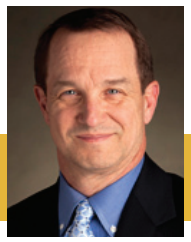
BUSINESS LAW UPDATE
FALL 2014

PRIORITY Read

Foreign Bank and Financial Accounts Reporting:

Are You or Your Financial Agent in Compliance?

By: Raj A. Malviya; malviyar@millerjohnson.com; 616.831.1799
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The Bank Secrecy Act says that any U.S. person who has a financial interest in, or signature authority over, financial accounts in a foreign country, with the aggregate value of all accounts exceeding $10,000 at any time during the calendar year, must file an informational return each year to the Department of Treasury. Such a return was formerly known as a Report of Foreign Bank and Financial Accounts TD F 90-22.1, but was replaced last September with a new form only available for filing online called the Financial Crimes Enforcement Network (FinCEN) Form 114, Report of Foreign Bank and Financial Accounts (FBAR). The FBAR informational return is due on or before June 30 each year and is filed online with the Department of Treasury.

For the purpose of FBAR filing requirements, a U.S. person includes U.S. citizens, residents and entities, including but not limited to domestic corporations, partnerships, limited liability companies, trusts and estates. An individual may have an interest in a foreign account either directly (as the owner of record or holder of legal title) or indirectly (through ownership or a beneficial interest of more than 50 percent in an entity holding such as a foreign account). Both a direct and indirect interest can give rise to FBAR filing requirements. Importantly, an individual has signature authority over a foreign account where the individual, alone or with another person, has the ability to control the disposition of assets held in the account. Does an agent under a financial power of attorney (POA) who

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has the authority to deal with foreign accounts satisfy the "signature authority" requirement? The IRS certainly thinks so.

Authority Under POA May Give Rise to FBAR Filing Obligations

The IRS recently released its revised "Reference Guide on the Report of Foreign Bank and Financial Accounts (FBAR)," which includes the following example with respect to the filing obligation of an attorney-in-fact with signature authority over foreign accounts:

> *Example: Megan, a U.S. resident, has a POA on her elderly parents' accounts in Canada, but she has never exercised the POA. Megan is required to file an FBAR if the POA gives her signature authority over the financial accounts. Whether or not the authority is ever exercised is irrelevant to the FBAR filing requirement.*

The above example clarifies the IRS's position that an agent under a financial POA stands in the shoes of the taxpayer for purposes of being subject to the FBAR reporting requirements, even if the agent never exercises the power. **Taking this position effectively makes the agent potentially liable for the principal's (taxpayer's) failure to comply with the informational reporting requirements.** Given this most recent guidance, if you have financial accounts outside of the U.S. and your POA document specifically authorizes your agent to deal with those accounts, you should not only take steps to ensure you are in compliance (or become compliant) with the informational reporting requirements, but also alert your agent of the duty to report. Additionally, you will need to determine whether your POA is currently effective (effective upon signing) or a springing version (effective upon your incapacity) to assess whether your agent faces any current reporting obligations. Finally, if you do not want your agent to have an obligation to report, you may want to have your estate planning attorney revise your POA so your agent is prohibited from dealing with your foreign accounts altogether.

Penalties for Failure to File the FBAR

A taxpayer who fails to properly file a complete and correct FBAR may be subject to a civil penalty not to exceed $10,000, per violation, for nonwillful violations that are not due to reasonable cause. For willful violations, the penalty may be the greater of $100,000 or 50 percent of the balance in the account at the time of the violation, for each violation. Criminal penalties for willfully failing to file an FBAR can be as much as $250,000 and/or five years in jail (or up to $500,000 and/or 10 years in jail if in conjunction with violating certain other laws). The criminal penalty for knowingly and willingly filing a false FBAR is $10,000 or five years in jail, or both.

Voluntary Disclosure

The IRS's Offshore Voluntary Disclosure Program (OVDP) provides an opportunity for taxpayers who have failed to comply with the FBAR filing requirement (and/or other offshore tax violations) in the past to come into compliance with U.S. tax laws with a reasonable degree of certainty as to the total cost of resolving their offshore tax issues. By entering the OVDP, taxpayers with undisclosed foreign accounts who make a voluntary disclosure may be able to avoid substantial civil penalties and generally eliminate the risk of criminal prosecution.

