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Curtis, Mallet-Prevost, Colt & Mosle LLP

Investment Funds: Recent Tax Developments

Understanding FBAR, FATCA, and Key Regulations in Europe

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TABLE OF CONTENTS

Part 1: FBAR, FATCA, and Other Relevant U.S. Tax Issues

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William L. Bricker, Jr.	Partner, NY
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Part 1: FBAR, FATCA, and Other Relevant U.S. Tax Issues

I. U.S. Overview – FBAR and FATCA

I. U.S. Overview—FBAR and FATCA

- The discovery that UBS was assisting U.S. taxpayers to avoid U.S. taxes had many profound consequences, perhaps the most significant of which were an expansive (if not vindictive) campaign to enforce the FBAR filing requirements and the enactment of the Foreign Account Tax Compliance Act ("***FATCA***").

- U.S. taxpayers must file an annual report—an FBAR—with respect to foreign financial accounts they maintain or co-sign on. Pre-UBS, compliance was lax; enforcement unusual. Post-UBS, the IRS essentially considers those failing to file FBAR as criminals, until proven to the contrary.

- FATCA has been referred to as "imperial" U.S. tax legislation. Simply stated, it requires most foreign financial institutions and investment entities to assist the U.S. in collecting U.S. taxes on income derived by U.S. taxpayers. Foreign institutions can:

  - Collect and turnover to the IRS data on U.S. clients with accounts of at least $50,000;
  - Withhold 30% of the interest, dividends, and investment income due such clients; or
  - Face the wrath of the IRS and significant tax on certain income it receives from the U.S.

II. FBAR

II.A. FBAR—General

- Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts ("***FBAR***"), is an annual report that must be filed by "U.S. Persons" who have a "financial interest" in *or* "signature authority" over a "foreign financial account(s)" with aggregate value exceeding $10,000 at any time during the year. An FBAR is required even if the foreign financial account generated no income.

- The Treasury Department's Financial Crimes Enforcement Network ("***FinCEN***") interprets the FBAR rules; the IRS administers FBAR compliance; and the DOJ Criminal Division handles enforcement. FBAR is not a tax return. It is filed with Treasury, not IRS.

  - FinCEN issued final regulations on March 28, 2011.

- Unlike U.S. income tax returns, FBARs must *arrive*—not simply be mailed—by their due date, which may be before tax returns are due. FinCEN announced on July 18, 2011, that it had developed an electronic filing system that will accept FBARs.

II.B. FBAR Definitions

- A "U.S. Person" is:
  - A citizen or resident of the United States, or
  - A domestic partnership, corporation, LLC, or trust, including a grantor trust.
- Because a domestic LLC, even if disregarded for U.S. tax purposes, is a U.S. person, a foreign person who uses a domestic LLC may become subject to FBAR reporting.
- Discretionary beneficiaries of a U.S. trust do not have to file FBARs.
- A U.S. Person has no age limit. Thus, a U.S. infant not required to file a U.S. tax return must file an FBAR if infant (beneficially) owns a $10,000+ foreign financial account.
- A U.S. resident includes a green card holder or a resident under the 183 day substantial presence test. An NRA under a tax treaty "tie breaker" is nonetheless a U.S. resident for FBAR purposes.

II.B. FBAR Definitions (cont.)

- A U.S. Person has a "financial interest" in a foreign financial account if (i) the U.S. Person is the owner of record of, or has legal title to, the account; (ii) another person is the owner of record of, or holds legal title to, the account but holds the account on behalf of the U.S. Person; or (iii) the U.S. Person is deemed to have a financial interest by attribution from a corporation, partnership or trust.

- A U.S. Person has "signature or other authority" over a foreign financial account if such person can (alone or in conjunction with another) control the disposition of money or other property in it by direct communication to the person with whom the foreign financial account is maintained.

- A "financial account" includes (i) a bank account, (ii) a securities account, or (iii) other financial account.
  - A reportable "securities account" is an account maintained with a person in the business of buying, selling, holding or trading stock or other securities.
  - Treasury is still considering whether a hedge fund (venture capital or private equity) may be a "financial account." This may be academic since FATCA will require reporting for foreign financial accounts in excess of $50,000.

II.B. FBAR Definitions (cont.)

- Information required on the FBAR includes:
  - Name, address, country and other personal information of the filer.
  - For each financial account, the maximum value during the year, name and address of the financial institution, account number, and the type of account.
    - ✓ Exception 1: If the filer has financial interest in **25 or more** foreign financial accounts, no information on the accounts is required on the form.
    - ✓ Exception 2: If the filer has signature authority over **25 or more** foreign financial accounts in which he has no financial interest, only certain identifying information of the account owner is required on the form.
- Records must be maintained for five years and be provided to the IRS upon request.

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II.C. FBAR Notices

- FinCEN Notice 2011-1 extended the 6/30/11 FBAR filing deadline until 6/30/12 for certain individuals with signature authority over a financial account of an employer or its affiliate. This Notice is limited to certain employees and officers of certain banks, publicly traded companies, or SEC-registered companies.
  - A person who can direct how an account is invested but cannot make dispositions generally does not have signatory control over the account.
- FinCEN Notice 2011-2 granted a one-year extension of the 2010 FBAR filing deadline until 6/30/12 for employees or officers of an investment advisor registered with the SEC who have signature or other authority over, and no financial interest in, a foreign financial account of persons that are not registered investment companies.
- IRS Notice 2011-54 provided that persons having signature authority over, but no financial interest in, a foreign financial account in 2009 or earlier calendar years will now have until 11/1/11, to file FBARs with respect to those accounts.

II.C. FBAR Notices (cont.)

Notice	Affected Filers	Effective Date
FinCEN Notice 2011-1	Employees & officers of banks, publicly traded companies, or SEC-registered companies	FBAR filing deadline extended until 6/30/12
FinCEN Notice 2011-2	Employees & officers of SEC-registered investment advisors	FBAR filing deadline extended until 6/30/12
IRS Notice 2011-54	Persons with signature authority over, but no financial interest in, a foreign financial account in 2009 or earlier	FBAR filing deadline extended until 11/1/11

- The IRS has offered two voluntary disclosure programs: the 2009 Voluntary Disclosure Program and the 2011 Offshore Voluntary Disclosure Initiative, which ended 9/9/11. These programs allowed taxpayers to come into compliance while avoiding criminal prosecution for their undisclosed accounts. It is unclear whether the IRS will implement a third such voluntary disclosure program.

