Excerpt from eBook

The IRS/Panama Papers - Money Laundering and Tax Evasion

FBAR

Prepared by:
Gary S. Wolfe
THE WOLFE LAW GROUP

LORMAN EDUCATION SERVICES
September 2016

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you UNLIMITED access to Lorman's ever-growing library of training resources:

- ☑ **Unlimited Live Webinars** - 120 live webinars added every month
- ☑ **Unlimited OnDemand and MP3 Downloads** - Over 1,500 courses available
- ☑ **Videos -** More than 700 available
- ☑ **Slide Decks -** More than 1700 available
- ☑ **White Papers**
- ☑ **Reports**
- ☑ **Articles**
- ☑ **... and much more!**

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.

Get Your All-Access Pass Today!

SAVE 20%

Learn more: **www.lorman.com/pass/?s=special20**

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

THE WOLFE LAW GROUP

Gary S. Wolfe has over 34 years of experience, specializing in IRS Tax Audits and International Tax Matters including: International Tax Planning/Tax Compliance, and International Asset Protection.

As of July 2016, Gary Wolfe has internationally published 15 books and 28 articles. Gary has received 14 international tax awards from five different Global expert societies in LONDON/UK including being voted one of the 100 leading world's law firms with votes from over 150,000 voters in over 160 countries with the following award: Global 100 (2016) (KMH Media Group) - CA/US International Tax Planning Law Firm of the Year.

For more information please visit our website: gswlaw.com

Gary S. Wolfe, A Professional Law Corporation
6303 Wilshire Blvd., Suite 201
Los Angeles, CA, 90048
Tel: 323-782-9139
Email: gsw@gswlaw.com

Chapter 35 – FBAR

Ownership of Accounts

Under the instructions to Form TD F 90-22.1, a U.S. person has a financial interest in a bank, securities, or other financial account in a foreign country under either of the following circumstances:

1. A U.S. person is the owner of record or has legal title, whether the account is maintained for his or her own benefit or for the benefit of others including non-U.S. persons. If an account is maintained in the name of two persons jointly, or if several persons own a partial interest in an account, each of those U.S. persons has a financial interest in that account.

2. U.S. person has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is:

a) A person acting as an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person;

b) A corporation in which the U.S. person owns directly or indirectly more than 50 percent of the total value of shares of stock;

c) A partnership in which the U.S. person owns an interest in more than 50 percent of the profits (distributive share of income); or

d) A trust in which the U.S. person either has a present beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.

Signature Authority

For purposes of Form TD F 90.22-1, a U.S. person is considered to have signature authority over a foreign financial account if such person can control the disposition of money or other property in the account by delivering his or her signature (or his or her signature and that of one or more other persons) to the bank or other person maintaining the account.

In addition, a U.S. person has “other authority” subject to FBAR reporting if such person can exercise comparable power over an account by direct communication to the bank or other person maintaining the account, either orally or by some other means.

Exceptions & Mechanics of Filing

Exceptions

Notwithstanding the general rules, Form TD F 90.22-1 is not required to be filed under the following circumstances:

1. An officer or employee of a bank which is subject to the supervision of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, or the Federal Deposit Insurance Corporation need not report that he has signature or other authority over a foreign bank, securities or other financial account maintained by the bank, if the officer of employee has NO personal financial interest in the account.

2. An officer or employee of a domestic corporation whose equity securities are listed upon national securities exchanges or which has assets exceeding $10 million and 500 or more shareholders of record need not file such a report concerning the other signature authority over a foreign financial account of the corporation, if he has NO personal financial interest in the account and he has been advised in writing by the chief financial officer of the corporation that the corporation has filed a current report, which includes that account.

3. As noted above, a U.S. person is not required to report any account maintained with a branch, agency, of other office of a foreign bank or other institution that is located in the United States, Guam, Puerto Rico, and the Virgin Islands.

Mechanics of Filing

Reporting on Form TD F 90-22.1 is required for each calendar year that a U.S. person maintains such interest or authority over foreign financial accounts. Persons having a financial interest in 25 or more foreign financial accounts are required only to note that fact on the form, i.e. a general statement indicating that information on all such accounts will be available upon request. (31 CFR § 103.24 Such persons will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.)