Most recently, the IRS made changes to the OVDP with the goal of making the program more streamlined, user friendly and not as severe of a course of action for nonwillful offenders. As it relates to FBAR compliance, for nonwillful offenders qualifying under this new streamlined program, the penalty will only be 5 percent of the highest aggregate balance of foreign accounts for residents and a waiver of the penalty for nonresidents. The previous OVDP rules allowed for reduced penalty amounts of 5 percent – 12.5 percent, but those options came with heavy restrictions and ruled out many taxpayers. There are additional complicated rules and exceptions that apply to the revised OVDP.

If you have any questions about this alert or FBAR reporting and OVDP in general, please contact one of the authors or a member of the Taxation practice group.

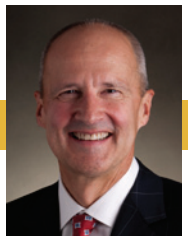
We're Honored

Sara Lachman was honored by *Michigan Lawyers Weekly* as a 2014 "Women in the Law".

Jon G. March was inducted into the National Academy of Distinguished Neutrals, a professional association committed to methods of alternative dispute resolution (ADR).

Six Miller Johnson attorneys are profiled in the 2014 edition of Chambers USA - America's Leading Lawyers for Business. Being recognized as Leaders in their Field are **Jeffrey Ammon** (Corporate/M&A); **Mary Bauman, Frank Berrodin** and **Jim Bruinsma** (Employee Benefits & Executive Compensation); and **Peter Kok** and **Jon March** (Labor & Employment).

The Best Lawyers in America® 2015 includes 49 lawyers from Miller Johnson. In addition, Best Lawyers named five attorneys as "Lawyers of the Year." Receiving this designation are **Jeffrey Ammon** in Grand Rapids for Closely Held Companies and Family Business Law, **David Buday** in Kalamazoo for Litigation – Labor and Employment, **Mary Bauman** – in Grand Rapids for Employee Benefits (ERISA) Law, **Cynthia Ortega** in Kalamazoo for Real Estate Law, and **Connie Thacker** in Grand Rapids for Family Law. Also noteworthy is that three members—**Joseph Doele, Michael Quinn,** and **Connie Thacker**—are listed for Collaborative Law: Family Law which was added for 2015. The full list of Best Lawyers is on our web site.



Bylaws: The Dirty Little Secret

By: Jeffrey S. Ammon; ammonj@millerjohnson.com; 616.831.1703

What if I told you that your 20-page bylaws could be cut to one page? And that doing so would actually improve your company's legal position? Read on to learn how this is possible. But be prepared—this article dispels some widely-held myths about traditional bylaws.

Here is the dirty little secret: roughly 95 percent of what you read in typical bylaws is filler—mere repetition of statutory rules. Virtually all of those statutory rules apply regardless of whether your bylaws repeat them.

For example, take the 3-4 pages of dense indemnity language often repeated in bylaws. Your company has that indemnity power without your bylaws mentioning it, let alone repeating it word-for-word. The statute does not say, for example, that indemnity powers exist *only as provided in the bylaws.*

So should we eliminate all that repetition? Maybe not: doesn't that repetition give you a handy reference to your governance rules? That would be a sensible reason—if it were true, which leads us to myth #1.

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Myth #1: Bylaws are a handy reference for your company's internal governance rules

Reality: Traditional bylaws are an incomplete and almost haphazard collection of only some of the governance rules binding your company.

First, the bylaws typically don't contain some of the most useful rules. For example, every set of bylaws dutifully repeats the statutory rule requiring an annual shareholder meeting. What would happen if you didn't hold the meeting? Wouldn't you like to know what the statute has to say about that? Trust me, you would. Do your bylaws tell you? I bet they don't. A truly handy reference would give you the answer. Under the traditional bylaw approach, however, you need to call your lawyer for the answer.

Second, the bylaws are an incomplete reference anyway because they don't even refer to the other internal rules you have created for yourself in shareholder agreements or in your articles of incorporation. Some bylaws actually conflict with the articles or the shareholder agreement.