II.D. FBAR & Foreign Investment Funds

- The IRS and FinCEN have labored in addressing the issue of whether foreign investment funds are "foreign financial accounts" that must be reported on an FBAR.
  - Initially they were considered foreign financial accounts but after industry lobbying efforts, the decision was postponed and ultimately waived through 2010.
  - The final regulations provide that an interest in a foreign investment fund is a (potentially reportable) foreign financial account if the fund "issues shares available to the general public that have a regular net asset value determination and regular redemptions." Treasury indicated that it will continue to consider the treatment of private foreign funds for FBAR purposes.
- An exempt organization owning an interest in a foreign investment fund through a blocker corporation should not be subject to FBAR reporting.
- Since interests in foreign investment funds generally must be reported under FATCA, the assumption is that FBAR reporting will not be required.

III. FATCA

III. FATCA

- Many in the U.S. Congress believe that U.S. persons who have, or may benefit from, "offshore" assets are attempting to avoid U.S. income tax. FATCA aims to prevent U.S. tax avoidance by the use of offshore financial accounts and requires certain foreign entities to assist in collecting U.S. income tax on income derived by U.S. taxpayers on their offshore assets.

- FATCA requires foreign financial institutions ("***FFIs***") either

  - to agree to satisfy specified reporting and diligence requirements for each "United States account," or

  - to be subject to 30% U.S. withholding tax ("***FATCA withholding***") on certain payments of U.S.-source income ("***withholdable payments***") that the FFI receives.

III. FATCA (cont.)

- A "financial institution" is, among other things, an entity that:
  - Is engaged (or is held out as being engaged) primarily in the business of investing, reinvesting or trading in securities, partnership interests, commodities or any interest (including a futures or forward contract or option) in such items.
  - This definition clearly includes hedge funds and private equity funds.
- A "financial account" is, among other things, generally any non-publicly traded equity or debt interest in an FFI (such as an interest in a hedge fund, private equity fund, and other investment firms).
- A "United States account" generally includes:
  - A financial account held by a specified U.S. person (i.e., U.S. citizen, resident, or business); <u>and</u>
  - A financial account held by a foreign entity that, directly or indirectly, has one or more substantial U.S. owners (i.e., a U.S. person who owns more than 10% (by vote or value) of the entity).

III. FATCA (cont.)

- An FFI cannot avoid FATCA by closing all its U.S. accounts because FATCA applies to withholdable payments, not to the existence of accounts that are beneficially owned by U.S. persons.

- FATCA withholding rules apply before mainstream U.S. withholding. If no FATCA withholding is required, mainstream withholding may apply. FATCA withholding differs from mainstream withholding in important aspects:

  - Other than FIRPTA gain, mainstream withholding does not apply to capital gains. FATCA withholding applies to the **gross proceeds** from the sale of assets that produce U.S. source dividend or interest income.

  - Unlike mainstream withholding, FATCA withholding does not apply to payments made directly to an individual but only to payments to FFIs.

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III.A. FATCA Agreements

- The central feature of FATCA is that an FFI must enter into an agreement (a "***FATCA Agreement***") with the U.S. Treasury Department in which the FFI agrees to obtain and report information on its U.S. accounts **<u>or</u>** be subject to FATCA withholding on any withholdable payments that it receives. An FFI that enters a FATCA Agreement is a "***Participating FFI***."
  - Withholdable payments include:
    - ✓ U.S. source fixed or determinable annual or periodical income ("***FDAP***" income) such as dividends, interest, royalties, rents, salaries, wages, and other FDAP income; and
    - ✓ **<u>Gross proceeds</u>** from the sale or disposition of securities that could generate interest or dividends from U.S. sources. Note that, like FIRPTA, FATCA's requirement to withhold on gross proceeds can result in withholding on a sale of a security at a loss.

III.A. FATCA Agreements (cont.)

- A FATCA Agreement will require a Participating FFI to:
  - Obtain information regarding each account holder as is necessary to determine which of its accounts are U.S. accounts;
  - Comply with verification and due diligence procedures with respect to the identification of its U.S. accounts;
  - Comply with requests by Treasury for additional information with respect to any of its U.S. account;
  - Attempt to obtain a waiver in any case in which any foreign law would prevent reporting of information with respect to any U.S. account maintained by the FFI and, if a waiver is not obtained, to close the account;
  - Report annually certain information related to its U.S. accounts; and
  - Deduct and withhold 30% from any "passthru payments" made by the FFI to a non-participating FFI or to an account holder that refuses to provide the required information (a "***recalcitrant account holder***").

III.B. FATCA & Foreign Investment Funds

- A fund-of-funds may attempt to avoid receiving any withholdable payments in order to avoid FATCA. However, if the fund-of-funds invests in another offshore fund, this other fund could receive withholdable payments subject to FATCA.
- A beneficial owner of a withholdable payment may, by filing a U.S. income tax return, claim a full or partial refund or credit for any FATCA withholding tax.
- If an FFI is treated as the beneficial owner of the withholdable payment and is eligible for a reduced rate under an applicable income tax treaty, refunds and credits may not exceed the amount of credit or refund attributable to such reduction in rate, and no interest will be paid on the credit or refund.
- If an FFI is not eligible for treaty benefits, no credit or refund will be allowed at all.

III.B. FATCA & Foreign Investment Funds (cont.)

- Determining U.S. Accounts: A Participating FFI must determine whether any of its accounts are U.S. accounts. Until Treasury issues regulations, Notices 2010-60 and 2011-34 provide interim guidance on how to make such determinations. The Notices outline extensive procedures whereby a Participating FFI must check its records for indicia of U.S. ownership and, in certain cases, request further information from its account holders.

- Reporting on U.S. accounts: A Participating FFI must report to the IRS certain information regarding its U.S. accounts:

  - the name, address and taxpayer identification number (TIN) of each account holder that is a specified U.S. person;
  - in the case of any account holder which is a U.S.-owned foreign entity, the name, address, and TIN of each substantial U.S. owner;
  - the account number and its balance at year end; and
  - the gross receipts and gross withdrawals or payments from the account.

III.B. FATCA & Foreign Investment Funds (cont.)

- Participating FFIs must generally withhold 30% on "passthru payments" made to a recalcitrant account holder or a non-Participating FFI.
- A payment made by an FFI will be a passthru payment to the extent of:
  - the amount of the payment that is a withholdable payment, plus
  - the amount of the payment that is not a withholdable payment, multiplied by the FFI's passthru payment percentage ("***PPP***").
- An FFI's PPP equals the ratio of the value of its U.S. assets over the value of its worldwide assets. An FFI must calculate and publish its PPP quarterly or else be deemed to have a PPP of 100%.
- <u>Example</u>: Assume (i) an FFI will make a $4,000,000 payment to a non-participating FFI, (ii) the total withholdable payment is $1,000,000 (so the amount that is not a withholdable payment is $3,000,000), and (iii) the payor FFI's PPP is 50%. To calculate how much the payor FFI must withhold on this $4,000,000 payment:
  - Multiply $3,000,000 by 50% (=$1,500,000).
  - Add this $1,500,000 to $1,000,000 (=$2,500,000).
  - Multiply $2,500,000 by 30% (=$750,000). The FFI must withhold $750,000.