The Form TD F 90-22.1 is filed with the U.S. Department of the Treasury, P.O. Box 32621, Detroit, MI 48232-0621, or it may be hand carried to any local office of the Internal Revenue Service for forwarding to the Department of the Treasury in Detroit, MI. The Form TD F 90¬-22.1 must be filed on or before June 30 each calendar year. An extension for filing one's U.S. income tax return does not extend the deadline for making a TD F 90-22.1 filing.

Additional Issues

Each U.S. person subject to this reporting requirement must also maintain records showing, (1) the name in which each such account is maintained, (2) the number or

other designation of such account, (3) the name and address of the foreign bank or other person with whom such account is maintained, and (4) the type of such account, and the maximum value of each such account during the reporting period (31 CFR §103.32). These records must be retained for a period of 5 years and must be kept at all times available for inspection as authorized by law.

Artwork and Foreign Land

*On 6/24/09, the IRS updated their Voluntary Disclosure FAQ clarifying the FBAR reporting requirements for foreign land and artwork owned in the taxpayer's own name.

In FAQ #37, the IRS confirmed that the FBAR filing for foreign land and artwork owned in the taxpayer's own name, is due once the asset becomes income-producing (i.e., yields current income, or gain from the sale).

If the foreign land/artwork is held in an entity, the taxpayer is required to file tax information returns (Trust: Form 3520) (Corporation: Form 5471).

Re: FAQ 20 A taxpayer owns valuable land and artwork located in a foreign jurisdiction. This property produces no income and there were no reporting requirements regarding this property. Must the taxpayer report the land and artwork and pay a 20 percent penalty?

FAQ 20 relates to income producing property for which no income was reported. Under those circumstances, no distinction is made between assets held directly and assets held through an entity in computing the 20 percent offshore penalty. However, if the taxpayer owns non-income producing property in the taxpayer's own name, there has been no U.S. taxable event and no reporting obligation to disclose. The taxpayer will be required to report any current income from the property or gain from its sale or other disposition at such time in the future as the income is realized. Because there has as yet been no tax noncompliance, the 20 percent offshore penalty would not apply to those assets. If the foreign assets were held in the name of an entity such as a trust or corporation, there would have been an information return filing obligation that may need to be disclosed.

*The IRS posted Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers and updated 6/08/16.

Domestic Corporations and Foreign Accounts

In the IRS Workbook on the Report of Foreign Bank and Financial Accounts, the IRS advised that a domestic (e.g., NY) corporation that has foreign accounts:

1. The corporation must file a FBAR for the corporations' accounts.

2. A majority shareholder (over 50% of the value of the stock), must also file a FBAR.

For a domestic corporation with foreign accounts, both the corporation and the majority shareholder must each file a FBAR to report the foreign account (owned by the domestic corporation).

Reporting Foreign Life Insurance Policy

In response to my inquiry, the IRS clarified (by FAQ) that a foreign life insurance policy is a foreign financial account if it includes a cash surrender value. The IRS 7/31/09 response:

1. Is a foreign life insurance policy with cash surrender value a financial account for FBAR reporting purpose?

A financial account, as defined in the FBAR General Instructions, includes "savings, demand, checking, deposit, time deposit, or any other account maintained with a financial institution or Other Person engaged in the business of a financial institution." An insurance policy with cash surrender value can "store" cash, available for withdrawal at a later time, and for this reason is treated as a financial account with a financial institution for FBAR purposes. If the insurance policy is located in a foreign country and has cash surrender value, the policyholder may have to report the policy on a FBAR. For FBAR reporting purposes, the cash surrender value of the policy is the value of the account. Insurance policies that are issued by a foreign-owned company but that are acquired through an insurance agent located in the United States is not a foreign financial account and is not required to be reported on an FBAR.

If the foreign life insurance policy is owned by a trust with two or more beneficiaries, a beneficiary of more than 50% of trust assets must file the FBAR (on account of the trust).

