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2020 FBAR Update: Revisit the Rules While Relief Is Available

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Enacted half a century ago in an era marked more by financial opacity than transparency, the Bank Secrecy Act ("BSA") remains a potent 21st century tool in the government's efforts to uncover hidden assets, money laundering, and tax noncompliance related to offshore accounts. In particular, BSA's requirement that U.S. owners of certain foreign financial accounts (and U.S. individuals with authority over the accounts) file annual reports — on FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* ("FBAR") — continues to spawn questions, controversies, and intense enforcement activity by the Internal Revenue Service and the U.S. Department of Justice.

Without a doubt, the government's FBAR enforcement actions remain focused on money laundering and tax evasion. Nevertheless, the BSA can potentially ensnare taxpayers who fully report income from their foreign financial accounts but who inadvertently neglect to satisfy the BSA's technical reporting requirements.

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Indeed, in light of potential penalties for FBAR noncompliance and continuing efforts to enforce the BSA by the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") and the IRS,[1] owners of foreign financial accounts and individuals holding signatory authority over these accounts must remain diligent. This article reviews the filing deadline for FBAR reports, current definitions and limited exceptions to the annual filing requirements, availability of possible relief from penalties for previous failures to file, and the scope and current status of proposed changes for future FBAR filings.

Snapshot: Requirements for 2019 FBAR Filing

- The due date for 2019 FBARs is April 15, 2020 (the same as for federal individual income tax returns), but a six-month *automatic* extension of the filing deadline to October 15 is available without having to file a specific extension request.
- FBARs must be filed electronically. Specifically, filers must e-file their FBAR reports, including any delinquent or amended FBARs for prior years, using the BSA E-Filing System (or other approved electronic system). Filers must ensure that their FBARs are *received*—not simply transmitted—by the due date.
- Officers and employees of certain regulated U.S. entities, including publicly traded companies and financial institutions, who have signature or other authority in respect of a foreign financial account may be eligible for an exception to the FBAR filing requirements. The reporting exception, however, is limited in scope and is *not* available to most U.S. officers and employees. Nevertheless, pursuant to FinCEN Notice 2019-1, a broader group of officers and employees may qualify for temporary (but, so far, continually renewed) relief. Affected individuals should carefully evaluate their eligibility for the limited-in-scope exception and the more broadly applicable extension to avoid potential penalties for not filing FBAR reports.
- Although FinCEN proposed substantial changes to the FBAR regulations four years ago, there has been no indication regarding when final regulations might be issued. Thus, while the regulatory amendments released in March 2016 will (if finalized) transform the landscape for FBAR reporting—easing reporting requirements for some filers but imposing additional burdens on others—for now, the old rules remain in force.
- Because companies often file not only their own FBAR, but also those of officers and employees who have signature or other authority over the company's foreign financial accounts, it is not too soon to begin preparing for this year's filings despite the automatic extension to October 15.

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[1] FBAR's overall administration has been assigned to FinCEN, but the IRS has been delegated significant responsibilities for investigating violations of the BSA, including the FBAR. Individuals must also answer questions regarding their financial interest in, or authority over, foreign financial accounts on their individual income tax returns (Form 1040, Schedule B, Part III, Line 7).

Background

In the 50 years since its enactment, the BSA has served to enhance transparency in the identification of overseas financial accounts held or controlled by U.S. taxpayers. Two developments in this century intensified BSA's significance. First, in 2004 Congress increased penalties for noncompliance as part of the American Jobs Creation Act.[2] Second, by passing the Foreign Accounts Tax Compliance Act ("FATCA") — which, among other things, separately requires the filing of Form 8938, *Statement of Specified Foreign Financial Assets,* pursuant to section 6038D of the Internal Revenue Code[3] — Congress signaled that its interest in combatting offshore tax evasion had not waned. FATCA hence became a wake-up call not only for the transparency measures included in the 2010 law but also for the independent, longstanding requirement for both profit and not-for-profit entities to annually report foreign financial accounts on the FBAR.[4]

