financial interest in more than one account, each account must be valued separately.

Step 2. In the case of non-United States currency, convert the maximum account value for each account into United States dollars. Convert foreign currency by using the Treasury's Financial Management Service rate (this rate may be found at www.fms.treas.gov) from the last day of the calendar year. If no Treasury Financial Management Service rate is available, use another verifiable exchange rate and provide the source of that rate. In valuing currency of a country that uses multiple exchange rates, use the rate that would apply if the currency in the account were converted into United States dollars on the last day of the calendar year.

If the aggregate of the maximum account values exceeds \$10,000, an FBAR must be filed. An FBAR is not required to be filed if the person did not have \$10,000 of aggregate value in foreign financial accounts at any time during the calendar year.

For United States persons with a financial interest in or signature authority over fewer than 25 accounts that are unable to determine if the aggregate maximum account values of the accounts exceeded \$10,000 at any time during the calendar year, complete Part II, III, IV, or V, as appropriate, for each of these accounts and enter "value unknown" in Item 15.

Item 16. Indicate the type of account. Check only one box. If "Other" is selected, describe the account.

Item 17. Provide the name of the financial institution with which the account is held.

Item 18. Provide the account number that the financial institution uses to designate the account.

Items 19-23. Provide the complete mailing address of the financial institution where the account is located. If the foreign address does not include a state (e.g., province) or postal code, leave the box(es) blank.

Part III – Information on Financial Account(s) Owned Jointly

Enter information in the applicable parts of the form only. Number the pages used, and mail only those pages. If there is not enough space to provide all account information, copy and complete additional pages of the required Part as necessary. Do not use any attachments unless otherwise specified in the instructions.

For Items 15-23, see Part II. Each joint owner must report the entire value of the account as determined under Item 15.

Item 24. Enter the number of joint owners for the account. If the exact number is not known, provide an estimate. Do not count the filer when determining the number of joint owners.

Items 25-33. Use the identifying information of the principal joint owner (excluding the filer) to complete Items 25-33. Leave blank items for which no information is available. If the filer's spouse has an interest in a jointly owned account, the filer's spouse is the principal joint owner. Enter "(spouse)" on line 26 after the last name of the joint spousal owner. See Exceptions, Certain Accounts Jointly Owned by Spouses, to determine if the filer's spouse is required to independently report the jointly owned accounts.

Part IV – Information on Financial Account(s) Where Filer has Signature Authority but No Financial Interest in the Account(s)

Enter information in the applicable parts of the form only. Number the pages used, and mail only those pages. If there is not enough space to provide all account information, copy and complete additional pages of the required Part as necessary. Do not use any attachments unless otherwise specified in the instructions.

25 or More Foreign Financial Accounts. Filers with signature authority over 25 or more foreign financial accounts must complete only Items 34-43 for each person on whose behalf the filer has signature authority.

Modified Reporting for United States Persons Residing and Employed Outside of the United States. A United States person who (1) resides outside of the United States, (2) is an officer or employee of an employer who is physically located outside of the United States, and (3) has signature authority over a foreign financial account that is owned or maintained by the individual's employer should only complete Part I and Part IV, Items 34-43 of the FBAR. Part IV, Items 34-43 should only be completed one time with information about the individual's employer.

For Items 15-23, see Part II.

Items 34-42. Provide the name, address, and identifying number of the owner of the foreign financial account for which the individual has signature authority over but no financial interest in the account. If there is more than one owner of the account for which the individual has signature authority, provide the information in Items 34-42 for the principal joint owner (excluding the filer). If account information is completed for more than one account of the same owner, identify the owner only once and write "Same Owner" in Item 34 for the succeeding accounts with the same owner.

Item 43. Enter filer's title for the position that provides signature authority (e.g., treasurer).

Part V – Information on Financial Account(s) Where Filer Is Filing a Consolidated Report

Enter information in the applicable parts of the form only. Number the pages used, and mail only those pages. If there is not enough space to provide all account information, copy and complete additional pages of the required Part as necessary. Do not use any attachments unless otherwise specified in the instructions.

Who Can File a Consolidated FBAR. An entity that is a United States person that owns directly or indirectly a greater than 50 percent interest in another entity that is required to file an FBAR is permitted to file a consolidated FBAR on behalf of itself and such other entity. Check box "d" in Part I, Item 2 and complete Part V. If filing a consolidated FBAR and reporting 25 or more foreign financial accounts, complete only Items 34-42 for each entity included in the consolidated FBAR.

For Items 15-23, see Part II.

Items 34-42. Provide the name, United States taxpayer identification number, and address of the owner of the foreign financial account as shown on the books of the financial institution. If account information is completed for more than one account of the same owner, identify the owner only once and write "Same Owner" in Item 34 for the succeeding accounts of the same owner.

Signatures

Items 44-46. The FBAR must be signed by the filer named in Part I. If the FBAR is being filed on behalf of a partnership, corporation, limited liability company, trust, estate, or other entity, it must be signed by an authorized individual. Enter the authorized individual's title in Item 45.

An individual must leave "Filer's Title" blank, unless the individual is filing an FBAR due to the individual's signature authority. If an individual is filing because the individual has signature authority over a foreign financial account, the individual should enter the title upon which his or her authority is based in Item 45.

A spouse included as a joint owner, who does not file a separate FBAR in accordance with the instructions in Part III, must also sign the FBAR (in Item 44) for the jointly owned accounts. See the instructions for Part III.

Penalties

A person who is required to file an FBAR and fails to properly file may be subject to a civil penalty not to exceed \$10,000 per violation. If there is reasonable cause for the failure and the balance in the account is properly reported, no penalty will be imposed. A person who willfully fails to report an account or account identifying information may be subject to a civil monetary penalty equal to the greater of \$100,000 or 50 percent of the balance in the account at the time of the violation. See 31 U.S.C. section 5321(a)(5). Willful violations may also be subject to criminal penalties under 31 U.S.C. section 5322(a), 31 U.S.C. section 5322(b), or 18 U.S.C. section 1001.



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

8.11.6

NOVEMBER 1, 2011

PURPOSE

- (1) This transmits new IRM 8.11.6, Penalties Worked in Appeals, FBAR Penalties.

BACKGROUND

- (1) The section has been added to the Appeals IRM to provide guidance and processing instructions for handling FBAR penalty cases within Appeals.

MATERIAL CHANGES

- (1) The information in this new IRM section describes the procedures for handling "FBAR" penalties under Title 31 (Bank Secrecy Act) for cases in Appeals.

EFFECT ON OTHER DOCUMENTS

None

AUDIENCE

Appeals employees

EFFECTIVE DATE

(11-01-2011)

Susan L. Latham
Director, Tax Policy and Valuation

8.11.6
FBAR Penalties

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8.11.6.1
(11-01-2011)
FBAR Overview

- (1) The Financial Crimes Enforcement Network (FinCEN) delegated to IRS its enforcement authority for penalties imposed under Title 31, Sections 5314 - 5321 for the failure to file Form TD F 90-22.1 Report Of Foreign Bank And Financial Accounts (FBAR) . This delegation was effective April 8, 2003, by memorandum of agreement between FinCEN and IRS.
 - (2) Form TD F 90-22.1 , Report of Foreign Bank and Financial Accounts, must be filed by US persons who have a financial interest in, signature authority, or other authority over one or more financial accounts in foreign countries with an aggregate value exceeding \$10,000 at any time during the calendar year. Failure to file this form may result in civil and/or criminal penalties. The civil penalties may be appealed.
 - (3) FBAR reports are filed at the Enterprise Computing Center (ECC) in Detroit, Michigan. Filings can be researched on the Currency and Banking Retrieval System (CBRS) or on IDRS using command code (cc): IRPTRO. Penalty cases, assessments and payments are recorded on a separate FBAR database maintained by the ECC.
 - (4) FBAR penalties may come to Appeals as stand-alone cases or together with a related income tax or international penalty.
 - (5) FBAR penalties are an Appeals Coordinated Issue (Category of Case) and require a referral to International prior to holding the first conference. International issue guidelines are available from the Appeals International Specialist Coordinator(ISC).
 - (6) The FBAR penalty case will usually be received in Appeals pre-assessment. However, upon request, Appeals will also conduct post-assessment hearings as provided in Title 31 CFR 5.4 and 900 to consider FBAR penalty liability and collection.
- Note:** Post-assessment FBAR penalty cases are priority cases and must be worked expeditiously. Appeals requires these cases be completed and approved within 60 days of assignment. This is calculated from the Appeals Officer assigned date (ASGNDATE) to the date the ATM approves the case for closing (ACAP date).
- (7) Additional FBAR Resource materials available:
 - IRM 4.26.16 Report of Foreign Bank and Financial Accounts (FBAR). It should be used a reference for background and statute information.
 - IRM 4.26.17 Report of Foreign Bank and Financial Accounts (FBAR) Procedures.
 - LMSB website
 - SBSE website
 - IRS.gov
 - (8) This chapter describes procedures for receipt and control, interim processing and closing of FBAR penalty within Appeals.

