new york state society of
NYSSCPA
certified public accountants

Home of the Trusted Professional
3 park avenue, at 34th street, new york, ny 10016-5991
212.719.8300 • fax 212.719.3364
www.nysscpa.org

October 5, 2009

Ms. Adrienne Mikolashek
Internal Revenue Service
CC:PA:LPD:PR (Notice 2009-62)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

By e-mail: notice.comments@irscounsel.treas.gov

Re: Comments on Revisions to Report of Foreign Bank and Financial Accounts (FBAR)
(IRS Notice 2009-62)

The New York State Society of Certified Public Accountants, representing 30,000 CPAs in public practice, industry, government and education, submits the following comments to you regarding the revised FBAR form and instructions. The NYSSCPA thanks the Internal Revenue Service for the opportunity to comment.

The NYSSCPA's International Taxation Committee deliberated the revisions and drafted the attached comments. If you would like additional discussion with us, please contact Mitchell Sorkin, Chair of the International Taxation Committee, at (212) 832-0400, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

Sincerely,

David J. Moynihan
President

Attachment

cc: Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, VA 22183
By e-mail: regcomments@fincen.gov

new york state society of
NYSSCPA
certified public accountants

Home of the Trusted Professional
3 park avenue, at 34th street, new york, ny 10016-5991
212.719.8300 • fax 212.719.3364
www.nysscpa.org

**NEW YORK STATE SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS**

COMMENTS ON REVISIONS TO REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS (FBAR) (IRS NOTICE 2009-62)

October 5, 2009

Principal Drafters

**Joseph M. Falbo, Jr.
Melissa S. Gillespie
Kevin Matz**

NYSSCPA 2009 – 2010 Board of Directors

David J. Moynihan, *President*
Margaret A. Wood, *President-elect*
Joseph M. Falbo Jr., *Secretary/Treasurer*
Elliot A. Lesser, *Vice President*
Mark L. Meinberg, *Vice President*
C. Daniel Stubbs, Jr., *Vice President*
Liren Wei, *Vice President*
Louis Grumet, *ex officio*
Scott M. Adair
Cynthia D. Barry
John Barone
Susan M. Barossi
S. David Belsky
Ian J. Benjamin
Anthony Cassella
Sherry L. DelleBovi
Adrian P. Fitzsimons
Robert L. Goecks
David R. Herman
John B. Huttlinger, Jr.
Martha A. Jaeckle
Suzanne M. Jensen
Robert Kawa
Gail M. Kinsella
Nancy A. Kirby
J. Michael Kirkland
Mark G. Leeds
Heather Losi
Anthony J. Maltese
Barbara A. Marino
Avery E. Neumark
Joel C. Quall
Ita M. Rahilly
Erin Scanlon
Thomas M. VanHatten
George I. Victor
Charles J. Weintraub
Jesse J. Wheeler

NYSSCPA 2009 – 2010 Tax Division Oversight Committee

Alan D. Kahn, *Chair*
Scott M. Cheslowitz, *Vice Chair*
Robert L. Goldstein
Adam Lambert
Charles N. Morrow
David Sands
Susan R. Schoenfeld
P. Gerard Sokolski
Neil H. Tipograph
Stephen P. Valenti
Cristina N. Wolff

NYSSCPA 2009 – 2010 International Taxation Committee

Mitchell Sorkin, *Chair*
Melissa S. Gillespie, *Vice Chair*
Peter D. Baum
Allen M. Beck
Nancy L. Berk
Scott M. Blish
William B. Blumenthal
James P. Booth
Susan L. Brown Otto
Thomas A. Butera
Lilly C. Cappucio
Ronald Carlen
James Cassidy
Anthony Chen
Peter G. Chen
Itzhak Cohen
Paul Dailey
Mary Ann R. Ellis
Mark L. Farber
Louis E. Feinstein
Thomas J. Flattery
Peter H. Frank
Julia P. Gowe
F. Wayne Holton
Eileen Horton
Richard W. Margaroli
Kevin Matz
Richard D. Nichols
Monica A. Ranniger
Thomas V. Ruta
Stanley G. Sherwood
Lawrence E. Shoenthal
David Silversmith
Marc J. Strohl
Ann-Christine Westerlund
Cristina N. Wolff
Jeffrey Yolles

NYSSCPA Staff

Ernest J. Markezin
William R. Lalli

New York State Society of Certified Public Accountants

Comments on Revisions to Report of Foreign Bank and Financial Accounts (FBAR) (IRS Notice 2009-62)

Our comments are made with the goal of efficiency as it relates to both tax practitioners and the Internal Revenue Service (IRS) and Department of the Treasury. Our comments specifically address the points requested in the Notice, reproduced below, as the introduction to each paragraph.