IV. Comparison of FBAR & FATCA

		FBAR	FATCA
(i)	Purpose	Collect information re foreign financial accounts	Collect taxes
(ii)	IRS	IRS auditor does not have FBAR	Auditor has both Form 8938 and tax return
(iii)	Threshold Amounts	Aggregate $10,000 or more	Aggregate $50,000 or more. $50,000 is presumed met if insufficient information given
(iv)	Trigger	Foreign financial accounts	Deposit request and custodial accounts
(v)	Reporting Form	TD F 90-22.1 filed in Detroit	Form 8938 to be attached to Form 1040
(vi)	§ 6103 Protection	NO	YES
(vii)	Foreign hedge funds, private equity funds, etc.	Issue reserved	YES

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IV. Comparison of FBAR & FATCA (cont.)

		FBAR	FATCA
(viii)	Statute of Limitations ("***S/L***") on penalty	5 years	3 years S/L does not begin until entire return and Form 8839 are filed. Effective returns filed for 2011
(ix)	Filing Deadline	June 30	When tax return is due
(x)	Penalties	Nonwillful -$10,000 per year Willful – 50% of account balance for each non-complaint year + possibly criminal penalties	$10,000/30 days; max = $50,000 40% on any understatement of gross income derived from an undisclosed foreign financial asset
(xi)	Effective Date	In effect	FFI Agreements must be entered into by June 30, 2013; FATCA Withholding begins January 1, 2014

V. Other Relevant U.S. Tax Issues

V.A. Senator Levin's Bill

- Senator Levin introduced a bill called the Incorporation Transparency and Law Enforcement Assistance Act. The bill requires each corporation or LLC to provide to the state in which it is organized a list of its beneficial owners, and provide certain identifying information about its beneficial owners (such as address and unique identifying number from a passport or drivers license). The corporations and LLCs must update this information periodically, and the states may reveal the information to other state, federal, and local agencies.

- In addition to any civil or criminal penalty that may be imposed by a State, any person who does not comply with the information requirements—

  - Shall be liable to the United States for a civil penalty of not more than $10,000; and

  - May be fined under title 18 of the U.S. Code, imprisoned for not more than 3 years, or both.

V.B. Carried Interest, Repatriation Holiday, Credit Suisse

- **Carried Interest**

  - Several versions of the carried interest proposal have been considered but have not been enacted. In 2010, legislation (proposed section 710) was introduced that would (i) tax as ordinary income any net income received on an investment services partnership interest and (ii) subject that income to self-employment tax. Losses allocated to such interests generally would be deductible as ordinary losses.

  - Proposed section 710 would apply to all interests received for providing investment advisory and asset management services to a partnership, including partnerships that invest in securities, other partnerships, and real estate.

- **Repatriation Holiday**

  - Some sectors are advocating for a repatriation holiday, allowing U.S. companies to repatriate their offshore earnings at reduced tax rates. This could bring between $800 billion and $1.2 trillion into the U.S. economy. It is unclear now if such a repatriation will occur.

- **Credit Suisse**

  - Consider the Credit Suisse experience.

Part 2: Recent Tax Developments Affecting Investment Funds in Italy

Fabrizio Vismara Partner, Milan

Part 2: Recent Developments Affecting Investment Funds in Italy

I. Overview

I. Overview

- The taxation of investment funds in Italy has been subject to recent reforms, as regards to both undertakings for collective investment in transferable securities (hereinafter "***investment funds***")[1], and real estate funds.

  - With regard to investment funds, the new rules introduced by Law Decree of December 29, 2010, No. 225, subsequently converted into Law of February 26, 2011, No. 10 (hereinafter "***Law 10/2011***") are mainly aimed at eliminating the disadvantage of Italian funds compared to foreign funds with EU passport (*i.e.* in compliance with European UCITS Directive), and providing for the transition from a taxation system applied on an accrual basis, at fund level, to a tax regime on a cash basis, in the hands of the investors.

  - In relation to real estate funds, the purpose of the recent reforms has been, instead, to create most severe conditions in order to be entitled to certain fiscal advantages granted by the applicable rules. Moreover, a transparency taxation has been introduced for investors holding qualified participations in real estate funds not exclusively held by institutional investors.

1. For a more detailed definition, *see infra* II.3.

II. Investment Funds

II. Investment Funds

1. The Inconveniences of the Previous Fiscal Regime

- The previous tax system of Italian investment funds was based on the principle of taxation of the increase of the net asset value of the fund during each year which was subject to a tax at the rate of 12.50% that had to be paid at fund level instead of by the investors.

- On the contrary, the income from foreign funds with EU passport is subject to a withholding tax at a rate of 12.50% (20% for the income payable and realized starting from January 1, 2012)[1] and this tax is paid directly by the investors on a cash basis when they receive the income realized, through the periodic distributions by the fund or through the trade or redemption of their units.

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1. The rate has been recently increased to 20% for the income payable and realized starting from January 1, 2012 (*see* Article 2, paragraph 6, of Law Decree of August 13, 2011, No. 138, that has to be converted into law by the Italian Parliament within 60 days from the date of its publication which, in this case, corresponds to the date of its adoption. This provision has set a single rate of 20% for withholding and substitutive taxes on income on capital and on other income of a financial nature).

II. Investment Funds (cont.)

➢ <u>The application of this different tax regime for Italian investment funds involved several disadvantages</u>,[1] *inter alia*:

- Italian investment funds showed worst performances even when their returns were exactly equal to those achieved by the other foreign funds with EU passport because they had to pay an annual tax on the increase of their net asset value and to indicate in their financial statements their returns net of this tax;
- In paying the tax on the increase of their net asset value each year, Italian investment funds were unable to reinvest the money used for payment of this tax. As a consequence, they achieved lower yields than those of the other foreign funds with EU passport not subject to tax in the State in which they are established.

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1. *See,* the Report of the Italian Investment Funds Association of February 2011 (*Task Force Assogestioni per l'Attuazione in Italia della UCITS IV. Documento conclusivo*).

II. Investment Funds (cont.)

2. The Purposes of the Reform

- The reform of the fiscal regime of Italian investment funds introduced by Law 10/2011 is aimed at creating a level playing field for Italian investment funds with respect to foreign funds with EU passport.

- Moreover, the upcoming transposition into national law of the Directive 2009/65/EC of July 13, 2009, the so-called UCITS IV Directive,[1] has accelerated this reform process, pointing out the necessity of making the Italian asset management industry more competitive. Indeed, the UCITS IV Directive establishes, *inter alia*, the rules of the management company passport allowing asset management companies to establish and manage investment funds in other EU Member States without having to be established also in these other States, increasing the competition among funds established in different European countries.