The continuing relevance of BSA, FATCA, and other financial transparency requirements, especially in the United States, can be illustrated by the following developments:

- The 2019 sentencing of Paul Manafort (former chairman of President Trump's presidential campaign), convicted for money laundering and failure to file FBARs (among other things); the campaign's former vice chairman, Rick Gates, pleaded guilty to similar violations in February 2018.
- The IRS's continued use of its Delinquent FBAR Submission Procedures to provide an incentive to self-report FBAR failings.[5]
- The revision of the Internal Revenue Code's whistleblower provisions to clarify that amounts collected in respect of an FBAR matter — including associated penalties — can be taken into account in computing the whistleblower's award. (In 2018, Congress amended the Internal Revenue Code to provide that FBAR penalties could give rise to a whistleblower award even

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[2] The 2004 amendments increased the penalty for willful FBAR violations to the greater of $100,000 or 50 percent of the account at the time of the violation. 31 U.S.C. § 5321(a)(5)(C). It also added a penalty for non-willful violations, limited to $10,000. 31 U.S.C. § 5321(a)(5)(B). An inflation adjustment applies to penalties assessed on or after February 19, 2020, with the minimum penalty for willful violations increased from $100,000 to $134,806, and the penalty for non-willful violations increased from $10,000 to $13,481. These inflation adjustments implement the requirements of the Federal Civil Penalties Inflation Adjustment Act of 1990, as further amended by the Federal Civil Penalties Adjustment Act Improvements Act of 2015.

[3] Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended (the "Code") or the applicable regulations promulgated pursuant to the Code (the "regulations").

[4] For calendar years before 2013, FBARs were paper filed on Form TD F 90-22.1. Nevertheless, any delinquent or amended filings of FBARs for 2012 and earlier calendar years must be e-filed.

[5] *See* Delinquent FBAR Submission Procedures, https://www.irs.gov/individuals/international-taxpayers/delinquent-fbar-submission-procedures. In contrast, in 2018, the IRS terminated its Offshore Voluntary Disclosure Program. Closing the 2014 Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers, https://www.irs.gov/individuals/international-taxpayers/closing-the-2014-offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers.

though those penalties are not imposed under Title 26 (the Internal Revenue Code) but rather under other provisions of federal law (such as Title 31, which includes the Bank Secrecy Act.[6])

— Expanded information sharing and return disclosures under measures to implement the Organisation for Economic Co-operation and Development's base erosion and profit shifting ("BEPS") action plans as well as the European Commission's complementary tax disclosure directive.[7]

— Continuing efforts by the United States and other countries to aggressively pursue enforcement of their anti-money-laundering and know-your-customer (AML/KYC) rules, leading not only to the collection of substantial taxes on previously undisclosed assets but also the assessment of a staggering amount of penalties. For example, in December 2019, the Justice Department announced the signing of a deferred prosecution agreement with HSBC Private Bank (Suisse) SA — which paid a whopping $192.35 million penalty — in connection with the bank's admission that it had helped U.S. taxpayers conceal income and assets from the United States.[8] Significantly, the 2016 change of administration in Washington to date has not significantly affected the U.S. government's focus on BSA enforcement or the funds appropriated for FinCEN.

The increased scrutiny, combined with penalties that can reach 100 percent of the highest amount held in the pertinent foreign financial accounts for willful failures, has clearly had an effect. From FATCA's enactment forward the number of FBAR filings has increased significantly.[9] What's more, the IRS and Justice Department continue to advance expansive interpretations of FBAR's reach and bite. In the last year, for example, the government has scored courtroom victories on a number of issues: (a) that the Fifth Amendment cannot be asserted as a defense to not filing an FBAR; (b) that the FBAR penalty may be imposed on an account-by-account basis, rather than a per-report basis; (c) that a Treasury regulation limiting FBAR penalties did not nullify subsequently enacted legislation authorizing significantly higher penalties for willful violations; and (d) that a taxpayer's failure to check a "I have a foreign account" box on the tax return (Form 1040, Schedule B, Line III, Line 7a) satisfies the definition of a "willful" failure, thereby subjecting the taxpayer to higher penalties. Even if not all of these pro-

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6 *See* section 7623(c).