8.11.6.2
(11-01-2011)
FBAR Administrative Case Files

- (1) Appeals requires 180 days remaining on the assessment statute of limitations at the time the administrative file is received.
- Note:** The FBAR penalty applies and is assessed separately and **not** jointly. There should be **one** individual under examination per FBAR case file.

- (2) Administrative files are generally forwarded to the Appeals Office by:

Type of FBAR case	Sent by
Post-assessed FBAR penalty Note: Verify penalty assessment by reviewing Form 13448 which should be in the case file.	The FBAR Penalty Coordinator at the Enterprise Computing Center -
pre-assesed FBAR penalty	Compliance Tech Services

Note: Email *SBSE BSA Compliance - FBAR Penalty Coordinator for information on the penalty assessment.

- (3) The administrative file will contain the following documents:

- A brief summary memorandum explaining the FBAR violation(s) containing statistical information which includes:

Item Number	Description
1.	A discussion of the FBAR violations.
2.	The number of penalty assessments.
3.	The dollar amounts.
4.	The FBAR case disposition.

- A Foreign Bank and Financial Accounts Report Related Statute Memorandum, Form 13535 signed by the designated Program Manager affirming that the information shows the FBAR violations were committed in furtherance of income tax violations, when appropriate.
- A copy of any delinquent FBAR(s) secured by examination
- FBAR issue workpapers
- FBAR 30-Day Letter

Note: Letter 3709 for pre-assessment

Note: Letter 3708 for post-assessment

- Taxpayers protest.
- FBAR/Title 31 Power of Attorney Form 2848, if applicable.

8.11.6.3
(11-01-2011)
**FBAR Statute of
Limitations**

- (1) The statutes of limitations on assessment (ASED) and collection (CSED) of FBAR penalties are defined under Title 31, the Bank Secrecy Act.
- (2) FBAR penalty cases may be sent to Appeals either pre-assessment or post-assessment.
- (3) Appeals controls the statute of limitations in pre-assessment cases with the ASED and in post-assessment cases with the applicable CSED.

(4) Statute of limitation must be obtained from each individual under examination.

Note: Married couples under FBAR examination are treated as individual cases and an extension must be obtained from each individual under examination.

8.11.6.3.1
(11-01-2011)
FBAR Penalty Statute of Limitations on Assessment (ASED)

(1) The statute of limitations on assessment (ASED) and collection (CSED) of FBAR penalties are defined under Title 31, the Bank Secrecy Act.

TYPE OF VIOLATION	ASED
Failure to file FBAR report (either willful or negligent)	6 years from the due date of the FBAR report (Due date is 06/30/yyyy)
Failure to maintain required records (either willful or negligent)	6 years from the date the IRS first asks for the records

- For requests to extend the time to assess an FBAR penalty, a Counsel FBAR coordinator should be contacted. Local Area Counsel can help in identifying the appropriate Counsel FBAR coordinator.
- Use Title 31 statute extension form.
- DO 4-35 provides information on who has authority to sign agreements extending the period of limitations on assessment or collection of civil FBAR penalties.

Examples	
Example 1:	In calendar year 2004, a foreign bank account owned by a U.S. person exceeds \$10,000.00. The Report of Foreign Bank and Financial Accounts (Form TD F 90-22.1) is due June 30, 2005, but the account holder does not file one. The assessment statute of limitations for failing to file an FBAR report expires June 30, 2011.
Example 2:	Same facts as in Example 1, and in addition, the account holder failed to maintain required records. An examiner requested the records on March 1, 2008. The assessment statute of limitations for failing to maintain required records expires on March 1, 2014.

Note: If both types of violations have occurred, examiners can assert both the failure-to-file an FBAR report penalty and failure to maintain required records penalty on the same account for the same period. However, Compliance policy in IRM 4.26.16.4.7 allows examiners discretion over whether to assert multiple violations against one FBAR report.

8.11.6.3.1.1
(11-01-2011)
**FBAR Penalty Statute of
Limitations on
Collection**

- (1) On post-assessment FBAR cases only the collection statute expiration date (CSED) will be entered on ACDS to control the statute of limitations.
- (2) There are two separate collection limitation periods for FBAR cases and they run concurrently:

CSED	Explanation
2-year limitation on filing suit	period in which the Government may file a civil action to recover an FBAR penalty.
10-year limitation on offsetting payment	period in which the Government may obtain payment of the FBAR by offsetting payments

- (3) The following table provides information on when to use the 2-year or 10-year date:

If FBAR received	Statute Date	Statute Code
30 days before the expiration of the 2-year CSED	enter a date 2 years from the date of assessment	enter statute code FBAR2
within 30 days of or after the 2-year CSED	enter a date 10 years from the date of the assessment	enter statute code FBAR10

8.11.6.4
(10-19-2007)
**Establishing FBAR
Penalty Cases on ACDS**

- (1) All FBAR Penalty cases are controlled on ACDS (Appeals Centralized Database System).
- (2) The taxpayer name is the U.S. person subject to the FBAR penalty and could include:
 - an individual citizen or resident of the United States
 - a domestic partnership
 - a domestic cooperation
 - a domestic estate or trust
 - a person in, and doing business in, the U.S. (except for a foreign subsidiary of a U.S. person)
- (3) Follow general guidelines for establishing the FBAR penalty case on ACDS the same way as other penalty appeal cases except for the following:
 - **TYPE** = FBAR
 - **MFT** = 00
 - **FEATRCD** (Feature Code) = **AI, IC and IT**
 - **Activity Code** = 545
 - **AIMS indicator** = E(xempt). FBAR cases are not controlled on AIMS or ERCS.
 - **STATDATE**(statute date) or **STATCODE** (statute code) will be input as follows and is dependant upon whether this is pre-or post-assessment: The table below provides information on what entries to make:

<u>If FBAR Penalty is:</u>	<u>Then enter the STATDATE (statute date)</u>	<u>CODE (statute code)</u>
not assessed	Enter a date 6 years from the date of the violation, either the due date of the FBAR report or date on which records requested.	Leave Blank
Assessed with more than 30 days before the expiration of the 2-year CSED	enter a date 2 years from the date of assessment	FBAR2
Assessed and within 30 days of the expiration of the 2-year CSED or the CSED has expired	enter a date 10 years from the date of assessment	FBAR10

- **Assessed Penalty** - Enter the total amount of the penalty assessed by ECC.
- **Proposed Penalty** - Enter the total amount of the penalty imposed for each period found on the summary memorandum.

(4) Assign the case to an Appeals employee in accordance with case assignment practices.

8.11.6.5
(11-01-2011)
**Appeals Officer
Procedures for FBAR
Penalty Cases**

- (1) Upon receipt of the case the Appeals Officer verifies Case Summary Card (CSC) information requesting changes when required:
- Entity information (address and spelling),
 - TIN to ensure correct account is controlled on ACDS.
 - MFT = 00
 - Type code = FBAR
 - Feature Code = AI, IC and IT and any others which apply
 - Category Code = IC (this is systemically generated based on feature code information)
 - POA/Representative information
 - Tax periods at issue covered by the Representative's authority
 - Statute Date or Statute Code, these fields **must** be validated within five (5) days of receipt. See IRM 8.21.3 , Appeals Technical Employees Statute Responsibility.
 - Verify the uniform ACDS acknowledgment letter and enclosure were sent to the taxpayer
 - Prepare referral Form 13381 and forward to the International Specialist Coordinator(ISC) responsible for the issue. A list of Appeals Coordinated issues and the responsible ISC can be found on the *Technical Guidance/ International Issue Locator* website.

- Case Activity Record (CAR) codes - mandatory codes:

CARATS code	CARATS code definition
CR	Case Received
CF/xx	Conference type/xx = <ul style="list-style-type: none"> • FF - fact-to-face • ML - by mail • NN - not necessary • NR - no response • NS - no show • PC - telephone call • VC - video conference
DM	Determination Made
AC-FR	Final Determination Made

Note: Additional CARATS codes are found xxxxx and will be entered to properly document case activity.

If corrections or updates are required at any time, which you cannot make, follow normal procedures to request them.

- (2) Verify the FBAR penalty assessment status. E-mail the **SBSE BSA Compliance FBAR Penalty Coordinator for assessment verification.
- (3) Post-assessment FBAR penalty cases are priority cases and must be worked expeditiously. Appeals requires these cases be approved and closed within **60** days of assignment to an Appeals Officer (assignment to ACAP).

8.11.6.6
(11-01-2011)

**Payment Procedures for
FBAR Case**

- (1) If payment is received on an FBAR penalty case:
 - Photocopy the check or money order and attach to a copy of Form 13449 Agreement to Assessment and Collection of Penalties Under 31 USC 5321(a)(5) and 5321(a)(6) (both front and back).
 - Complete Form 3210 describing all documents attached and include the taxpayers name and TIN.
 - Forward by **certified mail** the payment, copy of Form 13449, and Form 3210 to the FBAR Payment post office box used exclusively for FBAR payments:

Internal Revenue Service

P.O. Box 33115

Detroit, MI 488232-0115

Note: If any payment is made, **DO NOT USE** a Payment Posting Voucher, Form 3244 for any payments received.,.. The (2)

- (2) **DO NOT USE** Form 3244, Payment Posting Voucher when processing a payment on an FBAR penalty case. See 8.11.6.7 when this occurs to resolve the problem.
- (3) The information above is also available in IRM 4.26.17.4.5 Report of Foreign Bank and Financial Accounts (FBAR) Procedures.