Filing Requirements for Gold or other Non-Cash Assets

Under IRS FAQ's regarding Report of Foreign Bank and Financial Accounts (FBAR), the IRS confirmed:

1. A FBAR must be filed whether or not the foreign account generates any income;

2. A FBAR is required for account maintained with financial institutions located in a foreign country if the account holds gold (or other non-cash assets).

Hedge Funds

After the landmark agreement between the U.S. and Swiss government over secret (UBS) Swiss bank accounts, held by U.S. Citizens, the IRS is now focusing on hedge funds in the Cayman Islands. Recently, IRS officials advised that certain U.S. investors in offshore hedge funds must file a FBAR.

On June 12, 2009, an IRS official stated that the term "financial interest" (which requires a FBAR filing) includes hedge funds that "function as mutual funds".

It appears the IRS and Justice Department will identify U.S. Taxpayers who evade U.S. taxes, by investing with offshore hedge funds. The IRS and Justice Department are pressing foreign financial institutions to provide them with information about Americans with "foreign, secret bank accounts."

Trusts

Each US Trustee of a trust account must file a FBAR (even if the beneficiary of the trust is not a US Person). If the owner of an account gave someone the power of attorney over the account, both the owner and the attorney-in-fact must file a FBAR (if both are US Taxpayers).

If a trust that holds a foreign financial account provides for a Protector, whose powers include directing distributions if the Protector is a US Person, the Protector must file a FBAR.

If several members of the same family have accounts, the FBAR rules apply to each account holder individually. The IRC §318 attribution rules do not apply to filing the FBAR.

Under the grantor trust rules (IRC §679) any US Person who establishes a foreign trust (which holds the foreign financial account), established by a US Person for any US beneficiary, the US Settlor is responsible for filing a FBAR for the trust accounts (even if the US Settlor of the trust is not a beneficiary, has no authority over the trust or any of the trust accounts). Under US tax rules, he is treated as the owner of the trust (for US income tax purposes) because the trust is deemed a grantor trust which makes him responsible to file the FBAR form.

Financial interest may be present even if there is no signatory authority. If a trust holds an account and the US Taxpayer has a present beneficiary interest in more than 50% of the trust assets, receives more than 50% of the trust assets, or receives more than 50% of the current trust income, he must file a FBAR.

If a trust has 2 or more beneficiaries and none of the beneficiaries has more than a 50% interest in the income of principal, then none of them needs to file a FBAR (although each US Trustee who is a US Taxpayer must file the FBAR). Regarding the rules for a

discretionary trust, if a US Taxpayer receives distributions of more than 50% of trust income or principal in any given year, it requires filing the FBAR.

Foreign Bank Accounts: Definitions

Each U.S. person having a financial interest in, or signature or other authority over, any foreign financial accounts with an aggregate value exceeding $10,000 at any time during the calendar year must report such relationship by filing Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR").

In addition, they have to disclose the foreign account filing requirement on Schedule B of Form 1040 and including the income from these accounts on the United States person's U.S. federal income tax return.

Who Must File

Form TD F 90.22-1 is required to be filed by every U.S. person for each calendar year in which such person has a financial interest in, or signature or other authority over, any foreign financial accounts with an aggregate value exceeding $10,000 at any time during the calendar year. The test is based in the alternative – financial interest in or signature authority over the account.

Definitions

For purposes of FBAR, the term "United States person" means (1) a citizen or a resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust.

The term "financial account" generally includes any bank, securities, securities derivatives or other financial instrument accounts, (including any accounts in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund), savings, demand, checking, deposit, time deposit, or any other account maintained with a financial institution (or other person engaged in the business of a financial institution).

Any of the financial accounts described above is considered to be a foreign financial account for purposes of FBAR, if it is located outside the United States, Guam, Puerto Rico, and the Virgin Islands. The situs of a financial account is determined by the location where the branch is, not the location of the institution's home office.

The Element of Control

Under the FBAR instructions, signatory authority may be present and a FBAR may be required when there is an indirect element of control. The FBAR instructions state:

"Authority exists in a person who can exercise comparable power over an account by direct communication to the bank or other person with whom the account is maintained, either orally or by some other means."