For example, look up how many times your bylaws say *unless otherwise provided in the articles.* You need to check your articles to see if they provide *otherwise.* Should you have to look up all the different places where governance documents address your issue? Or pay your lawyer to do it? Are your bylaws answering your question, or just raising more questions?

Myth #2: You can amend your bylaws

Reality: You cannot change most of the statutory rules repeated in your bylaws. Those rules can be changed only by legislative action! For example, bylaws typically repeat the statutory rule that a notice mailed to a shareholder is effective when the corporation *mails* the notice, not when the shareholder *receives* it. Could you amend your bylaws to make notices effective only upon receipt? No. A bylaw cannot override that statutory mailing rule.

Only a few of the rules in the traditional set of bylaws can be amended. Do you know which ones? Of course not! Traditional bylaws give you no clue. You have to call your lawyer to find that out. For a little fun, ask your lawyer to identify which bylaw terms can be amended and which ones can't.

Myth #3: If the corporate law changes to give your company more flexibility, you can take advantage of that new flexibility

Reality: No. If your bylaws still contain the previous inflexible rule, then your bylaws lock you into that old rule until you amend your bylaws. To stay current, you'd need to amend your bylaws every time the law changes, which is roughly every year or so. Have you called your lawyer for this year's list of bylaw changes?

Myth #4: The law requires that you address all these subjects in your bylaws; that's why they are so long

Reality: The law doesn't even require bylaws! But the law does leave a few subjects for bylaws to address, such as the number of directors. You can cover that in one short sentence. And on one page, you can cover all the other rules left to the bylaws.

Is there a solution to the traditional bylaw approach? Yes. You can have a very short (one page) set of bylaws. Have your lawyer put the handy reference rules into a separate memo. A properly drafted memo would tell you which statutory governance rules had been modified in your bylaws, articles, or shareholder agreement. So the memo would truly be a handy reference for internal governance.

If you'd like to see a sample of this novel approach, contact the author. And ask yourself: why hasn't any lawyer suggested one-page bylaws before?

Subcontractors Beware of the Standard Indemnity Clause!

By: Daniel P. Perk; perkd@millerjohnson.com; 269.226.2961

It's no secret that the vast majority of commercial construction is performed by subcontractors who are hired by the general contractor. All too often the subcontractor simply signs off on the contract documents provided by the general contractor without carefully scrutinizing the forms, mistakenly believing that the general contractor will look out for their best interests.

Among the standard forms typically utilized by general contractors is the American Institute of Architects General Conditions (AIA A201). And, included in the AIA A201 general conditions is a standard indemnity clause that typically includes the following language or something similar to it:

> You as a Subcontractor/Supplier agree to . . . indemnify _____ Company . . . from and against all claims, damages, losses, demands, liens, payments, suits, actions, recoveries, judgments and expenses including attorney's fees, interest, sanctions, and court costs which are made, brought, or recovered against _____ Company, by reasons of or resulting from, but not limited to, any injury, damage, loss, or occurrence arising out of or resulting from the performance or execution of this Purchase Order and caused, in whole or in part, by any act, omission, fault, negligence, or breach of the conditions of this Purchase Order by [defendant], its agents, employees, and subcontractors regardless of whether or not caused in whole or in party by any act, omission, fault, breach of contract, or negligence of _____ Company. The Subcontractor/Supplier shall not, however, be obligated to indemnify _____ Company for any damage or injury caused by or resulting from the sole negligence of _____ Company.

In *Miller-Davis Co. v Ahrens Construction, Inc.,* (April 15, 2014), the Michigan Supreme Court interpreted this language expansively when it determined that the indemnity obligations applied to costs incurred by a general contractor when a subcontractor failed to undertake corrective work performed by the general contractor at the owner's request.

