

## US Foreign Bank Account Reporting Requirements

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A surprisingly large number of international holding structures utilizing limited liability companies ('LLCs') formed in the US are finding themselves confronted with unexpected US Report of Foreign Bank and Financial Accounts ('FBAR') information filing obligations. While these structures tend to be established by non-US families and tend not to have any US investments, the revised instructions to the FBAR form clarify that these entities must report any and all non-US accounts (unless their aggregate value is under \$10,000).

Where relevant, action may well be required before June 30, 2009.  
The problem typically arises where the LLCs either:

- hold non-US investment assets for primarily non-US families (with the LLC itself being typically held via a trust structure);
- or acts as investment manager/adviser of non-US investment portfolios.

The problem seems to be particularly symptomatic of Latin American structures where Delaware and Nevada LLCs typically are a vehicle of choice due to their 'white list' status, though the issue can easily arise in other contexts.

While much has been written in the press recently about 'US persons' and their FBAR filing obligations generally, this problem arises from a change to the FBAR form last October 'clarifying' that the obligation applies to all 'US persons'. An LLC is a US person for these purposes notwithstanding that it may otherwise be disregarded for US tax purposes and that it holds only investment assets and does not conduct any active business. Therefore, in most instances no US tax will be owed due to the LLC's disregarded status for tax purposes.

However, where applicable, the FBAR form must be filed in connection with the foreign accounts regardless of whether any US tax is otherwise owed on those accounts. The filing deadline for calendar year 2008 is June 30, 2009. It is not possible to get an extension for this deadline.

The penalty for failing to file the FBAR can be the greater of \$100k or 50% of the 'account' for wilful failures to file; non-wilful failures are penalized at \$10k per 'account'. The definition of 'account' also is broad and a look through rule applies to catch accounts held by non-US companies and partnerships owned by the LLC.

The IRS has recently indicated that where no US tax is owed on the accounts which must be disclosed, no penalties will be charged in connection with historic failures to file provided that they are promptly remedied. Of course, current filing obligations also must be met.

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