If a foreign corporation holds a foreign account and a US Person owns more than 50% of the shares, a FBAR must be filed. US Persons who are officers or directors of foreign corporations and have signatory authority over foreign corporate accounts must also individually file a FBAR whether or not they own shares of the corporation (certain publicly traded corporations and banks under US control are exceptions to this rule).

For partnerships owning foreign accounts, if the US Taxpayer holds more than a 50% interest in the partnership profits, they are required to file a FBAR.

If the US Person is the owner of a foreign life insurance policy or a foreign annuity contract with cash surrender value in excess of $10,000, he must file a FBAR. The owner of the contract has no direct authority over the accounts in which the premiums are deposited or invested. However, the owner has the authority to withdraw cash from the policy or contract.

The owner has a financial interest in the policy or contract and has an indirect financial interest in the underlying accounts.

Financial Interest Signatory Authority

The FBAR is not a tax return. The FBAR is a financial disclosure (i.e., a report of the Taxpayer's foreign financial accounts). The FBAR must be filed even if the reported accounts generate no interest or other taxable income. All income earned on the foreign account must be reported on the tax return of the beneficial owner which is an entirely separate reporting from the FBAR. However, once a Taxpayer discloses a foreign account on their Form 1040 Schedule B, the FBAR must be filed.

The FBAR form is designed to disclose the US Taxpayer's connection to a foreign financial account. The form details the US Taxpayer (e.g., name, address, identification number and balance held in the account over $10,000). The form asks for the name of the financial institution, the country and the account number for each account, if more than one. If there are joint owners, their names and identification numbers are requested and if the person who is reporting claims to have no financial interest in the account (such as a person holding a power of attorney or a corporate officer who has no shares in the corporation), then the name and the identification number of the beneficial owner must be disclosed.

Any US Person who has a financial interest in, or signatory authority over, any financial accounts in a foreign country if the total value of such accounts exceeds $10,000 at any time during the calendar year must file a FBAR. The accounts in Puerto Rico, Guam, and

the Northern Mariana Islands, American Samoa, and the US Virgin Islands are exceptions to this rule (see Workbook on the Report of Foreign Bank and Financial Accounts (FBAR)

US Taxpayers include resident aliens and other foreign individuals who are considered US Persons under the Substantial Presence Test (i.e., because of the time spent in the US in a given year [IRC §§7701(b)(1)(A)(ii) and 7701(b)(3)]). (FBAR rules also apply to a domestic trust, estate, partnership or corporation.)

A US Taxpayer has a required financial interest in an account if they:
1. Are the owner of the account.
2. Have legal title to the account (even if it is for someone else's benefit).

Both financial interest and the signatory authority generate the requirement to file the FBAR. When the account is in joint names, all joint owners must file their own FBAR (even though the funds may belong to only one of them). An exception to the joint account rule applies only if the joint owners are husband and wife (if they live together).

U.S. Taxpayer Tax Compliance Issues

FBAR rules are not found in the Code. Rather, they are set forth in the Bank Secrecy Act, first enacted by Congress in 1970. Since 2003, however, the IRS bears responsibility for enforcing these rules.

The FBAR rules require that every U.S. Person report (i) any financial interest or authority over a (ii) financial account in a foreign country with (iii) an aggregate value over $ 10,000 at any time during the taxable year. The report must be filed on a Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (hence the acronym "FBAR"). U.S. Persons must also disclose the existence of the account on their Form 1040, Schedule B, Part III. This is commonly referred to as "checking the 'B' box."

Taxpayers who fail to disclose the account on their Form 1040 could be subject to criminal sanctions for filing a false tax return.

The FBAR report is due on June 30th. This due date is not subject to extensions. The FBAR report must be filed separately from the U.S. Person's tax return.

Financial Interest Or Authority

A U.S. Person has a financial interest in a foreign account if he or she is the legal or beneficial owner. Attribution rules apply in making this determination. A person serving as a shareholder, partner, and trustee may also be deemed to hold a financial interest if the owner of the account is (i) a person acting as an agent on behalf of the U.S. Person, (ii) a corporation where the U.S. Person owns, directly or indirectly, more than 50 percent of the outstanding stock, (iii) a partnership in which the U.S. Person owns more

than 50 percent of the profits, or (iv) a trust in which a U.S. Person has either a present interest in more than 50 percent of the assets or from which the U.S. Person receives more than 50 percent of the income. If these thresholds are met, the U.S. Person has an FBAR reporting obligation, regardless of whether he or she has any authority over the account.