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1. Member States had to transpose UCITS IV Directive into national law by July 1, 2011.

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II. Investment Funds (cont.)

3. The New Regime applicable as of July 1, 2011[1]

- Law 10/2011, with effect from July 1, 2011, equated the taxation of the income deriving from the participation in Italian investment funds to the participation in other European investment funds, introducing a system of taxation on a cash basis in the hands of the investors. These new fiscal provisions apply, in particular, to the tax regime of:
  - Italian open-end securities funds;
  - Unit trusts (*società di investimento a capitale variabile*, *SICAV*);
  - Closed-end securities funds[2]; and to
  - Open-end securities funds based in Luxembourg (so-called "Luxembourg historical funds") authorized for the placement on the Italian territory and to which, for the part of the operating results computed each year with respect to the units placed in Italy, the same fiscal regime of Italian investment funds applies.
- In addition, Law 10/2011 modifies the tax regime of proceeds arising in the hands of resident investors from foreign funds without the EU passport.

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1. See, Letter Circular of the Italian Tax Agency of July 15, 2011 explaining the new tax regime of Italian investment funds.
2. These funds are the ones referred to in Article 11 of Law of August 14, 1993, No. 344.

II. Investment Funds (cont.)

3.a. The Tax Regime Applicable to the Fund

- In accordance with the applicable provisions, generally Italian investment funds are not subject to the tax on their income and to the regional tax on productive activities (*Imposta Regionale sulle Attività Produttive, IRAP*).

- However, Italian investment funds are still subject to a levy on certain income on capital where it is expressly required by specific provisions. In this case, a withholding tax shall be applied on this income on capital and it will have the nature of a final tax payment.[1]

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1. See, Letter Circular of the Italian Tax Agency of July 15, 2011. A few examples of the levies that continue to be applied on certain income of Italian investment funds are:
   - A withholding tax of 12.50% and 27% on interests and other profits of bonds and similar securities as provided under Article 26, paragraph 1, of the Decree of the President of the Republic No. 600 of 1973 (please note that the rate of this withholding tax shall be of 20% starting from January 1, 2012, in accordance with Article 2, paragraph 13, of Law Decree of August 13, 2011, No. 138, that has to be converted into law by the Italian Parliament within 60 days from the date of its publication which, in this case, corresponds to the date of its adoption);
   - A withholding tax of 27% on the profits of the deposits held at Italian banks as provided under Article 26, paragraph 2, of the Decree of the President of the Republic of September 29, 1973 No. 600.

II. Investment Funds (cont.)

3.b. The New Tax Regime Applicable to Investors

- With effect from July 1, 2011, the new rules provide for a withholding tax of 12.50% (20% for the income payable and realized starting from January 1, 2012)[1] for resident investors on the periodic revenues they receive or at the moment of the disinvestment of their units.[2]

- Instead, no withholding tax is applied against non-resident investors if they are:

  - residents in States that allow an adequate exchange of information;
  - foreign institutional investors established in States that allow an adequate exchange of information; or
  - international bodies and organizations established in accordance with international agreements ratified by Italy, as well as central banks or other organizations managing the official reserves of the State.

- On the proceeds of non-resident investors other than those described above, a withholding tax of 12.50% (20% for the income payable and realized starting from January 1, 2012)[3] shall be applied.

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1. See, Article 2, paragraph 6, of Law Decree of August 13, 2011, n. 138, that has to be converted into law by the Italian Parliament within 60 days from the date of its publication which, in this case, corresponds to the date of its adoption.
2. This withholding tax is applied as an advance tax payment if the income is received by the investor in connection with the exercise of a business concern while it will be applied as a final tax payment for the other investors. In the event there should be a negative difference between the consideration received by the investor and the cost at which he purchased his units, even if it comes from the operating result of the fund and not from any negotiation of the units, this difference shall be considered a capital loss and may be compensated with any potential capital gain realized by the investor during the same tax period.
3. See, footnote No. 1 above.

III. Foreign Funds without EU Passport

III. Foreign Funds without EU Passport

The Tax Regime Applicable to Resident Investors of Foreign Funds without the EU passport

- Law 10/2011, with effect from July 1st 2011, modifies also the fiscal regime of the proceeds of foreign funds without EU passport received by resident investors when the fund:

  - is established in another European Union or European Economic Area country; and
  - is subject to the regulatory supervision of the competent authorities of the country where it is established.

  Indeed, with regards to the proceeds of the units of these funds placed on the Italian territory, as is already the case for foreign funds with EU passport, a withholding tax of 12.50% (20% for the income payable and realized starting from January 1st 2012)[1] will be levied in the hands of resident investors when they receive their income by the Italian intermediary involved in the cashing process. In cases where no Italian intermediary is involved, a final substitutive tax of 12,50% shall be applied.

- With regards to the income arising from foreign funds, without EU passport, other than those mentioned above, it must be included in the Italian investors aggregate taxable income and is subject to progressive tax rates (up to 43%).

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1. See, Article 2, paragraph 6, of Law Decree of August 13, 2011, n. 138, that has to be converted into law by the Italian Parliament within 60 days from the date of its publication which, in this case, corresponds to the date of its adoption.

IV. Real Estate Funds

IV. Real Estate Funds

- The taxation of Italian real estate funds[1] has been recently modified by Law Decree of May 31, 2010, No. 78 (converted into Law of July 30, 2010, No. 122), and by Law Decree of May 13, 2011, No. 70 (converted into Law of July 30, 2011, No. 122).
- With regards to the taxation of the fund, Italian law provides for the exemption of the real estate fund from tax on their income and to the regional tax on productive activities (*Imposta Regionale sulle Attività Produttive, IRAP*).

1. A fund is, in principle, considered as a real estate fund under the applicable rules when the real estate activities of the fund (immovable property, rights *in rem* in immovable property and shares of real estate companies) represent not less than of 2/3 of the total value of the fund.

IV. Real Estate Funds (cont.)

- With regards to the taxation of investors of real estate funds, the proceeds obtained from the participation to the real estate fund are generally subject to a withholding tax of 20%.[1]

- Law Decree of May 13, 2011, No. 70 (converted into Law of July 30, 2011, No. 122) introduced a new tax regime for investors, who are not institutional investors,[2] holding a qualified participation (that is more than 5% of the assets) of a real estate fund. In this case, he shall be taxed according to a principle of transparency on the income achieved by the fund at the end of each fiscal year and recorded in its financial statements, regardless the actual receipt of this income and in proportion to his shareholding in the real estate fund. In this case:

  - if the investor is resident, this income shall form part of his yearly aggregate taxable income regardless of its actual receipt and the withholding tax of 20% mentioned above shall not be applied;
  - Otherwise, if the investor is non-resident, this income will be subject to a withholding tax of 20%, which is applied as a final tax payment.