7 Council Directive 2018/822/EU (commonly referred to as "DAC 6") imposes mandatory reporting of cross-border arrangements affecting at least one EU Member State that fall within one of a number of "hallmarks," i.e., broad categories setting out particular characteristics identified as potentially indicative of aggressive tax planning.

8 The signing of the HSBA Private Bank agreement followed the formal conclusion of the Justice Department's "Swiss Bank Program," which between March 2015 and January 2016 resulted in non-prosecution agreements with 80 Swiss banks and collected *more than $1.36 billion in penalties* from the participating banks in connection with more than 35,000 U.S.-related accounts. *See generally* https://www.justice.gov/tax/swiss-bank-program.

9 The IRS has reported that the number of FBARs filed increased an average of 17 percent each year from 2010 to 2015 (to a total of 1.16 million FBARs). IR-2016-42 (Mar. 15, 2016). More recent data is [should the verb be plural ("are")?] not available on the IRS website.

government positions are ultimately sustained (some are under challenge), they collectively confirmed the tenacity of the government's FBAR enforcement activities.[10]

To be sure, the increased penalties and stepped-up IRS enforcement activities have been targeted at unlawful or even criminal conduct. Nevertheless, the consequences of these efforts undeniably extend to inadvertent failures, so-called benign actors, and situations in which there has been no underreporting of income or underpayment of tax. Prudence dictates that companies carefully review how the rules apply to them, their officers, and their employees.

Overview of FBAR Rules

Generally, FBAR reporting applies to each "United States person" (U.S. person) who has a financial interest in, or signature or other authority over, foreign financial accounts that have an aggregate value exceeding $10,000 at any time during the *calendar* year. A U.S. person is defined as (1) a citizen or resident of the United States or (2) a domestic entity (including a corporation, partnership, trust, or limited liability company, regardless of whether the entity is treated as disregarded for federal income tax purposes). Financial accounts are defined to include bank and securities accounts, insurance and annuity accounts with cash value, and commodity futures and options accounts.[11] Also included in the definition are foreign mutual fund accounts or similar pooled fund accounts that (1) issue shares available to the general public, (2) have a regular net asset value determination, and (3) have regular redemptions. Limiting reportable funds to those having these characteristics generally results in foreign hedge funds and foreign private equity funds being excluded from the reporting requirement. The applicability of the FBAR rules to cryptocurrency held in a foreign exchange has yet to be formally addressed by FinCEN or the IRS, but informally a FinCEN representative has publicly stated that such an account is not required to be disclosed on an FBAR.[12]

Final FBAR regulations issued in 2011[13] by FinCEN provide a surprisingly narrow exception from reporting for certain officers and employees who are U.S. citizens or residents and have signature or other authority over these foreign financial accounts. The exception's limited scope prompted questions

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[10] *See, e.g.,* United States v. Bernstein, No. 1-19-cv-02912 (E.D.N.Y. Feb. 28, 2020) (Fifth Amendment right against self-incrimination does not excuse nonfiling of FBARs); United States v. Boyd, No. 2:18-cv-00803 (C.D. Cal. Apr. 23, 2019 (FBAR penalties imposed on a per-account not a per-return basis); Norman v. United States, 138 Fed. Cl. 189 (Jul. 31, 2018) (2004 statutory amendment overrides contrary 1987 regulations); United States v. Williams, 489 Fed. Appx. 655 (4th Cir. 2012) (taxpayer's failure to check the "foreign accounts" box on Schedule B of Form 1040 was evidence of willfulness). For more information, see the discussion under the heading *Penalties*.

[11] 31 C.F.R. §§ 1010.350(c)(1)-(3).