Non-owners with authority over a foreign account are also subject to the FBAR reporting rules. Authority means the U.S. Person has the ability to order a distribution or disbursement of funds or other property held in the account. This is not limited to signature authority, but includes the ability to order distributions by verbal commands or other communication. Authority does not include persons who have the right to invest, but not distribute, the foreign account funds.

There is no limitation for taxpayers who have authority over a foreign account, but only in an official capacity. (For example, the president of a corporation, the general partner of a partnership, or the manager of an LLC may be subject to these rules.)

Both the entity, as beneficial owner, and the representative, who has control over the account, may be required to file an FBAR report. Similarly, when more than one U.S. Person has authority over an account, i.e., president and vice president, both persons may have an FBAR reporting obligation.

Even when the account is subject to joint control, and the signature of someone other than the taxpayer is required to cause a distribution, the taxpayer is still considered to have authority over the account for FBAR reporting purposes.

Financial Account In A Foreign Country

The term financial account is broadly defined as any asset account and encompasses simple bank accounts (checking or savings), as well as securities or custodial accounts. It also includes a life insurance policy or other type of policy with an investment value (i.e., surrender value).

Foreign country naturally refers to any country other than the United States. Puerto Rico, U.S. possessions and territories are included as part of the United States (as they should) for these purposes. Accounts held by U.S. Persons in these areas are not foreign accounts subject to FBAR reporting.

The IRS has indicated that a traditional credit card with a foreign bank is not a foreign account. However, use of a credit card as a debit or check card could trigger foreign account status and thus an FBAR reporting obligation.

$10,000 Threshold

To be reportable, the account must have assets the value of which during the year, exceeds $10,000.

The Instructions to the FBAR report state that if the aggregate value of all financial accounts exceeds $10,000 at any time during the year, the U.S. Person must file an FBAR report. A U.S. Person who possesses multiple foreign accounts, all of which have less than $10,000, but which collectively exceed $10,000, may have an FBAR reporting obligation.

Taxpayers may transfer an appreciating asset to a foreign account, such as stock or securities. As these assets increase in value, they may trigger an FBAR reporting requirement.

Whether the account generates any income is not relevant.

Penalties

In an attempt to improve compliance, Congress enhanced the FBAR penalties in 2004. Under pre-2004 law, civil penalties applied only to willful violations. In 2009, civil penalties up to $10,000 may be imposed on non-willful violations. This penalty may be avoided if there was reasonable cause and the U.S. Person reported the income earned on the account. 31 U.S. C. §5321(a)(5).

Although reasonable cause is not defined, the IRS will likely apply the reasonable cause standard for late-payment/late-filing penalties.

The penalty for willful violations is far more severe. It is equal to the greater of $100,000 or 50 per-cent of the balance of the account at the time of the FBAR violation. No reasonable cause exception exists for a willful violation. 31 U. S. C. §5321(a)(5)(c).

The IRS has six years to assess a civil penalty against a taxpayer that violates the FBAR reporting rules.

Form TD F 90-22.1

*In FBAR FAQ #26 (posted on 6/24/09), the IRS confirmed that the revised version of Form TD F 90-22.1 (revised October 2008) should be used to report foreign accounts (including prior delinquent years):

If I had an FBAR reporting obligation for years covered by the voluntary disclosure, what version of the Form TD F 90-22.1 should I use to report my interests in foreign accounts?

Taxpayers should use the current version of Form TD F 90-22.1, (revised in October 2008), to file delinquent FBARs to report foreign accounts maintained in prior years. The

taxpayer may, however, rely on the instructions for the prior version of the form (revised in July 2000) for purposes of determining who must file to report foreign accounts maintained in 2008 and prior calendar years.