The Department of the Treasury requests comments regarding when a person with signature authority over, but no financial interest in, a foreign financial account should be relieved of filing an FBAR for the account. For example, comments are requested regarding whether relief from filing would be appropriate if a person with a financial interest in the account has filed an FBAR.

We propose that the Filer with the financial interest ("Primary Filer") have the responsibility to file the FBAR. The FBAR should be revised to include a list of all those individuals with signature authority only ("Secondary Filers"). There will be a box to check if the Primary Filer has signature authority over the account(s) reported. A copy of the filed FBAR should be sent to each Secondary Filer. The Primary Filer should file the FBAR with the Department of Treasury and send a copy to the Secondary Filer by April 30th. Therefore, if a copy of the FBAR is not received by the Secondary Filer soon after the due date of April 30th, the responsibility shifts to the Secondary Filer to file the FBAR by June 30th.

If the Primary Filer does not send a copy of the completed and filed FBAR to the Secondary Filers on a timely basis, the presumption is that the Primary Filer did not file, and the responsibility to file the FBAR would shift to the Secondary Filers. The current penalties would stay in place and would apply to the Primary Filer if not properly filed, and shift to the Secondary Filer if not properly filed. As stated above, the FBAR form should be revised, as appropriate, to include a section to list the Secondary Filers and to revise the section that the Primary Filers must complete to include a box to check that indicates whether the Primary Filer has signature authority over the account(s).

Consolidated filing should be allowed for those filers who have signature authority over more than 25 accounts. The requirement can be the same as for the consolidated reporting for filers who have a financial interest in more than 25 accounts.

The Department of the Treasury requests comments discussing in what circumstances the exception from FBAR filing currently available for officers and employees of banks and certain publicly-traded domestic companies might be expanded to apply to all officers and employees with only signature authority over, and no financial interest in, an employer's foreign financial account, including circumstances in which an individual has been advised that an FBAR has

been filed with respect to a foreign financial account for which that person has signature authority. The Department of the Treasury also requests comments discussing how the bank and publicly-traded company exception (including the requirement of notification that an FBAR was filed by a U.S. person with a financial interest in the account) might apply to officers and employees with only signature authority over accounts owned by clients of their employer.

The exception currently available for officers and employees of banks and certain publicly-traded domestic companies should be available for companies with $10,000,000 or less in assets or less than 500 shareholders. Different thresholds and different requirements could be established. For example, if a company has assets between $5,000,000 and $10,000,000, or between 25 and 500 shareholders, its officers and directors may be exempt from filing their own form if they are notified in writing by the chief financial officer of the company that the FBAR has been filed. If a company has $5,000,000 or less in assets or less than 25 shareholders, the Primary Filer/Secondary Filer rules outlined above may be followed.

Currently, there is a consolidated filing mechanism in place that allows a filer who has a financial interest in 25 or more foreign financial accounts to file a consolidated report. As stated above, this consolidated filing procedure should likewise be instituted for filers who solely possess signature authority over 25 or more accounts. This consolidated procedure should also apply to officers and employees with signature authority only over accounts owned by clients of their employer. The threshold in such situations should be lowered from 25 or more accounts to 10 or more accounts. A separate question could be added to the FBAR to elicit this information. [1]

The Department of the Treasury requests comments concerning when an interest in a foreign entity (e.g., a corporation, partnership, trust, or estate) should be subject to FBAR reporting. For example, comments are requested regarding the possibility of applying the principles of sections 1297 and 1298(b) of the Internal Revenue Code to determine when an interest in a foreign entity should be subject to FBAR reporting. Comments are also requested regarding whether the passive asset and passive income thresholds of 50 percent and 75 percent, respectively, are appropriate and whether the tests should apply conjunctively.

A similar procedure to that outlined above should be established for corporations, partnerships, and trusts and estates. There should be Primary Filers and Secondary Filers. For example, the officers of corporations, the General Tax Matters Partners of Partnerships, the Trustees of Trusts and the Executors of Estates, should be considered the Primary Filer on behalf of an entity. The distinction between the example above and this example is that there may be other Primary Filers, such as, the U.S. shareholders of a foreign corporation who also are considered Primary Filers.