8.11.6.7
(11-01-2011)
**Problems Related to
FBAR Case Payment
Posting**

- (1) Form 3244 is **not** used to post the payment for FBAR penalty cases.
- (2) If Form 3244 is inadvertently executed take the following steps:
 - the Appeals employee will be responsible for tracing the payment to ensure that it is refunded from the tax module
 - the Appeals employee will then need to obtain another payment which will be sent to ECC for posting to the FBAR database
 - Enterprise Computing Center (ECC) will record and process the payment utilizing, as appropriate:

type of document	title
Form 13448	Penalty Assessments Certification Summary (Title 31 FBAR) (internal document)
Letter 3708	Notice and Demand for Payment of FBAR Penalty (copy)
Notice 1330	Information on Making FBAR Penalty Payment by Check

8.11.6.8
(10-19-2007)
**FBAR Closing
Procedures**

- (1) There are three types of closing for an FBAR penalty case. Determine the type of case and follow those instructions outlined in the following sections:
 - Premature Referral
 - Pre-Assessment
 - Post-Assessment
- (2) It is important to know which type of FBAR case to determine the valid ACDS closing codes:

Determination Made	CLOSINGCD
Agreed or No Change - valid only for pre-assessment case	03
Unagreed or Partially Sustained valid only for pre-assessment case	13
Sustained in Full valid only for post-assessment case	14
Not Sustained valid only for post-assessment case	15

Determination Made	CLOSINGCD
Partially Sustained valid only for post-assessment case	16
Premature Referral valid for either pre-assessment or post-assessment	20

- (3) Maintain closed office files in accordance with guidelines found in IRM 8.20.

8.11.6.8.1
(11-01-2011)

**FBAR Closing -
Premature Referral**

- (1) Appeals may have received the income tax case or international penalty case along with the FBAR case or only the FBAR case.
- (2) See the table below for information on handling the case as a premature referral:

If Premature Referral-jurisdiction is released on the	Then
Combined income tax, FBAR and International Penalty case	<ul style="list-style-type: none"> close cases together return to the originating Compliance office, generally the QMS staff Appeals Officer prepares Form 5402 Appeals Transmittal and Case Memo, to notify the ECC FBAR Penalty coordinator jurisdiction is released.
Income tax case only	<ul style="list-style-type: none"> return to the originating Compliance office Appeals Officer prepares Form 5402 Appeals Transmittal and Case Memo, to notify the ECC FBAR Penalty coordinator jurisdiction is released
FBAR case only is being returned as a premature referral	<ul style="list-style-type: none"> return to the originating group notify the ECC FBAR Penalty Coordinator Appeals Officer prepares Form 5402 Appeals Transmittal and Case Memo, to notify the ECC FBAR Penalty Coordinator jurisdiction is released.

- (3) ACDS field entries for closing the premature referral. Case level entries are:
- Closing Code: 20 - Premature Referral (Jurisdiction Released)
 - Date Closed : Date case sent to the Quality Measurement Staff (QMS) or Group Manager
 - ACAPDATE : Date ATM signed Form 5402
 - Action : ACKCLS

- To Date: Date case sent to QMS or Group Manager
- From Date: entered when receipted Form 3210 is received back.

- (4) No entries are required at the return level.
- (5) Send the FBAR file with transmittal Form 3210 to QMS or the originating group.
- (6) Send a photocopy of Form 5402 and (ACM) to ECC at the following address:

Internal Revenue Service

Attn: FBAR Penalty Coordinator

P.O. Box 33113

Detroit, MI 4232-0113

8.11.6.8.2
(11-01-2011)
**FBAR Closing -
Pre-Assessment Case**

- (1) The Appeals Officer will prepare the closing letter and Form 5402.
- (2) There are two types of Agreed Pre-Ninety cases:
 - Agreed with signed waver Form 13449 Agreement to Assessment and Collection of Penalties under 31 USC 5321(a)(5) and 5321(a)(6) and itemized statement attached to Form 13449.
 - No Change case - FBAR is not sustained and signed Form 13449 is not required.
- (3) An unagreed case is when the FBAR penalty is fully or partially sustained. Form 13449 is not signed.
- (4) APS will date and mail the letter at the time the case is being closed.
- (5) ACDS Closing entries :
 - Closing Codes: see table above in IRM 8.11.6.8
 - Date Closed : Date Case sent to ECC
 - ACAPDATE: Date the ATM approves the case and signs Form 5402.
 - ACTION: ACKCLS
 - To Date: Date case was sent to the FBAR Penalty Coordinator at ECC.
 - From Date: Date the receipted Form 3210 was acknowledged by ECC.
 - Revised Penalty - Def/OA:

Agreement type	Dollar entry for each tax period
Agreed with waiver	enter total amount of penalty agreed to
No Change	enter zero (0)
Unagreed	total amount of the penalty imposed

8.11.6.8.3
(11-01-2011)
**FBAR Closing -
Post-Assessment Case**

- (1) Post-assessment FBAR cases are priority cases and require expedite handling.

- Assignment to ACAPDate = 60 days
- ACAPDate to Date Closed = 10 days

Note: Pay special attention to those cases where the FBAR assessment is more than 180 days old.

- (2) The Appeals Officer will prepare the closing letter and Form 5402
- (3) APS will date and mail the closing letter.
- (4) ACDS field entries for closing post-assessment FBAR cases:

- Closing Codes:

ACDS Closing Code	Closing Code Definition
14	sustained in full
15	not sustained
16	partially sustained

- Date Closed: Date case sent to the FBAR Penalty Coordinator at ECC.
- ACAPDATE: Date the ATM approves the case and signs Form 5402.
- Action: ACKCLS
- To Date: Date the case was sent to the FBAR Penalty Coordinator at ECC.
- From Date: Date receipted copy of Form 3210 received from ECC.
- Revised Penalty amounts:

Type of closing	Dollar entry for each tax period
Sustained in full (14)	enter total amount of penalty agreed to
Not Sustained (15)	enter zero (0)
Partially Sustained (16)	revised penalty amount

- (5) The FBAR administrative file should contain the following additional documents at closing:
- Form 13449 Agreement to Assessment and Collection of Penalties under 31 USC 5321(a)(5) and 5321(a)(6) and itemized attachment.
 - Form 5402 and settlement memorandum.
 - FBAR penalty computation, if any changes were made
 - Appeals closing letter - dated

- original and copy of any delinquent FBAR(s) secured by Appeals.

(6) Send the FBAR file with Form 3210 to:

Internal Revenue Service

Attn: FBAR Penalty Coordinator

P.O. Box 33113

Detroit, MI 48232-0113

8.11.6.9

(11-01-2011)

FBAR Closed Office File

(1) Prepare an office file at the time the FBAR cases is being closed.

(2) The following documents should be included in the closed file:

- Form 5402 and ACM
- Form 13449 and itemized attachments
- copy of any checks received in Appeals
- closing letter which has been dated
- CARATS activity record
- copy of any FBAR(s) received by Appeals
- FBAR Penalty Computation spreadsheet/worksheet
- copy of Form 13448, ECC assessment of penalty, if applicable
- ACDS Case summary card
- additional items identified as necessary.

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CREDIT SUISSE 

CREDIT SUISSE AG

Unit YXEB

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Switzerland

Tel: +41 44 335 60 00

www.credit-suisse.com

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Registered mail

us.helpline-cs@credit-suisse.com

Zurich, November 2, 2011

Reference No.

NOTICE TO UNITED STATES BENEFICIAL OWNERS OF ACCOUNTS WITH CREDIT SUISSE

Dear Mr.

We have been informed that the United States Internal Revenue Service (the "IRS") submitted a request for administrative assistance to the Swiss Federal Tax Administration (the "SFTA") pursuant to Article 26 of the Convention of October 2, 1996 between the Swiss Confederation and the United States of America with respect to Taxes on Income ("the 1996 Convention"). The IRS is seeking information with regard to accounts of certain U.S. persons owned through a domiciliary company (as Beneficial Owners) that have been maintained with CREDIT SUISSE AG ("CREDIT SUISSE") in Switzerland (as applicable in a given case in the "IRS Treaty Request") at any time during the years January 1, 2002 through and ending on December 31, 2010.

In connection with the IRS Treaty Request, the SFTA has issued an order directing CREDIT SUISSE to submit responsive account information to the SFTA. This order is immediately executable and CREDIT SUISSE as an information holder has no right to appeal.

This letter provides notice to you that the CREDIT SUISSE account of which you have or had the beneficial ownership appears to be within the abovementioned scope of the IRS Treaty Request.

This letter also provides certain information on the Treaty Process opened by the SFTA and the steps available to you in connection with that process, which are the following:

- Consent to the SFTA's sending the account information directly to the IRS, see #1 below.
- Appoint within 20 days an agent or lawyer in Switzerland to receive all official notifications by the SFTA, as described under #2 below.