Although the FBAR was revised in October 2008, IRS News Release IR-2009-58 (June 5, 2009) and IRS Announcement 2009-51, both available at the IRS website, permit the use of the definition of "United States person" in the prior version of the FBAR in determining who must file FBARs that are due on June 30, 2009. Accordingly, for all FBARs that are due in the current and prior years, the term "United States person" means (1) a citizen or resident of the United States; (2) a domestic partnership; (3) a domestic corporation; or (4) a domestic estate or trust.

With regard to interest charged (on penalties) under FAQ #36, the IRS confirmed:

1. For accuracy-related and delinquency penalties, interest runs from the due date of the Form 1040 (tax return) at issue.

2. For all other penalties, interest runs from the date of the assessment of the penalty.

*The IRS updated the FAQs Regarding Report of Foreign Bank and Financial Accounts (FBAR) – Filing Requirements on June 14, 2016.

Revised Form TD F 90-22.1

In October 2008, the IRS issued a revised version of TD F 90-22.1 "Report of Foreign Bank and Financial Accounts ("FBAR").

The revised FBAR form states: "Do not use previous editions of this form after December 31, 2008". All FBAR's due for Tax Years 2008 (forward) and back year FBAR's (unfiled) are to be reported on the new form.

The revised FBAR form includes new provisions designed to facilitate IRS off-shore enforcement. Specific new provisions are included for:

1. Foreign Trusts (Trust Protector)
If a U.S. person appoints a Trust protector, for a foreign account held by a Foreign Trust, the U.S. person has a financial interest in the account and must file a FBAR.

2. Foreign Trusts (Trust Beneficiaries)
Trust beneficiaries do not have a FBAR filing requirement unless they are a U.S. person who is the beneficiary of more than 50% of a Trust holding a foreign account.

3. Debit Card (Prepaid Credit Cards)
Reportable financial accounts include debit cards and prepaid credit card accounts.

4. Foreign Persons
Foreign persons in and doing business in the U.S. are required to provide identifying information (i.e., “foreign identification number”, such as foreign passport number) and file FBAR’s.

5. Account Value
Instead of an account value range, U.S. taxpayers must fill in the exact value of the account during the calendar year.

6. Foreign Account Owners
U.S. persons, with signature authority over the account (who file the FBAR) must identify the account’s foreign owner.

7. Joint Filing for Married Taxpayers
Previously, married taxpayers had to file separate FBAR’s for a jointly owned account. The new FBAR allows joint filing. The new FBAR requires the filer to provide the identifying information for the “principal joint owners”.

8. Record Retention
The new FBAR explicitly states the records must be kept for a period of 5 years and must be kept at all times available for inspection.

Currency Transaction Report (CTR) & Suspicious Activity Report (SAR)

U.S. financial institutions file Currency Transaction Reports (CTR) and Suspicious Activity Reports (SAR) with the IRS Detroit Computing Center (uploaded into the IRS/DCC Currency Banking and Retrieval System database at the IRS/DCC).

The combined CTR/SAS currency transaction reports provides a paper trail (or roadmap) for investigations of financial crimes and illegal activities including: tax evasion, embezzlement and money laundering. Between 1994 – 1997, the IRS Criminal Investigation Division initiated 1030 investigations as a result of CTR/SAR (Currency Transaction Reports).

Report/Requirements

Currency Transaction Report (CTR) – Filed by financial institutions that engage in a currency transaction in excess of $10,000.

Currency Transaction Report Casino (CTRC) – Filed by a casino to report currency transactions in excess of $10,000.

Report of Foreign Bank and Financial Accounts (FBAR)

Filed by individuals to report a financial interest in or signatory authority over one or more accounts in foreign countries, if the aggregate value of these accounts exceeds $10,000 at any time during the calendar year.

IRS Form 8300, Report of Cash Payments Over $10,000 Received in a Trade or Business – Filed by persons engaged in a trade or business who, in the course of that trade or business, receives more than $10,000 in cash in one transaction or two or more related transactions within a twelve month period.

Suspicious Activity Report (SAR) – Filed on transactions or attempted transactions involving at least $5,000 that the financial institution knows, suspects, or has reason to suspect the money was derived from illegal activities. Also filed when transactions are part of a plan to violate federal laws and financial reporting requirements (structuring).