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1. This withholding tax is applied as an advance tax payment if the income is received by the investor in connection with the exercise of a business concern, while it will be applied as a final tax payment for the other investors.
2. Under the applicable rules, institutional investors are, *inter alia*, the State and any other public entity, UCITS, pension funds, insurance companies, banking and financial intermediaries subject to prudential supervision, and the same subjects indicated above established in foreign countries that allow an adequate exchange of information.

IV. Real Estate Funds (cont.)

- The withholding tax mentioned above shall not apply where investors are:
  - Foreign pension funds and foreign collective investment undertakings established in countries allowing an adequate exchange of information;
  - international entities and organizations established in accordance with international agreements enforced in Italy; and
  - central banks or organizations which also manage the official reserves of the State.
- For foreign investors other than those mentioned above that are residents in countries with which Italy has signed international conventions against double taxation currently in force, the withholding tax shall apply according to the rate provided for in the applicable bilateral agreements.

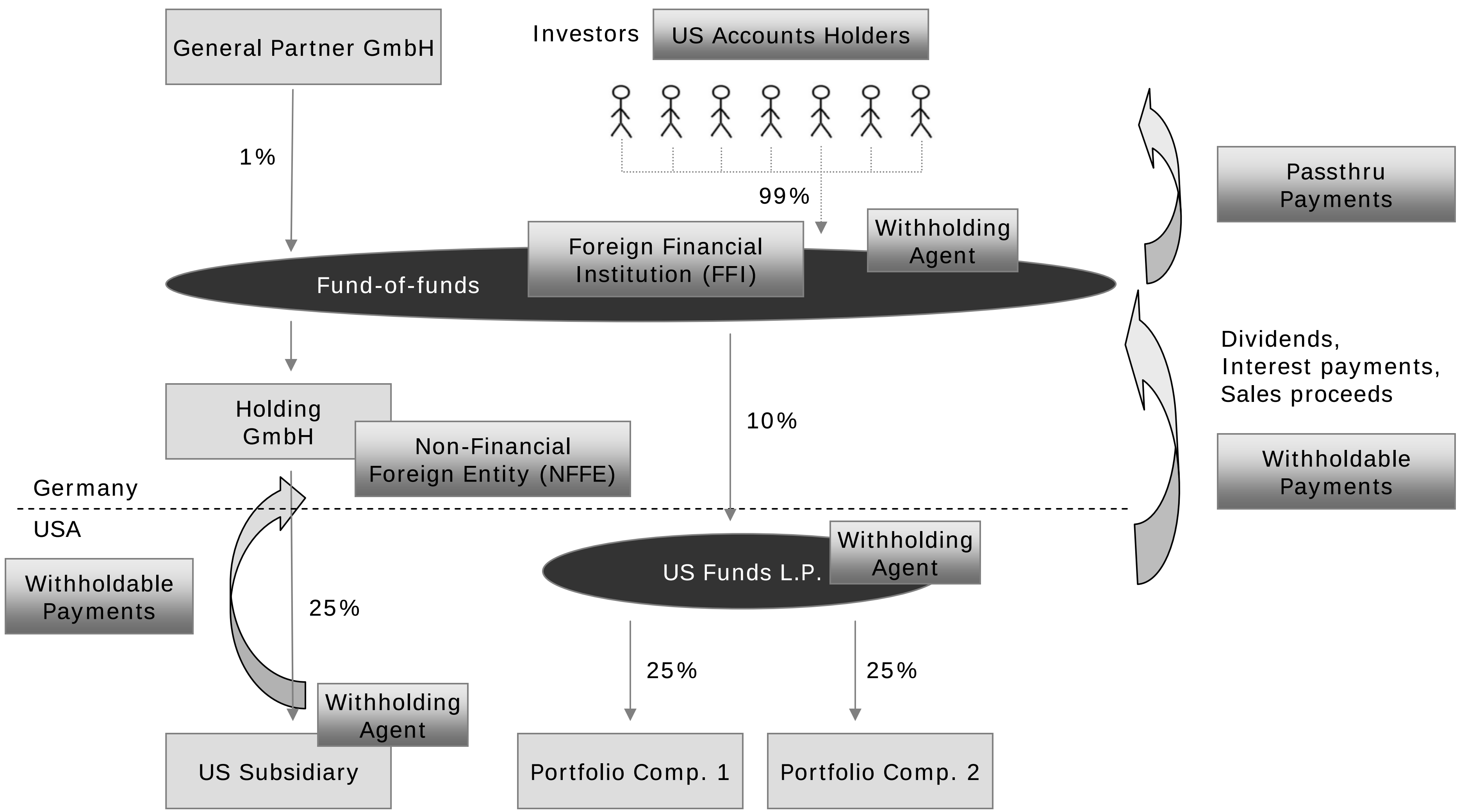
Part 3: Recent Tax Developments affecting Investment Funds in Germany

Christian Fingerhut Partner, Frankfurt

Part 3: Recent Developments Affecting Investment Funds in Germany

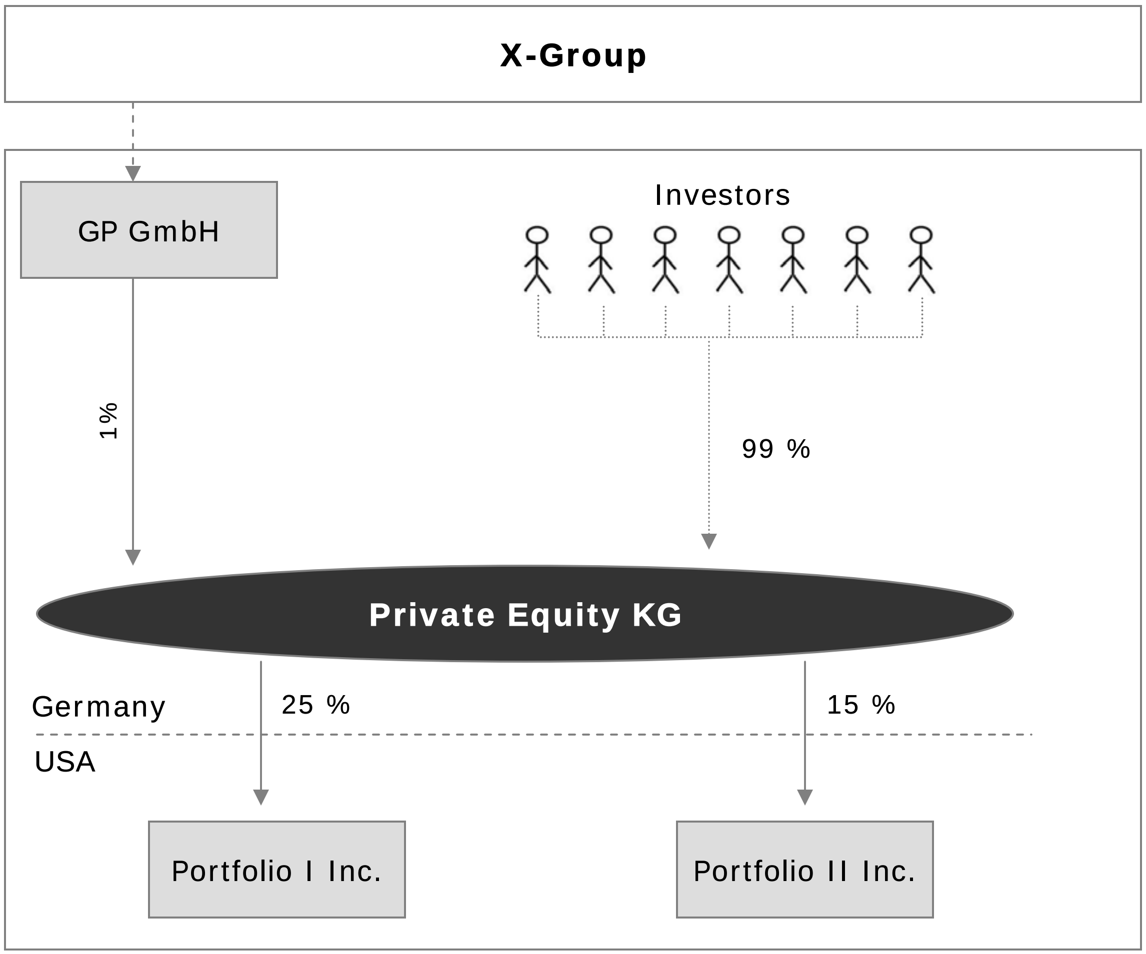
I. FATCA – Current Discussion in the German Funds Industry and Implementation Status Report