Should you have any questions, please consult the CREDIT SUISSE website at www.credit-suisse.com or call our dedicated team at CREDIT SUISSE at +41 44 335 60 00.

1. Consent to transmission of information by the SFTA

You can instruct and authorize the SFTA to directly send your account information to the IRS. If you wish to do so, you have to send a consenting letter to the SFTA in accordance with Art. 20i of the Ordinance on the 1996 Convention.

A copy of the letter for this authorization relating to your CREDIT SUISSE account is enclosed or you can download a standard template from the website of the SFTA at www.efd.admin.ch.

The appropriately completed and duly signed authorization has to be sent to the SFTA at the address indicated below. The SFTA will then transmit the requested account information received from CREDIT SUISSE to the IRS. **Consenting to the transmission of the information to the SFTA will conclude the Treaty Process for your account.**

2. Appointment of an agent or lawyer in Switzerland

If you do not authorize the SFTA to directly send your account information to the IRS, the SFTA requests that you

- appoint a person or a lawyer in Switzerland, authorized to receive notifications concerning these matters, and
- inform the SFTA of the person you have appointed and his/her address in Switzerland. Within 20 days of the receipt of this notification letter, please send this information to:

Swiss Federal Tax Administration
Service for exchange of information in tax matters (SEI)
Eigerstrasse 65
CH-3003 Bern, Switzerland

It is important to indicate the above Reference Number in all correspondence and communication, so as to allow the proper handling.

If needed, you may obtain assistance in identifying a person who could serve as your agent or lawyer in Switzerland and, if desired, advise on Swiss legal matters, by going to the website of the Swiss Bar Association at www.swisslawyers.com.

You can also contact the

Swiss Bar Association
Marktgasse 4
CH-3001 Bern, Switzerland
Telephone +41 31 313 0615 (helpline)
infousa@swisslawyers.com

The Swiss Bar Association will refer you to lawyers with the appropriate specialization.

The SFTA has instructed us to inform you that there will also be a publication in the Swiss Bundesblatt (Swiss Federal Gazette) and the SFTA advises you to consult: www.admin.ch/ch/d/ff/.

Should you not appoint an agent or lawyer, the SFTA will retain the following law firm as your agent for the service of process and subsequently direct all correspondence and orders to it:

Bill, Isenegger, Ackermann AG
Rechtsanwälte, Attorneys at Law
Witikonstrasse 61
P.O. Box
CH-8032 Zurich, Switzerland
Telephone +41 44 386 88 88
E-Mail: bia@bialaw.ch

If, after comprehensive examination of your account information, the SFTA comes to the conclusion that information relating to your CREDIT SUISSE account is required to be provided to the IRS pursuant to the 1996 Convention, the SFTA will render an appropriate final decision and notify your agent or lawyer in Switzerland. The authority will then also advise your agent or lawyer of your right under Swiss law to appeal such a decision by the SFTA to the Swiss Federal Administrative Court.

The SFTA has asked us to point out that if you choose to appeal such a decision, you should be aware that: (i) Title 18 United States Code Section 3506 provides in Section (a) that "any national or resident of the United States who submits, or causes to be submitted, a pleading or other document to a court or other authority in opposition to an official request for evidence of an offense shall serve such pleading or other document on the Attorney General [of the United States] at the time such pleading or other document is submitted" and (ii) you should consult with

CREDIT SUISSE 

a qualified lawyer concerning whether to appeal any such decision of the SFTA and concerning any obligations you may have under Section 3506 of Title 18 of the United States Code.

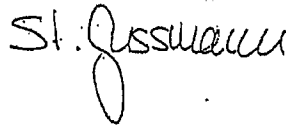
Please be advised that CREDIT SUISSE is not able to provide any information on whether or not information with respect to a specific account will be provided to the IRS. Because CREDIT SUISSE will not be made aware of this decision, this information can be obtained only from SFTA.

Sincerely yours,

CREDIT SUISSE AG



Michel Ruffieux
Managing Director



Stephan Gussmann
Managing Director

CREDIT SUISSE Reference No. (Account No):

Name and Address of the Domiciliary Company (Accountholder):

Name and Address of the Beneficial Owner:

To:
Swiss Federal Tax Administration
Service for exchange of information in tax matters (SEI)
Eigerstr. 56
CH-3003 Bern
Switzerland

Re: Consent to Transmission of Information by the SFTA

Dear Sir/Madam,

By letter dated ... November 2011 (the notification letter), CREDIT SUISSE AG ("CREDIT SUISSE") in Zurich, Switzerland informed me that the IRS has submitted a request for information exchange to the Swiss Federal Tax Administration ("SFTA") based on Art. 26 of the Double Taxation Convention between the Swiss Confederation and the United States of America of 2 October 1996 and thereby has opened the administrative assistance procedure (the Treaty Process). The IRS is seeking for information with regard to accounts of certain U.S. persons owned through an offshore company that have been maintained with CREDIT SUISSE in Switzerland.

Based on point 1 of this notification letter, I hereby formally and irrevocably give my consent to the SFTA that all information and documents requested in the Treaty Process concerning the aforementioned bank account with CREDIT SUISSE Switzerland be transmitted to the IRS.

I note that after receiving this declaration to transmit the required information and documents to the IRS, the SFTA will conclude the Treaty Process as far as this account is concerned.

Yours faithfully,

..... (Signature of Beneficial Owner)

Place, Date

.....
(Signature of all authorized Signatories for the Domiciliary Company)

Place, Date

LAW OFFICES
HOCHMAN, SALKIN, RETTIG, TOSCHER & PEREZ, P.C.
 Telephone (310) 281-3200 Facsimile (310) 859-1430
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Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 1
To: (Name of Taxpayer and Company, Division or Branch)	Subject Audit of 2008 1040 tax return	Submitted to:
	Dates of Previous Requests:	

Description of Documents Requested:

IT IS IMPORTANT THAT YOU PROVIDE THE FOLLOWING INFORMATION BY THE DATE INDICATED BELOW. IT WILL PERMIT THE EXAMINATION TO BE COMPLETED AS SOON AS POSSIBLE. THANK YOU FOR YOUR COOPERATION.

A. TAX RETURNS

1. COPIES of all Tax Returns and Information Return Forms filed:

- a. Form 1040, U.S. Income Tax Return for Individuals including all schedules and attached informational returns for the year 2008.
- b. Forms 1099 received by the taxpayer for the year 2008.
- c. Forms 1099 issued by the taxpayer for the year 2008.
- d. Forms 1065, U.S. Partnership Return of Income including all schedules and attached informational returns for the year 2008.
- e. Forms 1120 and 1120S, U.S. Corporate Income Tax Returns including all schedules and attached informational returns for the year 2008 for each corporation of which taxpayer owned or exercised control over more than 50 percent of the total combined voting power of all classes of stock or more than 50 percent of the total value of the stock of the corporation.
- f. Form 1120F, U.S. Income Tax Return of a Foreign Corporation including all schedules and attached informational returns for the year 2008 for each corporation of which the taxpayer owned or exercised control over more than 50 percent of the total combined voting power of all classes of stock or more than 50 percent of the total value of the stock of the corporation.
- g. Form 1041, U.S. Income Tax Return for Estates and Trusts, including all schedules and attached information returns for which the taxpayer was the administrator, executor, fiduciary, trustee, grantor, or a beneficiary for year 2008.
- h. Form 1040NR (used for foreign trusts), U.S. Nonresident Alien Income Tax Return, including all schedules and attached information returns for which the taxpayer was the administrator, executor, fiduciary, trustee, grantor, or a beneficiary for year 2008.
- i. Form 3520A, Annual Information Return of Foreign Trust With a U.S. Owner for year 2008 for which the taxpayer is or is treated as an owner.
- j. Form 3520, Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts for year 2008 for which the taxpayer is or is treated as an owner.
- k. Form 1042, Annual Withholding Tax Return for U.S. Sourced Income of Foreign Persons for year 2008.
- l. Form 1042S, Foreign Person's U.S. Source Income Subject to Withholding for year 2008.

Information Due By 4/18/11 At Next Appointment Mail In

FROM	Name and Title of Requestor Revenue Agent	Date: March 31, 2011
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Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 1
To: (Name of Taxpayer and Company, Division or Branch)	Subject Audit of 2008 1040 tax return	Submitted to:
	Submitted to:	Submitted to:
	Dates of Previous Requests:	Submitted to:

Description of Documents Requested:

- m. Form 5471, Information Return of a Person With Respect to Certain Foreign Corporations for year 2008.
- n. Form 5472, Information Return of a 25-percent Foreign-Owned Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business for year 2008.
- o. All amended tax returns and informational returns.

