POWERS OF ATTORNEY

How to Avoid Potential Agent Liability with a Quick Fix

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Under the Federal Bank Secrecy Act, the U.S. Treasury Department was given the authority to collect information about financial accounts held anywhere outside of the United States. Financial accounts are broadly defined, covering bank or brokerage accounts, commodities, futures and options, mutual funds, and many other kinds of securities, insurance policies with a cash value, and any other accounts which are held with a foreign financial institution. The Act was aimed at ensuring that U.S. law enforcement and tax agencies could acquire information about accounts which might be used for illegal purposes, such as money laundering, drug or weapons trafficking, and tax evasion. However, to accomplish this goal, the Act casts an extremely broad net. The Internal Revenue Service is authorized by the Financial Crimes and Enforcement Network (FinCEN) to collect this information and administer penalties to those who fail to comply with the Act.

Under the Act, U.S. persons who have a financial interest in or just signatory authority over foreign accounts with a total combined value of $10,000 U.S. in any given year are required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts, known as the "FBAR." The FBAR form must provide extensive information about each account, and it is generally due by June 30 of the following year, with no extensions available. Failing to file the FBAR properly and report all accounts can result in **draconian penalties**. Each separate account which should have been reported counts as a separate violation. Penalties for non-willful violations are up to $10,000. If the violation is determined to have been willful, the civil penalty can be up to the greater of $100,000 or 50% of the value of the assets in each unreported account, and criminal penalties of up to $250,000, 5 years in jail, or both, can also apply. If multiple parties all have powers over or interests in the same account, each individual party has an independent obligation to report it. Compliance by one party does not excuse failure on the part of other parties.

In April 2014, the IRS released an updated *Reference Guide on the Report of Foreign Bank and Financial Accounts*. The updated *Guide* contained a new example regarding what type of power over a foreign financial account created a need for the power holder to file the FBAR. This example was unexpected, and has led to concern among estate planning attorneys. The example describes a U.S. resident, Megan, who holds power of attorney over her elderly parents' Canadian accounts. The example states that the power of attorney gives Megan signatory authority over the accounts and thereby creates the need for her to file the FBAR and report her parents' accounts, even if she never exercises the power of attorney.

Most well-drafted general powers of attorney give the power holder (the "agent") the authority to act with regard to the financial accounts of the person who grants the power (the "principal"), and this authority will generally constitute "signatory authority" as defined by the Act. However, in many cases, the agent is not even aware that the power exists unless the principal actually becomes incapacitated. Even those who are aware they have been named agents may still not be aware of the principal's assets if they have not had to act on the principal's behalf.

The IRS has not issued anything which clarifies the extent to which lack of knowledge may protect agents from penalties for failing to file required FBARs, or how broadly the term "power of attorney" will be interpreted with regard to foreign financial accounts. There are many good reasons to hope that this situation will be resolved, and it is generally desirable to ensure that a general power of attorney gives the agent authority over as many assets as possible. However, until the IRS provides more information about how this new example will be interpreted and penalties applied, estate planners need to consider how to address this issue and reduce the risk of creating big problems for innocent agents. The simplest option may be to have powers of attorney explicitly state that the agent is not to be given any power which would be deemed signatory authority over any foreign financial account. Planners who don't use this option should consider others, or at least discuss with clients the importance of ensuring that they provide their agents with annual notice about any foreign financial accounts the clients have, and of any reporting obligation the agents may have as a result.

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