In *Miller-Davis Co.,* the subcontractor (Ahrens Construction) was hired to install a proprietary wooden roofing system in connection with a YMCA recreational complex of which Miller-Davis was the general contractor. Among the contract documents executed by the parties was AIA A201 general conditions containing the above quoted indemnity language. Ahrens also agreed to correct at its expense any work that was rejected or found not in compliance with the contract documents within one year of substantial completion. Within one year of completion of its work, Ahrens was notified of moisture problems in the roofing system and Ahrens undertook remedial action and thereafter received final payment. Over three years later, the owners' architects discovered significant deficiencies with the installation of the roofing system and requested Miller-Davis to perform corrective work who in turn notified Ahrens. When Ahrens refused to perform the corrective work, Miller-Davis undertook the corrective work at its expense and filed suit against Ahrens for, among other things, breach of its indemnity obligations.

The trial court ruled that Miller-Davis had no claim for breach of indemnity because "no claims, suits, actions, recoveries or demands were ever made or brought or recovered against" Miller-Davis within the meaning of the indemnity language. On appeal, the Michigan Court of Appeals agreed that the trial court correctly ruled that no one had brought a claim or demand against Miller-Davis within the meaning of the indemnification clause. The Court of Appeals also noted that consistent with the traditional view and previous case law interpreting similar indemnity language, "indemnification clauses are not intended to be used as a sword or shield in disputes between the contracting parties with respect to the

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Subcontractors Beware, *continued*

performance of the contract itself." Rather, such clauses are intended to apply to claims and demands made by third parties.

However, on further appeal to the Michigan Supreme Court, the Court, in a unanimous decision, reversed the Court of Appeals and held that the indemnity language did apply to the corrective work undertaken by Miller-Davis at the owner's request. The Court explained that the "language used by the parties in contracting for indemnity is unambiguous and clearly intended to apply as broadly as possible," and it was not limited to claims made by third parties. Rather it applied to "all claims, damages, losses, demands . . . arising out of or resulting from the performance" of Ahrens work. Furthermore, the owner had clearly made a "claim" within the meaning of the indemnity language and Miller-Davis had taken corrective work that was required by Ahrens' defective work. As such, "we hold that the indemnity clause of the subcontract apply to Miller-Davis's corrective work."

It is thus clear that indemnity clauses similar to those in the Miller-Davis case will be interpreted broadly and will not be limited to claims and demands made by third parties. More importantly, it is clear that such clauses should be carefully reviewed by all of the contracting parties in order to avoid such broad and unintended liability.

If you have any questions about this article, contact the author. You may also contact him or any member of Miller Johnson's construction practice group for assistance with contract issues or related matters.

Dare to be Different. Arena Place.

You probably caught the news back in January that Miller Johnson signed on to be the anchor tenant at Arena Place, thereby expanding the scope of the project from a 5 story to an 11-story building.

Then a month ago, the media was abuzz at a groundbreaking held for Arena Place with the claim that this is where the NEW Grand Rapids will work, live, and play.

Yes, it's true that we have embraced our mission of "daring to be different" by planning a move in 2016 to the new mixed used development which combines office and retail space in addition to studio apartments and parking. Miller Johnson will have the top four floors along with a rooftop patio.

www.arenaplacegr.com

"Our clients, the city, even practicing law, have become more sophisticated so, it was time to reflect that in our offices," explains Craig Mutch, Miller Johnson Managing Member. From the latest in video conferencing and data security to small group collaboration, clients will reap the benefits. Mutch said, "You could say the new environment demonstrates we're not just your grandparent's law firm."

Certificates of Insurance: New Law May Require Contract Revisions

By: Jeffrey S. Ammon; ammonj@millerjohnson.com; 616.831.1703

On June 28, the Governor signed a new Michigan law addressing the legal effect of certificates of insurance, those commonly-used pieces of paper that you exchange with others to prove that insurance coverage exists. This new law underscores the importance of your contract insurance requirements—and the unreliability of certificates of insurance.

Yes, certificates of insurance are unreliable. Courts have consistently held that you cannot rely on a certificate's contents as proof that the insurance coverage exists. So your insurance claim will fail if the policy is not in place or does not have the coverage you expected, regardless of what the certificate led you to believe.

Despite their legal unreliability, certificates are routinely exchanged and (mistakenly) relied upon. Which prompts the question: what *can* you rely on to make sure that others carry the insurance you require of them?