Family Ownership Attribution Rules

IRC §318 constructive ownership of stock rules attribute ownership to family members who maintain common ownership in an entity (e.g., trust). If 2 or more family members are Trust beneficiaries (or any one act as Trustee), the issue is whether IRC §318 Family Attribution Rules (i.e., greater than 50% ownership interests) require any Trust beneficiary to file a FBAR to disclose foreign bank accounts owned by the Trust.

Under IRS §318(a)(1)(A)(i)(ii), an individual shall be considered as owning the stock owned, directly (or indirectly), by or for:
1. His spouse.
2. His children, grandchildren and parents.

The IRS has advised:
A US Taxpayer, who is a Trustee, is required to file a FBAR for the Trust if the US Trustee has either:
a. A financial interest, or
b. Signature authority over a foreign account.

On 8/21/09 the IRS confirmed to my law offices: A beneficiary of more than 50% of trust assets must file the FBAR on account of the trust.

As the IRS clarified (8/21/09) U.S. Taxpayer Family Trusts may hold Foreign Bank (and Financial) accounts, and unless one of the Trust beneficiaries has a more than a 50% interest in income or principal, none of the Trust beneficiaries are required to file a FBAR (to disclose the foreign bank [financial] account).

On 8/21/09, the IRS confirmed:

1. If the trust has a discretionary class of two or more beneficiaries, and none of the beneficiaries has a more than a 50% interest in income or principal, none of the beneficiaries need to file a FBAR to report foreign bank accounts.

2. The "ownership" attribution rules of Title 26 (IRC §318) are not applicable to a FBAR (filing) (which includes a discretionary class of beneficiaries [i.e., family trusts]).

Foreign Accounts with Multiple Signatories

*On 6/24/09, the IRS updated their Voluntary Disclosure FAQ clarifying the FBAR reporting requirements for foreign accounts with multiple signatories:

If parents have a jointly owned foreign account on which they have made their children signatories, the children have an FBAR filing requirement but no income. Should the children just file delinquent FBARs as described by FAQ 9 and have the parents submit a voluntary disclosure? Will both parents be penalized 20 percent each? Will each have a 20 percent penalty on 50 percent of the balance?

Only one 20 percent offshore penalty will be applied with respect to voluntary disclosures relating to the same account. In the example, the parents will be jointly required to pay a single 20 percent penalty on the account. This can be through one parent paying the total penalty or through each paying a portion, at the taxpayers' option. For those signatories with no ownership interest in the account, such as the children in these facts, they may file delinquent FBARs with no penalty as described in FAQs 9 and 41. However, any joint account owner who does not make a voluntary disclosure may be examined and subject to all appropriate penalties.

If there are multiple individuals with signature authority over a trust account, does everyone involved need to file delinquent FBARs? If so, could everyone be subject to a 20 percent offshore penalty?

Only one 20 percent offshore penalty will be applied with respect to voluntary disclosures relating to the same account. The penalty may be allocated among the taxpayers making the disclosures in any way they choose. The reporting requirements for filing an FBAR, however, do not change. Therefore, every individual who is required to file an FBAR must file one.

*The IRS posted Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers on 6/26/12 and updated 6/08/16.

U.S. Trustee Foreign Non-Grantor Trust

A U.S. trustee of a foreign non-grantor trust must file Form TD F 90-22.1 if the Trustee has a financial interest in or signature authority or other authority over any financial

accounts, including bank, securities, or other types of financial accounts in a foreign country if the value of such accounts exceeds $10,000. A person has a financial interest in any such account if she has legal title to it.

Trustees generally have legal title to accounts in which trust funds are invested. In addition, if legal title to an account is held by a corporation or partnership and the trustee owns more than 50% of the corporation or partnership, the trustee will be treated as having a financial interest in such account.

A person has signature authority over an account if she can control the disposition of account property by the delivery of a document signed by her and one or more other persons. A person has other authority over an account if she can control such disposition by direct communication to the person with whom the account is maintained.

Form TD F 90-22.1 must be filed by June 30th of the year following the year in which the U.S. person had such financial interest or signature or other authority.