



US TAX ALERT

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REPORTING NON US FINANCIAL ACCOUNTS

The US Annual Report of Foreign Bank and Financial Accounts, Form TDF 90-22.1 (TDF return), is often overlooked. It must be filed by United States *persons* which includes individuals who are US citizens, green card holders or US residents and may include others. The information reported on the form is recorded on the database of the United States Financial Crime Enforcement Network to counteract terrorism, money laundering and tax avoidance.

The reporting in this **US TAX ALERT** is more extensive than normal given the many new and intricate provisions of the revised legislation and the very serious penalties. Much of the instructions to the TDF return have been reported verbatim.

Filing and Fines

The TDF return is due June 30 each year and no filing extension is allowed. The penalties for non – wilful violation are up to US \$10,000 and for wilful violation the greater of \$10,000 or 50% of the balance in the accounts at the time of the offense. Criminal penalties can also be assessed.

The general instructions for the TDF return indicate that the following persons must file:

*Each United States person (both husband and wife report separately if they are US citizens) who has a **financial interest in or signature or other authority over** any foreign financial accounts (non US accounts), including bank, securities, or other types of financial accounts, in a foreign country, if the aggregate value of these financial accounts exceeds \$10,000 at any time during the calendar year, must report that relationship each calendar year by filing this report with the Department of the Treasury on or before June 30, of the succeeding year.*

The TDF return must be filed by a United States person which means “a citizen or resident of the United States, or a person in and doing business in the United States”. That is an extremely broad definition – particularly because it now covers people doing business in the United States and not necessarily living there.

If a US Citizen living in Canada and married to a Canadian and is a joint owner of their spouse’s investments and/or bank accounts, they must report these account interests– even if they don’t have enough income to file a US personal tax return.

Financial Accounts in a Foreign Country

The meaning of a *financial account* in a foreign country includes all accounts in geographical areas outside the United States. The definition of an *account* is very broad as follows:

The term includes any bank, securities, securities derivatives or other financial instruments accounts. Such accounts generally also encompass any accounts in which the assets are held in a commingled fund, and the account owner holds and equity interest in the fund (including mutual funds). The term also means any savings, demand, checking, deposit, time deposit, or any other account (including debit card and prepaid credit card accounts) maintained with a financial institution.....

A financial account would pick up RRSP's, RESP's and RRIF's.

Financial Interest or Signature Authority over an Account

What is so frightening about this US legislation is how far it reaches. It not only covers ownership and joint ownership of accounts but also includes accounts where you simply have signing authority (say you are treasurer of a local charity).

The instructions to the TDF return define a financial interest as follows:

A financial interest in a bank, securities, or other financial account in a foreign country means an interest described in any one of the following three paragraphs:

- 1. A United States person has a financial interest in each account for which such 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 United States persons.*
- 2. A United States 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 US person, b) a corporation in which the United States person owns directly or indirectly more than 50 % of the total value of shares of stock or more than 50% of the voting power for all shares of stock, c) a partnership in which the United States person owns an interest in more than 50% of the profits... or d) a trust in which the United States person either has a present beneficial interest, either directly or indirectly, in more than 50% of the assets or from which such person receives more than 50% of the current income.*
- 3. A United States 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 trust, or a person acting on behalf of a trust, that was established by such United States person and for which a trust protector has been appointed.*

You would have a signature authority over an account if you meet the following test:

A person has signature authority over an account if such person can control the disposition of money or other property in it by delivery of a document containing his or her signature (or his or her signature and that of one or more other persons) to the bank or other person with whom the account is maintained.

It is obvious that any account for which you are acting as a trustee or hold a power of attorney would be included.

Filing Deadline and Record Retention

Filing information and record retention details taken from the TDF return guide are paraphrased as follows:

This report must be filed on or before June 30 of the year following the calendar year reported. The report is required annually. ... There is no extension of time available for filing this report. ... If this report this report is required, certain records must be retained. Such records must contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each account during the reporting period.

Information to Report on TDF Return

Until 2008 you simply had to report the maximum value of accounts within a range. Starting in 2009 you must report the exact maximum value in foreign accounts. It is a mystery how US individuals are going to get this information say on an account that is owned by someone else and they are only a signing officer. The following information is required for *each* account:

- ◆ Maximum value in the year
- ◆ Type of account (bank, securities, other)
- ◆ Name of financial institution
- ◆ Account number
- ◆ Mailing address of institution

Forms Completion

The TDF return has a series of schedules attached to it requiring details of each account in each of the following categories:

- ◆ Part II – Accounts owned separately
- ◆ Part III – Accounts owned jointly
- ◆ Part IV – Accounts where the filer has signature or other authorization but no financial interest
- ◆ Part V –Accounts for corporate filers.

Summing Up

The onerous penalties are obviously compelling to make US *persons* file this report. Penalties apply whether the form is not filed for non-wilful or wilful reasons. Many US persons living in Canada treat lightly the fact that they don't file US income tax returns. Carelessness about not filing the TDF return can be far more serious.

*J. E. Arbuckle Financial Services Inc.
30 Dupont St. E., Suite 205, Waterloo, Ontario N2J 2G9
Phone: 519-884-7087 Fax: 519-884-5741
Email: info@finplans.net*