B. BANK RECORDS

2. For each bank account, in any name, whether foreign or domestic, over which the taxpayer had signature or other authority and/or over which the taxpayer exercised control, during the year 2008 produce all documents in the taxpayer's possession, custody, control including, but not limited to:
- a. account applications (regardless of date)
 - b. monthly or periodic statements
 - c. wire transfer authorizations and confirmations
 - d. deposit slips and deposited items
 - e. credit and debit memos and advices
 - f. cancelled checks
 - g. check registers
 - h. passbooks
 - i. loan applications (regardless of date)
 - j. promissory notes
 - k. certificates of deposit
 - l. letters of credit
 - m. cashiers checks
 - n. money orders
 - o. safe deposit box rental agreements (regardless of date)
 - p. safe deposit box visitation ledgers
 - q. all correspondence
 - r. memorandum files maintained by the bank or other financial institution or any of their officers or employees, reflecting communications between the bank and the taxpayer or others acting on the taxpayer's behalf, and documenting actions taken pursuant to directions received from the taxpayer or on the taxpayer's behalf; and reflecting any thoughts or decisions of the bank or its employees or officers regarding the account
 - s. documents verifying the origin of all funds used to open the accounts or deposited to these accounts (regardless of date)

Information Due By 4/18/11 At Next Appointment Mail In

FROM	Name and Title of Requestor Revenue Agent	Date: March 31, 2011
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Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 1
To: (Name of Taxpayer and Company, Division or Branch)		Subject: Audit of 2008 1040 tax return
		Submitted to:
		Dates of Previous Requests:

Description of Documents Requested:

3. For the 2008, provide all period statements for each bank account, whether foreign or domestic, under any name, over which the taxpayer had signature or other authority or over which the taxpayer exercised control.
4. For each bank account, whether foreign or domestic, under any name, over which the taxpayer had signature or other authority and/or over which the taxpayer exercised control during the year 2008 produce the Know Your Customer Account information given to the bank and/or financial institution by the taxpayer and/or on the taxpayer's behalf including, but not limited to, all account set up documents (regardless of the year), such as signature cards, opening deposit slips, passport copies, certificates of beneficial ownership, letters of reference, certificates of clean funds and/or other source of funds documentation.
5. For each Certificate of Deposit, Time Deposit, or equivalent account at a bank or financial institution, whether foreign or domestic, over which the taxpayer had signature authority or other authority or over which the taxpayer exercised control at any time during the year 2008 produce statements of certificates of deposit, records reflecting the purchase of the certificate, earnings, and records reflecting redemption or other disposition of the certificate. In addition, provide documents verifying the origin of all funds used to open these accounts or deposited to these accounts at any time.
6. For all transfers of funds during the year 2008 between all bank accounts, financial accounts, and other accounts over which the taxpayer had signature or other authority, or over which the taxpayer exercised control during the year 2008, provide the following:
 - a. list of transfers
 - b. documents showing the source of the funds transferred (e.g., copy of check—back and front, wire transfer authorizations, bank statement; source of cash deposit)
 - c. documents showing the deposit of the funds transferred (e.g., bank statement)
 - d. advice memos, correspondence or other direction the taxpayer sent or received regarding the transfers, withdrawals and deposits
7. All documents relating to foreign and domestic credit, debit, ATM or charge accounts over which the taxpayer had signature or other authority or over which the taxpayer exercised control for the year 2008, including, but are not limited to:
 - a. original cards (The IRS will make a copy of each card and return it to the taxpayer.)
 - b. card applications (regardless of date)

Information Due By 4/18/11 At Next Appointment Mail In

FROM	Name and Title of Requestor Revenue Agent	Date: March 31, 2011
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Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 1
To: (Name of Taxpayer and Company, Division or Branch)	Subject: Audit of 2008 1040 tax return	
	Submitted to:	
	Date of previous Requests:	

Description of Documents Requested:

- c. agreements (regardless of date)
- d. customer relationship records or other similar record identifying persons with signatory authority or other authority over the account (regardless of date)
- e. monthly or periodic charge statements
- f. charge receipts
- g. cash advance confirmations
- h. payments or funds transferred for balances due
- i. electronic payment and/or transfer records

C. BROKERAGE OR SECURITIES ACCOUNTS

1. For each brokerage or securities account, in any name, whether foreign or domestic, over which the taxpayer had signature, dealer or other authority or which the taxpayer controlled, either directly or through nominees, agents, powers of attorney, letters of direction, or any device whatsoever, during the year 2008 produce all documents in the taxpayer's possession, custody or control or to which the taxpayer had right of access for the period January 1, 2008 through December 31, 2008, including but not limited to:

- a. account application (regardless of date)
- b. signature cards (regardless of date)
- c. monthly or periodic account statements
- d. annual account summaries
- e. wire transfer authorizations and confirmations
- f. all correspondence, including but not limited to, letters, memoranda, telegrams, telexes, e-mail, and letters of instruction
- g. memorandum files maintained by the brokerage firm or any of their officers or employees, reflecting communications between the firm, their officers, or employees and the taxpayer or others acting on the taxpayer's behalf; documenting actions taken pursuant to directions received from the taxpayer or on the taxpayer's behalf; and reflecting any thoughts or decisions of any person regarding the account
- h. documents verifying the origin of all funds deposited in the account
- i. know-your-customer (KYC) files or other similar records maintained for anti-money laundering purposes (regardless of date), including but not limited to account set up documents, identification documents such as passports, driver's licenses, opening deposit slips, certificates of beneficial ownership, letters of reference, certificates of clean funds and other source of funds documentation.

D. OWNERSHIP

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FROM	Name and Title of Requestor Revenue Agent	Date: March 31, 2011
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Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 1
To: (Name of Taxpayer and Company, Division or Branch)	Subject: Audit of 2008 1040 tax return	
	Submitted to:	
	Dates of Previous Requests:	

Description of Documents Requested:

1. For each entity or structure—foreign or domestic—in which the taxpayer exercised control and/or held an ownership interest, legal interest, fiduciary interest, and/or beneficial interest at any time during year 2008, provide all documents relating to each entity, including but not limited to:
 - a. organizational documents, deeds of incorporation, by-laws, registrations (regardless of date)
 - b. ownership documents including those reflecting the taxpayer's percentage of legal ownership, percentage of beneficial ownership, and all changes in ownership (regardless of date)
 - c. operational and business documents
 - d. financial statements

2. For each entity or structure identified, provide all books and records for the year 2008, including, but not limited to:
 - a. monthly or periodic bank statements
 - b. articles of incorporation
 - c. memoranda of association
 - d. stock record book
 - e. minute book
 - f. partnership agreements
 - g. trust instruments and other formation documents
 - h. documents designating beneficiaries
 - i. documents designating trustees
 - j. documents designating protectors
 - k. documents designating partners
 - l. documents designating percentage ownership
 - m. contracts and agreements
 - n. records of brokerage or other investment accounts
 - o. records of assets and liabilities
 - p. powers of attorney, letters of wishes, letters of direction, or other similar documents granting authority to agents to act on behalf of the entity

3. For each entity or structure identified, provide all documents distributed, sent, and/or transmitted by or to any legal, fiduciary and/or beneficial owners to and from professionals (e.g., attorneys, accountants, bankers, trust

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LAW OFFICES
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Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 1
To: (Name of Taxpayer and Company, Division or Branch)	Subject Audit of 2008 1040 tax return <hr/> Submitted by <hr/> Dates of Previous Requests:	

Description of Documents Requested:

advisors, etc.) including, but not limited to, contracts, agreements, advisories, schedules, letters, memoranda, notes, and instructions.

4. For each entity or structure identified, provide the name, address and telephone number of the person(s) controlling the assets of the entity or structure during the year 2008.
5. All written contracts, agreements, letters, memoranda, notes, statements, and all other documents of the year 2008 pertaining to the assignment and transfer of ownership interest in and rights to use of real, personal or intangible property by or for the taxpayer or the taxpayer's benefit.
6. All powers of attorney giving the taxpayer authority to act on behalf of any person or entity, foreign or domestic, during the year 2008.
7. All powers of attorney executed by the taxpayer giving another the authority to act on the taxpayer's behalf or on behalf of any person or entity, whether foreign or domestic over which the taxpayer exercises control, during the year 2008.
8. All certificates of beneficial ownership, stock certificates, including bearer shares, or other similar evidences of ownership interests owned by the taxpayer at any time during the year 2008 with respect to any foreign trust, corporation, foundation, international business company, or similar entity.

E. NON-TAXABLE SOURCES OF INCOME

1. All records pertaining to any non-taxable sources of income, including, but not limited to, proceeds of loans, gifts, inheritances, insurance settlements, tax refunds, and tax-exempt interest the taxpayer received for year 2008.
2. For each loan, whether commercial or private, made or obtained by the taxpayer or on the taxpayer's behalf during the year 2008 or which was in existence during the year 2008, provide all documents evidencing the terms and performance of the transaction, including, but not limited to:
 - 1) loan applications (regardless of date)
 - 2) loan agreements and contracts (regardless of date)
 - 3) loan amortization schedules (regardless of date)
 - 4) promissory notes

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FROM	Name and Title of Requestor I Revenue Agent	Date: March 31, 2011
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Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 1
To: (Name of Taxpayer and Company, Division or Branch)	Subject: Audit of 2008 1040 tax return	Submitted to:
	Dates of Previous Requests:	

Description of Documents Requested:

- 5) grant deeds, deeds of trust, mortgages, or other security
- 6) documents showing disbursement of the loan proceeds (e.g., wire transfer authorization)
- 7) records of receipt of principal and interest
- 8) records of payment of principal and interest (e.g.,

F. TRAVEL

1. All of the taxpayer's original U.S. passports, both current and expired.
2. All of the taxpayer's original foreign passports, both current and expired.
3. All records of foreign travel during the year 2008, including, but not limited to, commercial transportation, private leasing, and vehicles/aircraft/boats owned by the taxpayer.