You should begin by reinforcing your contract insurance requirements. That reinforcement should describe the insurance features that matter to you, such as what risks are covered; what are the policy limits; who is insured; who are the additional insureds, if anyone; what are the policy effective dates; etc.

You will also probably need to revise your contract's insurance requirements regarding notice of nonrenewal or cancellation as the typical contract will violate the new law on this point. Here's why. The new law prohibits you from requiring a certificate of property or casualty insurance containing terms different from those in the policy. Your contracts, if typical of industry practice, probably require the other party to obtain a policy that will give you notice, say, 30 days before cancellation or nonrenewal. But most policies do not provide for this notice to anyone other than the named insured. If your contract requires such a certificate, your contract will violate the new law.

This is not a hypothetical problem. According to the Senate Fiscal Agency's analysis of the new law, Michigan Department of Transportation (MDOT) contracts contain exactly this kind of requirement that the new law would ban. Since 2011, roughly 13 other states have adopted similar laws.

After your contract is revised and reinforced, you should require proof of insurance. But now you know that a mere certificate of insurance is no proof at all. And you know that requiring the wrong form of certificate may be a violation itself.

Instead, require a communication directly from the insuring company (not the independent agent). The best form of direct communication? A copy of the policy itself, with all endorsements attached.

What about certificates that others require you to deliver? The new law makes you responsible for errors in any certificate you deliver regarding property and casualty insurance. You can be fined up to $500 for each violation ($2,500 if you knowingly violated the law). Are you off the hook if you didn't prepare the certificate yourself? After all, you never prepare it: your insurance agent does. That difference is irrelevant under the new law. You are still responsible if you deliver the incorrect certificate. Liability attaches to the preparer (your agent) and to the deliverer (you).

What to do? We suggest several things:

- Stop relying on certificates of insurance as proof that the insurance exists. Demand to see a copy of the policy.
- Review your standard contract insurance requirements. Are your requirements adequately specific? Do you require a copy of the policy or

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Certificates of Insurance, *continued*

other reliable proof of insurance? Or do you require merely a "certificate" of insurance? Would the required certificate violate the new law, especially as to notice of cancellation or nonrenewal? Reinforce your standard requirements as needed.

- Consult your insurance advisor and experienced legal counsel to coordinate your future practices regarding insurance.

For more information, contact your Miller Johnson contract lawyer or the author.

In the News

TJ Ackert and **Jeff Ammon** presented Hot Topics in Construction at a seminar with Rehmann and the Lighthouse Group on June 12.

Sara Lachman is on the Board of Directors for the Fulton Street Farmer's Market. She is also on the Grand Rapids Public Museum Board of Trustees.

Raj Malviya was selected to serve a two-year term in the Fellows Program instituted by the American Bar Association Section of Real Property, Trust and Estate Law. He was on a panel June 20th discussing "Tax Planning and Compliance Issues for International Executives" at the South Asian Bar Association North America's "Elevating the Bar" convention in Chicago.

Neil Marchand is on the Board of Directors for the Rotary Club of Grand Rapids. He also serves as the chair of their membership committee.

Cathy Metzler is presenting at a Medicaid Senior Advocate Training; a Primer on Michigan's Medicaid Program sponsored by Elder Law of Michigan. She is also doing two Medicaid/Long Term Care Seminars for Edward Jones. One is on August 26 with James Reslock and the other on September 24 with Michael Mattison.

Laurie Murphy was interviewed for the article "Retirement in River City" which was in the June 2 issue of *Michigan Lawyers Weekly.*

Jason Miller was appointed to serve as the Vice Chair of the American Bar Association Young Lawyers Division Ethics and Professionalism Committee. He was also appointed to the Editorial Board of *Human Rights Magazine*, the esteemed publication of the Individual Rights and Responsibilities Section of the ABA.

Dan Perk was elected to Fellowship by the Board of the American Bar Foundation.

John Piggins presented on the Federal Rules of Bankruptcy Procedure as Related to Adversarial Proceedings at the 2014 Western District Federal Bar Association Bankruptcy Seminar on August 1.

Andrew Oostema was appointed by the Mayor of Grand Rapids to serve a 3-year term on the Housing Appeals Board.