I. Overview / Key Terms relevant to the German Funds Industry



I. Examples

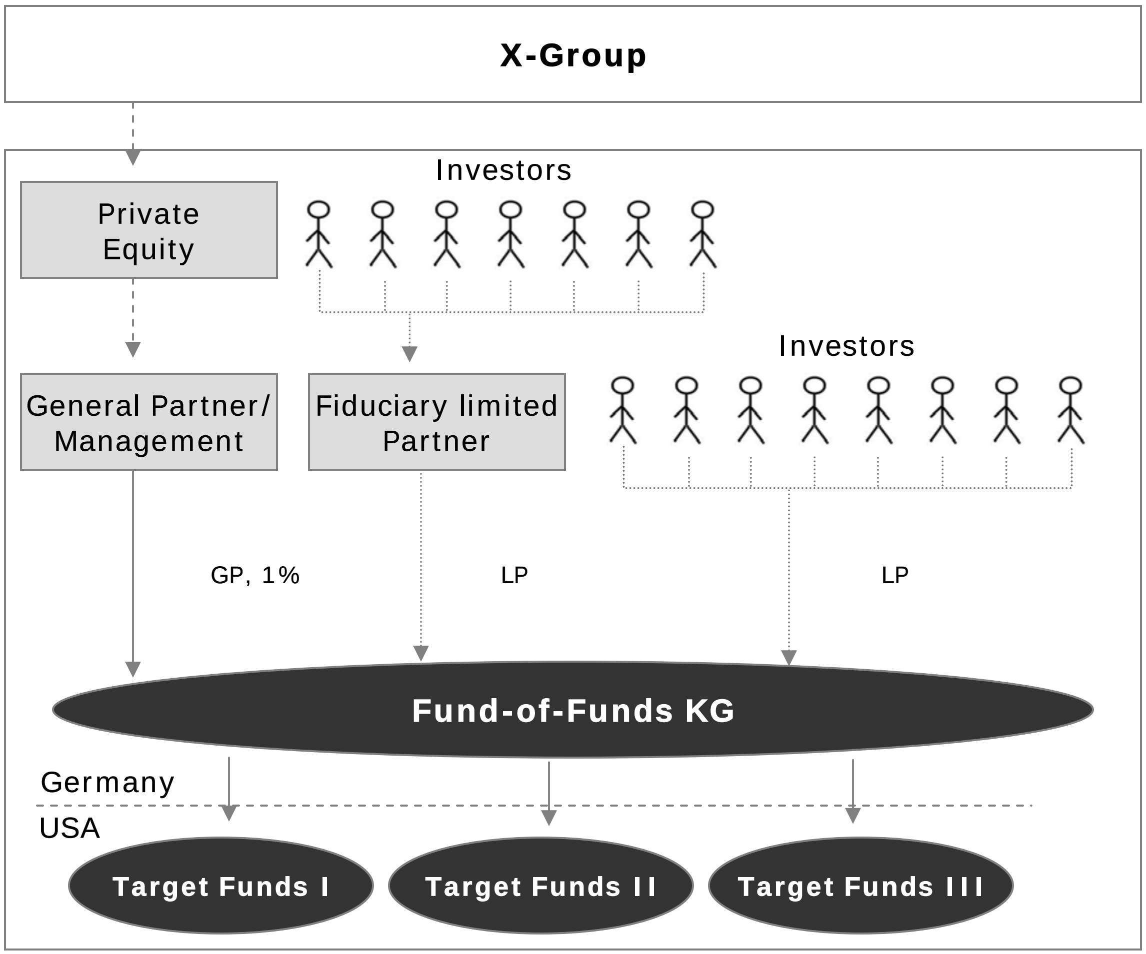
Private Equity (Direct Investments)



- Private Equity KG qualifies as **FFI**
- If Private Equity KG is non-compliant, the US Portfolio companies are required to withhold **30% FATCA withholding**
- **Both Portfolio Companies and Private Equity KG qualify as Withholding Agents**
- If Private Equity KG should sell any of its Portfolio Companies, the **Purchaser is Withholding Agent** for FATCA withholding tax (irrespective of whether the purchaser is a US person or not!)