[1] Consideration should also be given to the special circumstances that are presented by US persons who are employees who work in non-blacklisted countries and possess solely signature authority as a matter of convenience for their private individual clients (and such clients' closely held companies) that are not affiliated with any person or entity that is engaged in a trade or business in the United States. Otherwise, the FBAR reporting requirement could unfairly subject such US persons to discrimination in the global marketplace without furthering any significant tax or law enforcement objectives. It may be possible to address this on a country-by-country basis via income tax treaty.

There should be one principal filing with one party on whom the primary responsibility is imposed (the corporate officers, etc.) to file the FBAR and to report the foreign bank account, investments, *etc*. and to report anyone else who has a filing requirement, *i.e.*, other Primary Filers, such as U.S. shareholders who own greater than 50% of the corporation's stock; U.S. owners of greater than 50% of a partnership's interests in profits or capital; and U.S. owners of present beneficial interests in more than 50% of the assets or income of trusts. A copy of this filed FBAR would be sent to the Primary and Secondary Filers.

In addition, the passive foreign investment company (PFIC) principles that are set forth, *inter alia*, in sections 1297 and 1298(b) of the Internal Revenue Code (including the 50% passive assets and 75% passive income tests under section 1297(a)) should not be used as a benchmark for determining whether an interest in a foreign entity should be subject to FBAR reporting. In our experience, U.S. investors can have tremendous difficulty obtaining financial information from foreign entities that they do not control. The inability of U.S. investors to obtain such financial information manifests itself in the limited frequency in which U.S. investors in foreign mutual funds are able to qualify to make a qualified electing fund (QEF) election under section 1295 of the Internal Revenue Code (notwithstanding the substantial benefits of QEF elections in most instances to avoid the harsh tax rules that can otherwise apply to U.S. persons who invest in PFICs). Applying PFIC testing and definitional principles to the FBAR context would fail to generate additional transparency through FBAR reporting, and would add significantly to the administrative complexity.

The Department of the Treasury also requests comments on whether a U.S. person should be relieved from an FBAR filing requirement with respect to a foreign commingled fund in other circumstances, such as when filing would be duplicative of other reporting.

In situations in which a financial institution or brokerage house is serving as custodian for an investment in a foreign commingled fund, the reporting requirement should be placed upon the custodian. If there is no such custodian, the foreign fund itself could be assigned the filing responsibility (although enforcement of such requirement upon the foreign commingled fund could pose practical difficulties). The custodian would be required to provide the necessary information in a report on each U.S. investor who meets a certain dollar threshold. The filing could include all the applicable investors in the offshore funds and the necessary information as it pertains to the specific investment.

Shifting the filing responsibility to the custodian of the foreign commingled fund (or the foreign commingled fund itself) consolidates the filing obligations upon the parties to whom the necessary information is more readily available, and eliminates the undue burden that would otherwise be imposed upon individual taxpayers to gather information concerning funds for which they may lack the legal or practical ability to compel the production of the requested information. It further eliminates the resulting administrative complexity (and cost) to the IRS of having to match duplicative filings for the same foreign commingled fund. The due date for this filing should remain June 30.

Alternatively, if it is determined that an investment in an offshore fund is considered an investment in a foreign commingled fund, and the procedures as outlined immediately above as they relate to the custodian being responsible for the filing are not adopted, this information should only be reported on the Form 8621. The Form 8621 should be revised to include a separate page that gathers the required FBAR information along with a disclaimer section in which the taxpayer checks off that this information, which is provided solely for FBAR purposes, may be utilized as if a separate Form 90-22.1 filing. Either the IRS or the individual could forward a copy of this page of the Form 8621 to the Department of the Treasury. By revising the current Form 8621 and including this information within the form and within the taxpayers' income tax filing, it eliminates the duplicative filing of information and the unnecessary and time consuming process of filing and reviewing a separate Form 90-22.1 filing and deadline.

Finally, it would be extremely helpful if the IRS were to issue clear and definitive guidance, with comprehensive examples, of what is considered a commingled fund. These examples of reporting must address not only who has the obligation to file, but also how to report, for example, the maximum value of foreign securities, the value of hedge funds or commingled funds, etc. Such guidance would prove extremely helpful to both practitioners and Treasury alike.