G. PROFESSIONALS

1. All financial statements prepared by the taxpayer, for the taxpayer, or on the taxpayer's behalf for any purpose during and/or for the year 2008.
2. Provide the name, address, telephone number of each private banker, broker, trust advisor, investment or other financial advisor, advisor on privacy matters, lawyer and accountant from whom the taxpayer received advice or services during the year 2008.
3. All business cards for attorneys, paralegals, consultants, accountants, and/or other professionals in the taxpayer's possession and/or within the taxpayer's control during year 2008.
4. All records relating to any payments in the year 2008 by or for the benefit of the taxpayer or any nonpublicly traded entity, foreign or domestic, in which the taxpayer held a direct or indirect ownership or beneficial interest or over which the taxpayer exercised control, either directly or through a nominee, agent, power of attorney, letter of direction, letter of wishes, or any device whatsoever, for:
 - a. management fees
 - b. consulting fees
 - c. research and development fees
 - d. legal fees

Information Due By 4/18/11 At Next Appointment Mail In

FROM	Name and Title of Requestor I Revenue Agent	Date: March 31, 2011
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Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 1
To: (Name of Taxpayer and Company, Division or Branch)	Subject: Audit of 2008 1040 tax return	
	Submitted to:	
	Dates of Previous Requests:	

Description of Documents Requested:

- a. brokerage fees
- f. other personal services fees
- g. salaries or wages
- h. insurance premiums
- i. royalties
- j. lease or rental fees
- k. loan fees
- l. interest

These records should include, but are not limited to:

- a. contracts or agreements
- b. invoices
- c. cancelled checks
- d. wire transfers
- e. letters of credit
- f. all correspondence

5. Identify all professional, social and civic organizations the taxpayer has been a member of from January 1, 2008 to present. Include in your response the following:

- name, telephone number and current address of the organization
- dates of membership
- offices held (and dates)
- membership number or other identifying numbers (e.g., State Bar Numbers, C.P.A. ID numbers)

6. If the taxpayer is a member of an organization with an oversight committee or disciplinary board, identify any complaints filed against you, including:

- name and address of the Complainant (if anonymous, so indicate)
- date of complaint
- specific allegations
- case or investigation number
- date and location of any hearing, including the tribunal you appeared before

Information Due By 4/13/11 At Next Appointment Mail In

FROM	Name and Title of Requestor Revenue Agent	Date: March 31, 2011
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LAW OFFICES
HOCHMAN, SALKIN, RETTIG, TOSCHER & PEREZ, P.C.
 Telephone (310) 281-3200 Facsimile (310) 859-1430
 www.taxlitigator.com

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 1
To: (Name of Taxpayer and Company, Division or Branch)	Subject: Audit of 2008 1040 tax return	
	Submitted to:	
	Dates of Previous Requests:	

Description of Documents Requested:

- copy of your written response
- disposition or result of investigation

INSTRUCTIONS FOR THIS REQUEST—READ CAREFULLY

1. The term "document(s)" is used in the broadest sense and includes all attachments. Document(s) includes any written, typed, photo static, recorded, or otherwise visually reproduced communications or presentations, whether comprised of letters, words, numbers, pictures, sounds, symbols, or any combination thereof. Document(s) refers to all written, printed, typed, graphically, visually or aurally reproduced material of any kind, or other means of preserving thought or expression, and all tangible things from which information can be processed or transcribed. Further, "documents" include, but are not limited to:

- a. Items designated as internal, confidential, "not to be disclosed" or private;
- b. All electronic mail (e-mail), whether on an electronic disk and/or any other system or device which saves e-mails, attachments, links; and
- c. Videotapes, audiotapes, CDs, cassettes, DVDs, films, flash drives (memory sticks, etc.), microfilm, computer files, computer discs, computer programs and other electronic media.

2. If a document has been prepared in several copies, or additional copies have been made, and the copies are not identical (or, by reason of subsequent modification or notation, are no longer identical), each nonidentical copy is a separate "document."

3. The taxpayer has "possession, custody, or control" if the taxpayer has actual or constructive possession of the document and/or can access the document upon inquiry and/or through a legal right to obtain the document.

4. All responsive documents in the taxpayer's possession, custody, or control should be provided, as well as all documents, in the possession, custody, or control of the taxpayer's agents, employees, and/or representatives,

Information Due By 4/18/11 At Next Appointment Mail In

FROM	Name and Title of Requestor I Revenue Agent	Date: March 31, 2011
	_____ Phon FAX	

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Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 1
To: (Name of Taxpayer and Company, Division or Branch)		Subject Audit of 2008 1040 tax return
		Submitted to:
		Dates of Previous Requests:

Description of Documents Requested:

including, but not limited to, responsive documents in the possession, custody, or control of taxpayer's lawyer(s), accountant(s), banker(s), advisor(s), and/or trust advisor(s).

5. If any responsive document was, but is no longer, in taxpayer's possession, custody or control, state what disposition was made of it, the reason for such disposition and who has possession or control of the document.

6. The term "taxpayer" means the individual under audit. The term "taxpayer" also means all foreign or domestic entities or structures over which the individual taxpayer exercises control including, but not limited to, corporations, partnerships, associations, limited liability companies, trusts, estates, foundations, escrows, charitable foundations, banks, and nominees.

7. A taxpayer can "exercise control" by acting directly or indirectly. Indirect control includes, but is not limited to, the use of nominees, agents, powers of attorney, protectors, advisors, trusts, letter of wishes, by-laws, letters of direction, or any device whatsoever.

8. The taxpayer has "signature or other authority" over an account if the taxpayer can control the disposition of money or other property in the account by delivery of a document containing the taxpayer's signature—either alone or with the signature of other person(s) and/or with code word(s) and/or code name(s)—to the bank or other person with whom the account is maintained, or if the taxpayer can exercise comparable authority over the account by direct or indirect communication with the bank or other person with whom the account is maintained, either orally or by some other means.

9. If the taxpayer claims a "privilege" for any document responsive to any request, or any part of such document, specify:

- a. name and title of the author;
- b. date appearing on such document or, if undated, the date or approximate dates such document was created;
- c. name and title of each addressee and of each recipients of the document and/or copies thereof;
- d. subject matter of the document;
- e. name and address of each persons having present possession, custody, or control of such document and/or copies thereof;
- f. privilege or protection claimed; and
- g. number of the request(s) to which the production of the document would otherwise be responsive.

Information Due By 4/18/11 At Next Appointment Mail In

FROM	Name and Title of Requestor Revenue Agent	Date: March 31, 2011
	Pho: FAX	Page 10

LAW OFFICES
HOCHMAN, SALKIN, RETTIG, TOSCHER & PEREZ, P.C.
 Telephone (310) 281-3200 Facsimile (310) 859-1430
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Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 1
To: (Name of Taxpayer and Company, Division or Branch)		Subject: Audit of 2008 1040 tax return
		Submitted to:
		Dates of Previous Requests: _____

Description of Documents Requested:

10. If you do not have one or more of the requested items or do not know the answer to one or more of the questions asked, but you know who does, please state the name, address, and phone number or other contact information for each such person in your response to the request or question.

Additional years and items can be added as audit issue(s), and additional records or documents may be requested as the examination progresses. Also, please retain all previously requested records or documents until your examination is completed.

Information Due By 4/13/11 At Next Appointment Mail In

FROM	Name and Title of Requestor Internal Revenue Agent	Date: March 31, 2011
	Phr FAJ	Page 11

When Penalties Are Excessive— The Excessive Fines Clause as a Limitation on the Imposition of the Willful FBAR Penalty

By Steven Toscher and Barbara Lubin

Steven Toscher and Barbara Lubin examine how the Excessive Fines Clause of the Eighth Amendment may limit the IRS's ability to impose an excessive FBAR penalty.

Over the last five years, international tax enforcement has become a high priority for the IRS, both as an outgrowth of the globalization of the U.S. economy and the realization that taxpayer compliance with our international tax regime is in need of improvement. The compliance problem is attributable to a number of factors, including the breadth and complexity of the U.S. tax regime, which imposes income tax on transactions that occur beyond our borders; the difficulty of enforcing compliance where documents, people and information are outside the United States; and what might be referred to as a historical and ingrained “Las Vegas” attitude of many taxpayers when it comes to disclosing their offshore transactions, that is, what happens overseas should stay overseas.

Congress attempted to increase compliance with international reporting in 2004 by drastically increasing the penalties imposed on U.S. taxpayers who “willfully” fail to report the existence of their foreign financial accounts. U.S. taxpayers are required to report the existence of certain foreign financial accounts on their federal income tax returns and are also required to file a Report of Foreign Bank and Financial Account, formally known as TD F 90-22.1,

and disclose the details of the account (hereinafter, “FBAR”).¹ The disclosure requirement is separate and apart from the duty to report and pay tax on the income earned on the account.