I. Examples

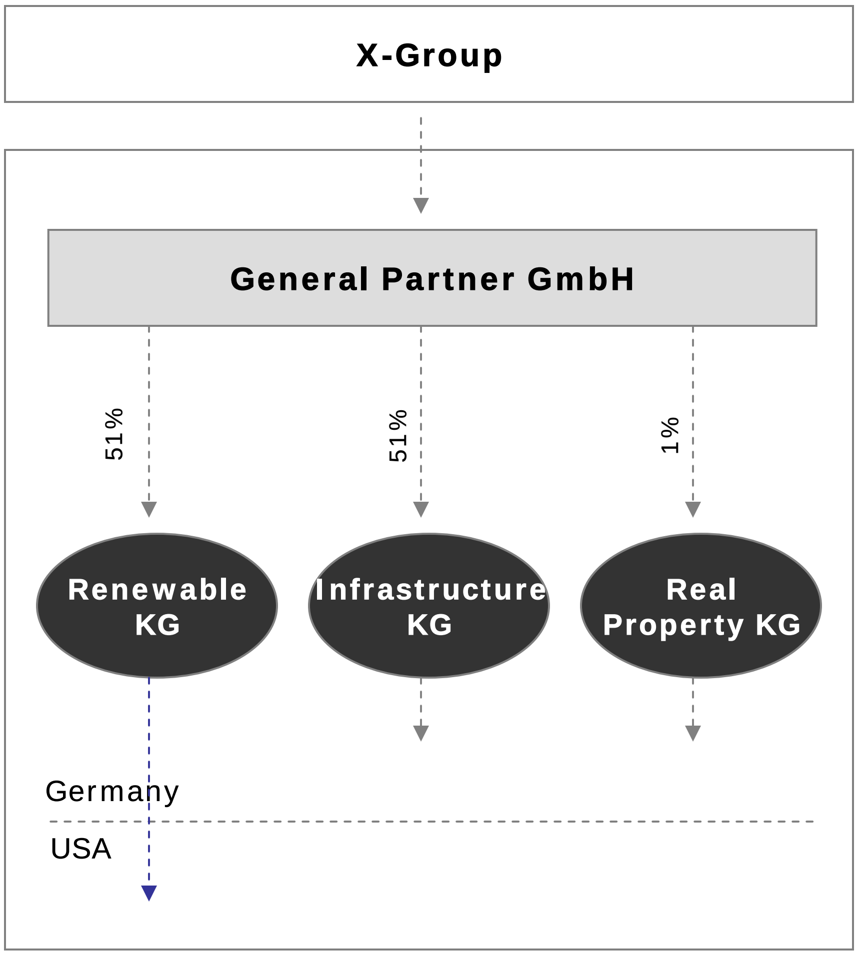
Private Equity (Fund of Funds)



- Fund-of-Funds KG qualifies as **FFI**
- If Funds-of-Funds KG does not comply with the FATCA regime, US-Target Funds are required to **FATCA-withholding of 30%**
- X-Group and Fund-of-Funds KG do <u>not</u> constitute an Expanded Affiliated Group (participation only 1%)

I. Examples

Expanded Affiliated Group – German "closed end funds"



- Renewable KG, Infrastructure KG and Real Property KG qualify as FFI, General Partner GmbH is a Non-Financial Foreign Entity (**NFFE**)
- Renewable KG will be required to enter into an **FFI Agreement** with the IRS as it owns US assets
- The X-Group including Renewable KG, Infrastructure KG and General Partner GmbH constitute an Expanded Affiliated Group (EAG) because Renewable KG is a FFI, majority in renewable KG is held by General Partner GmbH and Renewable KG has entered into an FFI Agreement with the IRS
- Compliance obligations of Renewable KG will also relate to the entire EAG, including, in particular, Infrastructure KG, General Partner GmbH and X-Group
- **Investors** in Renewable KG or Infrastructure KG could be US Account Holders
- **Shareholders** of X-Group could be US Account Holders

I. Summary and Options being currently discussed

Retreat from the US market?

- Not a viable option for many

Wait-and-see?

- In light of the drastic consequences (30% withholding of payments from US sources, including payments to non-US investors) this does not seem to be a practicable idea either

- FATCA tax may become “definitive” (no tax credit available under the German US tax treaty)

- FATCA tax in addition to other withholding taxes?

→ FATCA Compliance!

I. Summary and Options being currently discussed

What to do?

- Expanded Affiliated Groups (EAG's) should try to achieve **Deemed Compliant FFI** status for most entities
  - This is not possible for investment structures having natural persons as investors
- Deemed Compliant FFI need to **exclude US Account Holders** and ensure that US Account Holders may not invest in the future
- Requires **"Waiver-or-out"-policy**, uncooperative investors (including non-US Account Holders) need to be excluded

II. Overview on Recent German Tax Regulations Affecting Investment Funds

Recent Tax Treaties

- USA, Ireland, UK
  - "Limitation of benefit" rules (Art. 28 para 6 DTT USA, Prot. 1 b) DTT Ireland) implying **tax residence of investment funds under the respective DTT**
  - Definition of "Dividends" includes distributions of German Investment Funds in most recent DTT's (Art. 10 para 3 DTT Ireland, UK, Spain, Cyprus)
- Switzerland
  - Revision of DTT, especially regarding the exchange of information Article (negotiations successfully terminated on August 10, 2011), new DTT to enter into force probably in 2013
  - Recent Tax Treaty (*bilaterales Steuerabkommen*) on interest income, text has not been published yet, *Bundesrat* likely not to grant consent

II.2. Recent German Tax Regulations Affecting Investment Funds

Implementation of the UCIT-IV Directive

- Modifications to the procedure of withholding and crediting dividend withholding tax (cum/ex-transactions) in Sections 44, 44a and 50d of the German Income Tax Code

- Amended definitions of "domestic" and "foreign" investment funds in Section 1 para 1 Investment Tax Act, reflecting new crossborder collective portfolio managements via branch offices of EU managers, amendments to Section 11 Investment Tax Act, determine whether EU Investment Funds are tax resident in Germany

- Planned tax-free treatment of cross-border mergers of investment funds has not yet been implemented

APPENDIX: Draft Form 8938 & TD F 90-22.1 (FBAR)

Caution: DRAFT FORM

This is an advance proof copy of an IRS tax form. It is subject to change and OMB approval before it is officially released.

If you have any comments on this draft form, you can submit them to us on our web site. Include the word DRAFT in your response. You may make comments anonymously, or you may include your name and e-mail address or phone number. We will be unable to respond to all comments due to the high volume we receive. However, we will carefully consider each suggestion. So that we can properly consider your comments, please send them to us within 30 days from the date the draft was posted.

Form **8938**
(November 2011)
Department of the Treasury
Internal Revenue Service

Statement of Specified Foreign Financial Assets

▶ **See separate instructions** ▶ **Attach to your tax return**

OMB No. 1545-2195

Attachment Sequence No. **175**

If you have attached additional sheets, check here ☐

Name(s) shown on return	Identifying number

Number, street, and room or suite no. (if a P.O. box, see instructions)

City or town, province or state, and country (including postal code)

For tax year beginning , 20 , and ending , 20

Note. All information must be in English. Show all amounts in U.S. dollars. Show currency conversion rates in Part I, line 6(2), or Part II, line 6(2).

Type of filer

a Specified individual **(1)** ☐ Married filing a joint return **(2)** ☐ Other individual

b Specified domestic entity **(1)** ☐ Partnership **(2)** ☐ Corporation **(3)** ☐ Trust **(4)** ☐ Estate

Check this box if this is an original, amended, or supplemental Form 8938 for attachment to a previously filed return . . . . . . ☐

Part I Foreign Deposit and Custodial Accounts (see instructions)

If you have more than one account to report, attach a continuation sheet with the same information for each additional account (see instructions).