Tripp Vander Wal was interviewed for the article "Form 5500 is late? That's $1,000 per day" in the July 28 issue of the *Grand Rapids Business Journal*.

Miller Johnson's running team is the Triple Crown Series Overall Champions (Div II). Members are **Eric Starck, Frank Berrodin, Gary Chamberlin, Kaley Connelly, Patricia Emerson, Dustin Jackson, Hope Moxey, Andy Portinga,** and **Clare Portinga**.

Contractors and Owners Take Note: AIA Replaces its Design-Build Form

By: Jeffrey S. Ammon; ammonj@millerjohnson.com; 616.831.1703

If you work in the construction industry, you are familiar with the American Institute of Architect (AIA) construction document forms. AIA revises and replaces these forms on staggered 10-year cycles. AIA has just released its 2014 contract form between the owner and design-builder.

You'll be forced to abandon the 2004 form sooner or later when your AIA software no longer processes it. It is not too early to begin using the 2014 form. Here are a few things you'll need to know.

More Attention to Insurance

The 2004 form contained little more than a few blanks for owners and design-builders to address insurance requirements. The 2014 form devotes an entirely separate page exhibit to insurance. Calling more attention to this is a good thing for everyone. But the newly-added insurance details will require your careful review—and negotiation.

Structure

The 2004 form had 11 pages. But it was intentionally incomplete: for no good reason, many of the contract terms were contained in a separate 30-page exhibit! The 2014 form wisely consolidates these separate parts into one form. So don't be alarmed that the 2014 form has 35 pages instead of 11!

Design Focus

The 2004 form addressed design requirements only briefly. This was always a shortcoming of the AIA design-build form, especially when compared to the AIA's much more detailed form of owner-architect agreement used in the traditional design-bid-build model.

The 2014 form drives more attention to design in several ways. First, the form invites the owner to include the owner's project goals and specifications (so-called *project criteria*). Second, the form elaborates on the design requirements that the design-builder must apply to those criteria. Third, the form defines the design product that the design-builder must deliver: a preliminary design that includes the design-builder's suggested project cost and timing.

Project Cost and Timing Not Set Upon Signing

The 2004 form required the parties to agree on the project cost and timing when the contract was signed. The 2014 form allows the parties to postpone, however, agreement on cost and construction timing until after the design phase is complete. At that point, the owner and design-builder decide on cost and timing and sign an amendment to the original contract (or else the project does not get built).

This contract-then-amendment sequence should remind you of the two contract steps that occur in the traditional design-bid-build method of construction. The 2014 contract form covering the design phase is like the traditional owner-architect agreement; the 2014 contract amendment is like the owner-contractor agreement, because it adds the construction phase.

Owner Risks Remain

The 2014 form, like the 2004 form, continues to favor design-builders over the owners. The 2014 form still waives the owner's right to consequential damages. The 2014 form still does not indemnify the owner for the design-builder's breach of contract. None of this should surprise you; after all, the form is produced by the American Institute of *Architects*, not *Owners*.

The 2014 form makes other changes and rearranges many of the 2004 form's sections. So learning to work with the new form will take some patience. We will continue working hard to protect your rights under this new form, whether you are the owner, designer, constructor, or consultant. For more information, contact the author.

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Any of the lawyers listed can also put you in contact with Miller Johnson attorneys who practice in the areas of Banking, Construction, Economic Development, Health Care, Health Professionals, Immigration, Manufacturing and Small Business.

Miller Johnson is a member of Meritas, a global alliance of over 7,000 lawyers serving in more than 170 full-service law firms across more than 70 countries. For direct access to locally-based legal expertise worldwide, please visit the Meritas website at www.meritas.org.

U.S. News Media Group and Best Lawyers awarded Miller Johnson with top rankings for 25 practice areas in Grand Rapids and 8 in Kalamazoo as part of their 2014 "Best Law Firms" report. Achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise according to the report. Services ranked as Tier 1 include employee benefits, bankruptcy and creditor/debtor rights, corporate law, labor and employment, mergers and acquisitions, banking and finance, litigation, mediation, real estate, tax law, trusts and estates, and family law.