Failing to disclose an offshore account can subject a taxpayer to severe penalties. There are three separate monetary penalties authorized for FBAR reporting violations: (1) criminal fines for willful violations; (2) civil penalties for willful violations; and (3) civil penalties for nonwillful violations.² The statute authorizes the stacking of civil and criminal fines for the same violation.³ Since the first enactment of FBAR reporting obligations in 1970, up until the recent legislation under the American Jobs Creation Act of 2004,⁴ the civil penalty for willful violations could be up to \$100,000 per violation. Notwithstanding the fact that few, if any, penalties were ever imposed for violations during the almost 40-year history of the reporting requirement, Congress increased the civil penalty for willful violations to an amount up to the greater of \$100,000 or 50 percent of the balance in the account at the time of the violation.⁵

The legislative provision amending the FBAR penalties originated in the Senate and only included the addition of a penalty for nonwillful reporting violations. Only in the Conference Committee was the increased penalty for willful violations added to the legislation. The legislative history to the 2004 Jobs Act provides no rationale for increasing the willful FBAR penalty from a maximum of

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\$100,000—to an amount up to 50 percent of the foreign bank account. The legislative history focuses entirely on adding a penalty of up to \$10,000 for nonwillful FBAR reporting violations. As noted in the Senate Report:

The Committee understands that the number of individuals involved in using offshore bank accounts to engage in abusive tax scams has grown significantly in recent years. For one scheme alone, the IRS estimates that there may be hundreds of thousands of taxpayers with offshore bank accounts attempting to conceal income from the IRS. The Committee is concerned about this activity and believes that improving compliance with this reporting requirement is vitally important to sound tax administration, to combating terrorism, and to preventing the use of abusive tax schemes and scams. Adding a new civil penalty that applies without regard to willfulness will improve compliance with this reporting requirement.⁶

It appears Congress was concerned with taxpayers not complying with their foreign reporting obligations and took the legislative leap to conclude that increasing the penalty, to what amounts to draconian levels, would fix the problem. It might help, but what Congress did not consider were the constitutional limits on imposing excessive penalties in an effort to change taxpayer behavior. These limits and protections go back to the origins of our republic and were born out of the excessive fines imposed by the unlimited power of the King. Fortunately, we have a Constitution that limits the government's ability to punish—including limitations on draconian financial penalties for even willful noncompliance with the laws.

As discussed in detail below, the Excessive Fines Clause of the Eighth Amendment to the Constitution require that any fine—including the FBAR penalty—be “proportionate” to the conduct it seeks to punish, provides real limitations on the government's ability to impose an excessive FBAR penalty. The case law developed under the Excessive Fines Clause also provides a meaningful structure—through a proportionality analysis—of how the IRS must exercise its discretion in imposing the FBAR penalty, in order to avoid running afoul of the Constitution by imposing the type of excessive penalties that the Eighth Amendment sought to banish to medieval English history.

The Excessive Fines Clause of the Eighth Amendment

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Supreme Court has explained that the Excessive Fines Clause “limits the government's power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’”⁷ “The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.”⁸ “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”⁹

The Forfeiture Cases

The applicability of the Excessive Fines Clause to the FBAR penalty can be found in the case law applying the clause to the government's efforts to forfeit property connected with criminal activity. While the Supreme Court has interpreted the Excessive Fines Clause on only a few occasions over its more-than-200-year history, these cases indicate that a civil penalty or forfeiture is unconstitutional if the penalty or forfeiture is at least in part “punishment” and that punishment is grossly disproportionate to the conduct which the penalty is designed to punish.

The Supreme Court considered the Excessive Fines Clause in *R.L. Austin*, where it held that the Clause applied to certain forfeitures by the federal government. In *Austin*, the Supreme Court held that the Excessive Fines Clause applied to forfeitures of property under 21 USC §881(a)(4) and (7), and remanded for a determination of whether the forfeiture was excessive.¹⁰

The Supreme Court made clear that to come within the ambit of the Excessive Fines Clause, the forfeiture could in part serve a remedial purpose; it was only necessary for the forfeiture to be in part punishment. In evaluating whether the Excessive Fines Clause applied, the Supreme Court explained: “We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained

as serving in part to punish.”¹¹ The Court evaluated the history of forfeiture as well as the particular forfeiture statutes at issue, and found punishment to be an aspect of these forfeitures. For instance, there was an innocent owner defense, and the relevance of the culpability of the owner made the statutes look more akin to punishment.¹²

While *Austin* dealt with forfeitures and not a fine or penalty such as the FBAR penalty, the label is not what is determinative. What counts is whether the imposition of the penalty has a punitive element to it, and one can have no doubt that an FBAR penalty equal to 50 percent of the taxpayer’s foreign bank account will be punitive in most factual situations under any reasonable understanding of the word “punishment.”

Having determined that the Excessive Fines Clause could apply to a forfeiture in *Austin*, the Court took the next step in *H.K. Bajakajian* and found that if a forfeiture was grossly disproportionate to the conduct it sought to punish that it was indeed unconstitutional. In *Bajakajian*, the Supreme Court held that forfeiture of \$357,144, under 18 USC §982(a)(1), in connection with a criminal conviction for willfully failing to report that he was transporting more than \$10,000 out of the United States in violation of 31 USC §5316(a)(1)(A), violated the Eighth Amendment’s Excessive Fines Clause.¹³ “The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”¹⁴ “Although the Government has asserted a loss of information regarding the amount of currency leaving the country, that loss would not be remedied by the Government’s confiscation of [Bajakajian]’s \$357,144.¹⁵ “[F]ull forfeiture of [Bajakajian]’s currency would be grossly disproportional to the gravity of his offense.”¹⁶

In many cases, the application of the 50-percent FBAR penalty will be grossly disproportionate to the conduct sought to be punished and should suffer the same fate as the forfeiture in *Bajakajian*. For example, assume an individual willfully failed to report the existence of a foreign bank account with a balance of \$2 million and for which there was unreported tax of \$150,000.¹⁷ The IRS could assert a penalty of up to 50 percent of the account balance for each year in which there was a willful failure to report. Assuming the IRS asserted a penalty of 50 percent for one year or a penalty of \$1 million, the penalty seems grossly disproportionate to the conduct sought to be punished. This is especially true if the taxpayer was also required to pay a civil fraud penalty on the unpaid tax which was evaded.

In determining that the forfeiture was excessive in *Bjakajian*, the Supreme Court reviewed the penalty structure under the Federal Sentencing Guidelines to determine the seriousness of the offense. The Supreme Court determined that under the Guidelines, the period of incarceration was five months and the fine was up to \$5,000 comparatively and that a forfeiture of \$347,000 was disproportionate under the Eighth Amendment. The Supreme Court affirmed the lower courts determination that a forfeiture of \$15,000 and a \$5,000 fine was proportionate and constitutional.

Halper

The Supreme Court’s decision in *Halper* lends support to the conclusion that the willful FBAR penalty constitutes punishment and is subject to proportionality limitations.¹⁸ Like the constitutional inquiry pursuant to the Excessive Fines Clause, analysis under the Double Jeopardy Clause also distinguishes between sanctions that constitute punishment and those that do not. In *Halper*, the Supreme Court held that where the amount of the fine bears no rational relation to the government’s loss, the fine constituted punishment that unconstitutionally violated the Double Jeopardy Clause when imposed subsequent to a criminal conviction for the same act.¹⁹ The Court found that imposition of a fine in excess of \$130,000 to be sufficiently disproportionate when compared to the government’s costs of approximately \$16,000.²⁰ Although *Halper* was largely disavowed for purposes of Double Jeopardy analysis in *J. Hudson*,²¹ it is still viable precedent with respect to how the Court evaluates whether a civil penalty constitutes punishment for constitutional purposes. *Halper* was largely overruled by *Hudson* because the Supreme Court determined that the Double Jeopardy Clause limited successive prosecutions—not successive punishments.²² Indeed, in Justice Breyer’s concurrence in *Hudson*, he noted that, “the Court in *Halper* might have reached the same result through application of the constitutional prohibition of “excessive fines.”²³

The Tax Penalty Cases

The constitutionality of a tax penalty and whether it constitutes punishment has been before the Supreme Court before but not in the context of the Excessive Fines Clause. The seminal case with regard to the civil fraud penalty and whether it constitutes punishment was *Helvering v. Mitchell*.²⁴ Although *Mitchell* was a

Double Jeopardy case, the Supreme Court analyzed whether the civil fraud penalty was punishment (thus implicating the Double Jeopardy Clause) or purely remedial in character and not punishment. In finding that the civil fraud penalty was remedial in character, the Court stated:

The remedial character of sanctions imposing additions to a tax has been made clear by this Court. ... They are provided primarily as a safeguard for the protection of the revenue and reimburse the government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.²⁵

The government will be hard pressed to demonstrate that the 50-percent FBAR penalty for "willful" failures is anything but punishment—especially where it is imposed in addition to the civil fraud penalty. Moreover, the Supreme Court's subsequent punishment analysis in *Austin* and *Bajakajian* suggests that *C.E. Mitchell's* punishment analysis is limited to tax penalties imposed under the Internal Revenue Code and is not applicable to a penalty imposed under Title 31—like the FBAR penalty.

