

US single member LLC entities and US Foreign Bank Account Reporting (FBAR) Requirements

Background

The FBAR is a by-product of the Bank Secrecy Act which was first enacted in 1970. The FBAR reporting requirement has been in force for the last 9 years and is applicable to all parties that fall under the definition “US person”. The act requires that “US persons” file an annual FBAR report disclosing details where they have “a financial interest in or signature or other authority over any foreign financial 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 a calendar year”.

Definition of “US person”

Often in international structures for commercial reasons and/or to avoid the application of potential fiscal ‘blacklists’ clients would utilise single member US LLCs. In these cases there would be no US beneficial owners, no US assets and no US business activity. In these circumstances it was historically believed that such a US LLC would not fall within the definition of “US person” and accordingly it was thought that FBAR filing regulations were not applicable.

Over the last year as part of the on going IRS crackdown on US taxpayers the need to submit current and outstanding FBAR forms has been widely published by the IRS and this has been accompanied by further clarification of who falls within the definition of a US person and extension of the persons covered by the FBAR requirements to include non resident persons with a branch or business activity in the US.

The IRS have confirmed that in their view a single member US LLC is a US person for the purposes of the FBAR reporting regime and the fact that for US tax purposes such a US LLC would be treated as a ‘disregarded’ entity is not relevant.

Filing Deadlines

An FBAR form is due for filing by the 30 June in the following year. Given the rapidly changing view points on the exact requirements and to enable more time for US tax payers to bring their affairs into order the filing deadline in relation to FBARs forms for 2008 has been extended in certain circumstances to 15 October 2009. Where applicable FBARs due in the previous six years should also be filed.

Position for single member LLCs

There has been significant debate during 2009 on the issue of whether a single member LLC falls within the revised definitions of “US person”. There are still various contradictory opinions, but what is clear is as follows:

- Any US LLC in existence during 2008 may potentially be subject to an FBAR filing requirement and this will depend on whether the pre-2009 definition of a US person included US LLCs or whether they are only treated as US persons from 2009 onwards under the revised definition.
- Any US LLC in existence during 2009 will be subject to the 2009 FBAR requirements and will need to file an FBAR form for 2009 by 30 June 2010.

US Opinion

SMP Partners are working with US advisors to try and clarify what the final position is of the IRS and to ensure that where applicable relevant filings are made.

SMP Partners viewpoint

- The primary intent of the widened FBAR reporting requirements is to capture data that will assist US authorities in determining whether US Residents and Citizens have additional incomes that should be subject to US taxes.
- It is clear that the majority of US LLCs operated by our respective businesses would not fall into this category, however, faced with the additional administrative burden and costs of annual filing of data it is our view that where a US LLCs no longer provides a benefit over alternate jurisdictions then for ease of administration and to mitigate costs consideration should be given to replacing the US LLC with a new entity.
- Depending on the particular circumstances the US LLC could be replaced by for example an Isle of Man or BVI company or where there are commercial or other considerations then one may wish to consider using for example UK or Irish nominee companies or UK Limited Liability Partnerships or Scottish Limited Partnerships.
- To enable a smooth transition from existing US LLCs, irrespective of whether or not they are currently managed by SMP Partners, we can arrange for new entities to be substituted into existing structures without charging our standard formation fees for the new entity, where we are managing an LLC that is to be replaced we are also not proposing to charge our standard dissolution fees for closure of the LLC.
- We are in the process of reviewing existing structures utilising US LLCs in anticipation of further discussion with our client base in light of the input due from US advisors, in the meantime if clients wish to discuss the issues for their LLCs whether or not they are managed by SMP Partners please contact your usual SMP advisor.

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