1 Type of account ☐ Deposit ☐ Custodial

2 Account number or other designation

3 Check all that apply **a** ☐ Account opened during tax year **b** ☐ Account closed during tax year
c ☐ Account jointly owned with spouse **d** ☐ No tax item reported in Part III with respect to this asset

4 Maximum value of account during tax year . . . . $

5 Did you use a foreign currency exchange rate to convert the value of the account into U.S. dollars? . . ☐ Yes ☐ No

6 If you answered "Yes" to line 5, complete all that apply.

(1) Foreign currency in which account is maintained	**(2)** Foreign currency exchange rate used to convert to U.S. dollars	**(3)** Source of exchange rate used if not from U.S. Treasury Financial Management Service

7 Name of financial institution in which account is maintained

8 Mailing address of financial institution in which account is maintained. Number, street, and room or suite no.

9 City or town, province or state, and country (including postal code)

Part II Other Foreign Assets (see instructions)

Note. *If you reported specified foreign financial assets on Forms 3520, 3520-A, 5471, 8621, or 8865, you do not have to include the assets on Form 8938. You must complete Part IV. See instructions.*

If you have more than one asset to report, attach a continuation sheet with the same information for each additional asset (see instructions).

1 Description of asset

2 Identifying number or other designation

3 Complete all that apply

a Date asset acquired during tax year, if applicable . . . .

b Date asset disposed of during tax year, if applicable . . . .

c ☐ Check if asset jointly owned with spouse **d** ☐ Check if no tax item reported in Part III with respect to this asset

4 Maximum value of asset during tax year (check box that applies)

a ☐ $0 - $50,000 **b** ☐ $50,001 - $100,000 **c** ☐ $100,001 - $150,000 **d** ☐ $150,001 - $200,000

e If more than $200,000, list value . . . . $

5 Did you use a foreign currency exchange rate to convert the value of the asset into U.S. dollars? . . . ☐ Yes ☐ No

Part II Other Foreign Assets *(continued)*

6 If you answered "Yes" to line 5, complete all that apply.

(1) Foreign currency in which asset is denominated	**(2)** Foreign currency exchange rate used to convert to U.S. dollars	**(3)** Source of exchange rate used if not from U.S. Treasury Financial Management Service

7 If asset reported in Part II, line 1, is stock of a foreign entity or an interest in a foreign entity, report the following information.

a Name of foreign entity ____________

b Type of foreign entity **(1)** ☐ Partnership **(2)** ☐ Corporation **(3)** ☐ Trust **(4)** ☐ Estate

c ☐ Check if foreign entity is a PFIC

d Mailing address of foreign entity. Number, street, and room or suite no.

e City or town, province or state, and country (including postal code)

8 If asset reported in Part II, line 1, is not stock of a foreign entity or an interest in a foreign entity, enter the following information for the asset.

Note. If this asset has more than one issuer or counterparty, attach a continuation sheet with the same information for each additional issuer or counterparty (see instructions).

a Name of issuer or counterparty ____________

Check if information is for ☐ Issuer ☐ Counterparty

b Type of issuer or counterparty

(1) ☐ Individual **(2)** ☐ Partnership **(3)** ☐ Corporation **(4)** ☐ Trust **(5)** ☐ Estate

c Check if issuer or counterparty is a ☐ U.S. person ☐ Foreign person

d Mailing address of issuer or counterparty. Number, street, and room or suite no.

e City or town, province or state, and country (including postal code)

Part III Summary of Tax Items Attributable to Specified Foreign Financial Assets (see instructions)

Asset Category	Tax item	Amount reported on form or schedule	Where reported: Form and line	Where reported: Schedule and line
I. Foreign Deposit and Custodial Accounts	**a** Interest	$		
	b Dividends	$		
	c Royalties	$		
	d Other income	$		
	e Gains (losses)	$		
	f Deductions	$		
	g Credits	$		
II. Other Foreign Assets	**a** Interest	$		
	b Dividends	$		
	c Royalties	$		
	d Other income	$		
	e Gains (losses)	$		
	f Deductions	$		
	g Credits	$		

Part IV Excepted Specified Foreign Financial Assets (see instructions)

If you reported specified foreign financial assets on the following forms, check the appropriate box(es). Indicate number of forms filed. You do not need to include these assets on Form 8938 for the tax year.

☐ 3520 Number of forms ____ ☐ 3520-A Number of forms ____ ☐ 5471 Number of forms ____

☐ 8621 Number of forms ____ ☐ 8865 Number of forms ____

TD F 90-22.1

(Rev. March 2011)
Department of the Treasury

Do not use previous editions of this form

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 12/31

___ ___ ___ ___

Amended ☐

Part I Filer Information

2 Type of Filer
a ☐ Individual **b** ☐ Partnership **c** ☐ Corporation **d** ☐ Consolidated **e** ☐ 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: ☐ Passport ☐ 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?
☐ 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)

☐ No

Part II Information on Financial Account(s) Owned Separately

15 Maximum value of account during calendar year reported	**16** Type of account **a** ☐ Bank **b** ☐ Securities **c** ☐ 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)

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 20 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 ☐ Taxpayer Identification Number ☐ 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** ☐ Bank **b** ☐ Securities **c** ☐ 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** ☐ Bank **b** ☐ Securities **c** ☐ 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** ☐ Bank **b** ☐ Securities **c** ☐ 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** ☐ Bank **b** ☐ Securities **c** ☐ 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** ☐ Bank **b** ☐ Securities **c** ☐ 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** ☐ Bank **b** ☐ Securities **c** ☐ 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

Complete a Separate Block for Each Account Owned Jointly

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 ☐ Taxpayer Identification Number ☐ 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 ☐ Bank b ☐ Securities c ☐ 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 ☐ Bank b ☐ Securities c ☐ 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 ☐ Bank b ☐ Securities c ☐ 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)

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 ☐ Taxpayer Identification Number ☐ 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** ☐ Bank **b** ☐ Securities **c** ☐ 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** ☐ Bank **b** ☐ Securities **c** ☐ 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** ☐ Bank **b** ☐ Securities **c** ☐ 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 ☐ Taxpayer Identification Number ☐ 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 ☐ Bank b ☐ Securities c ☐ 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 ☐ Bank b ☐ Securities c ☐ 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 ☐ Bank b ☐ Securities c ☐ 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, make the needed additions or corrections, attach a statement explaining the additions or corrections, and staple a copy of the original FBAR to the amendment. An amendment should not be made until at least 90 calendar days after the original FBAR is filed. Follow the instructions in "When and Where to File" to file an amendment.

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 Corporate 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. 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.

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