Even with respect to tax penalties, a number of courts have revisited the application of "punishment analysis" in the wake of *Austin*, and have "recognized that ... it is now possible for forfeitures and fines in civil cases to be regarded as punitive exactions, thus implicating the [Excessive Fines Clause]."²⁶ The taxpayers in *T.H. McNichols*, *P.L. Thomas* and *W.D. Little* each challenged the civil penalty imposed under the Internal Revenue Code as punishment under the *Excessive Fines Clause*. The courts of appeals all suggested that the Excessive Fines Clause must be considered, but found that the imposition of these civil tax penalties did not violate the Excessive Fines Clause in those cases because "the additions to tax at issue in [these] case[s] are purely revenue raising because they serve only to deter noncompliance with the tax laws by imposing a financial risk on those who fail to do so."²⁷ The Fourth Circuit in *Thomas* explained that the penalty, being based on the taxpayer's individual tax deficiency, essentially protects the penalty from being excessive.²⁸ "If the addition to tax is always calculated as fifty percent of the tax deficiency ... the sanction could not be excessive as to one person, but not excessive as to another."²⁹ By contrast, the FBAR penalty is based on the value of the account rather than on the tax deficiency.

The FBAR Penalty Is Punishment and Not Purely Remedial

In order to be subject to the Excessive Fines Clause, the FBAR penalty for willful reporting violations must, at least in part, be punishment.³⁰ If it is solely remedial it is not subject to the Excessive Fines Clause.³¹ Like in *Austin*, the lack of culpability of the owner was a defense to forfeiture under those statutes, and the civil FBAR penalty that provides for 50 percent of the account to be taken demands willfulness on the part of the taxpayer. This *mens rea* component in both the forfeiture statutes and the FBAR civil penalty is consistent with punishment.³²

The FBAR civil penalty for willfulness has much more in common with the penalty for the reporting offense in *Bajakajian* than with the civil penalties in the tax cases. In *Bajakajian*, like application of the FBAR penalty, the penalty is simply based on how much currency the individual happened to have in his suitcase or bank account—which may have little to do with the culpability of the taxpayer.

In the context of a willful FBAR violation, an individual who failed to report \$10 million would be subject to a penalty of \$5 million, whereas an individual who committed the same violation, but only had \$1 million in the bank would be penalized \$500,000. Unlike the tax penalty held to be constitutional in *Mitchell* because of its correlation to the tax loss involved, the willful FBAR penalty has no correlation to the amount of the Government's tax loss and suffers the same constitutional problem as the forfeiture in *Bajakajian*.

Proportionality Test as Applied to FBAR Penalty

Since the willful FBAR penalty is at least in part punishment, the Supreme Court's proportionality analysis under the Excessive Fines Clause (and the Double Jeopardy Clause) should be applied in determining whether the penalty is excessive and therefore unconstitutional.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."³³ The standard, as articulated by the Supreme Court, follows: "[A] punitive forfeiture violates the Excessive Fines Clause if it is

grossly disproportional to the gravity of a defendant's offense."³⁴ In finding the forfeiture grossly disproportional to the gravity of Bajakajian's offense, the Court stated: "Respondent's crime was solely a reporting offense. It was permissible to transport the currency out of the country so long as he reported it."³⁵ Also, the "violation was unrelated to any other activities" and "[he] does not fit into the class of persons for whom the statute was principally designed: He is not a money launder, a drug trafficker, or a tax evader."³⁶ In addition, the maximum sentence that could have been imposed on Bajakajian was six months with the maximum fine being \$5,000.³⁷

The lower courts have been applying the Supreme Court's proportionality analysis in an effort to place some constitutional limits on the government's ability to exact forfeitures. For example, in *M. Varrone*,³⁸ in an opinion written by Judge (now Justice) Sotomayor, the following *Bajakajian* factors were used in evaluating the amount of the forfeiture:

- "The essence of the crime" of the [defendant] and its relation to other criminal activity
- Whether the [defendant] fit into the class of persons for whom the statute was principally designed
- The maximum sentence and fine that could have been imposed
- The nature of the harm caused by the [defendant's] conduct

Following *Bajakajian*, Congress amended the statute governing forfeitures to include a proportionality analysis. Title 18, Section 983 (g) provides:

(g) Proportionality.(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense

giving rise to the forfeiture.(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

The IRS has promulgated mitigation guidelines in the Internal Revenue Manual to promote consistency and guide its agents in administering the FBAR penalty.³⁹ The mitigation guidelines were originally developed before the increase in the amount of the willful penalty to up to 50 percent of the unreported account. And while updated, the mitigation guidelines do not take into account how excessive the FBAR penalty can be on large accounts in comparison to the conduct, *i.e.*, the tax loss sought to be punished. The mitigation guidelines need to be further updated to take into account the proportionality analysis required by the Excessive Fines Clause of the Eighth Amendment which includes consideration of the nature and amount of tax loss involved.

Conclusion

There is no doubt that increased tax compliance for foreign transactions is a laudable goal. When one taxpayer pays less, we all pay more. However, the punishment must fit the crime and the civil penalty must be proportionate to the conduct involved.

The IRS has the discretion under the statute to insure that the penalty imposed fits the conduct involved and should insure that its discretion is exercised consistent with the Excessive Fines Clause of the Constitution.

ENDNOTES

¹ The FBAR reporting requirement is part of the Bank Secrecy Act, 31 USC §5311 *et seq.* For a more detailed discussion of the FBAR reporting requirements, penalties, procedures and defenses, see Steve Toscher and Michel R. Stein's articles: *FBAR Enforcement is Coming!* J. TAX PRACTICE & PROCEDURE, Dec. 2003–Jan. 2004; *FBAR Enforcement—An Update*, J. TAX PRACTICE & PROCEDURE, Apr.–May 2006; and *FBAR Enforcement—Five Years Later*, J. TAX PRACTICE & PROCEDURE, June–July 2008.

² See 31 USC §5322 and 31 USC §5321(a)(5).

³ 31 USC §5321(a)(7)(D).

⁴ American Jobs Creation Act of 2004 (P.L. 108-357).

⁵ 31 USC §5321(a)(5)(C)

⁶ Senate Committee Report (S. REP. NO. 108-192, Pub. Law 108-357).

⁷ *R.L. Austin*, 509 US 602, at 609–10 (1993) (citations omitted).

⁸ *Id.*, at 610 (*citing Halper*, 490 US 435, 447–48 (1989)).

⁹ *H.K. Bajakajian*, 524 US 321, 334 (1998) (*citing Austin*, *supra* note 7, at 622–23).

¹⁰ *Austin*, *supra* note 7, 509 US, at 604.

¹¹ *Id.*, at 610.

¹² *Id.*, at 619.

¹³ *Bajakajian*, *supra* note 9, 524 US, at 324.

¹⁴ *Id.*, at 334.

¹⁵ *Id.*, at 329.

¹⁶ *Id.*, at 324.

¹⁷ For purposes of the Eighth Amendment analysis, we can assume the government can establish that the failure to file the FBAR was willful and even that the taxpayer was convicted of a felony for his or her failure to file the form and to evade the tax on the income from the account.

¹⁸ *Halper*, *supra* note 8.

¹⁹ *Id.*, at 448–49.

ENDNOTES

- ²⁰ *Id.*, at 452.
- ²¹ *J. Hudson*, 522 US 93 (1997).
- ²² *Id.*, at 95–96.
- ²³ *Id.*, at 116 (Breyer’s concurrence).
- ²⁴ *C.E. Mitchell v. Helvering*, SCt, 38-1 USTC ¶9152, 303 US 391 (1938).
- ²⁵ *Id.*, at 401.
- ²⁶ *P.L. Thomas*, CA-4, 95-2 USTC ¶50,439, 62 F3d 97, 99. *See also W.D. Little*, CA-9, 97-1 USTC ¶50,207, 106 F3d 1445; *T.H. McNichols*, CA-1, 94-1 USTC ¶50,005, 13 F3d 432.
- ²⁷ *Little*, *supra* note 26, at 1454 (citations omitted).
- ²⁸ *Thomas*, *supra* note 26, at 103.
- ²⁹ *Id.*
- ³⁰ *Austin*, *supra* note 7, at 610, 618, note 12.
- ³¹ *Id.*
- ³² *See Austin*, *supra* note 7, 619.
- ³³ *Bajakajian*, *supra* note 9, at 334 (citations omitted).
- ³⁴ *Bajakajian*, *supra* note 9, at 334.
- ³⁵ *Bajakajian*, *supra* note 9, at 337.
- ³⁶ *Bajakajian*, *supra* note 9, at 338.
- ³⁷ *Id.*
- ³⁸ *M. Varrone*, CA-2, 554 F3d 327 (2009).
- ³⁹ *See* INTERNAL REVENUE MANUAL §4.26.16.4.6 (July 1, 2008) (Mitigation).

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