[12] *See* Kristen A. Parillo, *Cryptocurrency Isn't Subject to FBAR Filing Rules*, 165 Tax Notes Federal 1201 (Nov. 18, 2019).

[13] RIN 1506-AB08, 76 Fed. Reg. 10245 (Feb. 24, 2011). As discussed later under the heading *Proposed FinCEN Regulations Would Significantly Revise FBAR Filing Requirements*, on March 1, 2016, FinCEN promulgated proposed regulations that would make significant changes to the FBAR rules. Because the proposed changes may be altered during the rulemaking process and, by their own terms, do not contain an effective date, U.S. persons remain subject to the 2011 FinCEN regulations.

and concerns from many U.S. corporations, which in turn led FinCEN to grant a temporary filing extension with respect to certain officers and employees.[14]

This, however, is no ordinary filing extension. Rather than granting an additional six months during which to file the required report, FBAR filers have been favored with an evergreen deferral, which for some filers is now of *ten years' duration.* In light of the six-year statute of limitations applicable to FBARs, which starts on the report's due date regardless of whether the FBAR is filed, the latest extension brings into question the need to file 2013 (and earlier) FBARs by those U.S. individuals who have taken advantage of the extension for calendar year 2013 (and earlier years). Generally, the extension means many officers and employees will not have to file FBARs (for calendar years 2014-2019) until 2021 (although some, with the assistance of their employers, have opted to forgo the available deferral and filed annual FBARs). The reporting exception, as well as how it would be revised under FinCEN's 2016 proposed regulations, is described later in the article.

Further complicating matters for *individuals* with FBAR reporting obligations is the separate requirement to file Form 8938, *Statement of Specified Foreign Financial Assets*.[15] Foreign financial accounts in which a U.S. individual does not have a financial interest but over which the individual has signature authority (and that are reportable on the FBAR) are *not* required to be reported on Form 8938. Nevertheless, the scope of foreign assets in which an individual has a reportable interest for purposes of Form 8938 is broader than those implicated by the FBAR rules (e.g., vested interests in a foreign pension plan or foreign deferred compensation plan may be reportable on Form 8938).

April Due Date, with Automatic Extension to October

The due date for filing FBARs, which must be submitted electronically, had historically been June 30, regardless of when the filer's income tax return is due. As a result of legislation passed in 2015,[16] the statutory due date is now April 15.[17]

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[14] FinCEN Notice 2019-1 is the most recent announcement of an extension originally granted in 2011 by FinCEN Notice 2011-1. See the later discussion under the heading *FinCEN Grants a Deferral to Certain Individuals*.

[15] This reporting requirement under section 6038D of the Code, which first took effect for calendar year 2011, is filed with the individual's annual federal income tax return (e.g., Form 1040). The reporting requirement was expanded in 2016 when Treasury issued final regulations implementing reporting rules for certain domestic entities formed or availed of for purposes of holding specified foreign financial assets. T.D. 9752, 81 Fed. Reg. 8835 (Feb 23, 2016). A detailed discussion of Form 8938 is beyond the scope of this article, but note that the form and instructions were revised in late 2019. The current form may be accessed at https://www.irs.gov/pub/irs-pdf/f8938.pdf.

[16] Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2006(b)(11), 129 Stat. 443 (Jul. 31, 2015), effective for years beginning after December 31, 2015.

[17] Although FBAR reporting falls under Title 31 of the U.S. Code (the Bank Secrecy Act), and thus is not subject to the procedural rules of the Internal Revenue Code (which is Title 26 of the U.S. Code), when April 15 last fell on a Sunday (in 2018), FinCEN announced that the due date would advance to coincide with the due date for filing Form 1040. Presumably this practice will be followed in the future. Alternatively, FinCEN could include a provision in revised FBAR regulations, prospectively aligning the FBAR filing deadline with the deadline for filing individual income tax returns or adopting the "next succeeding day" rule under section 7503 of the Internal Revenue Code.

In addition to aligning the FBAR due date with the deadline for filing individual income tax returns, the 2015 legislation provided for a six-month extension. Significantly, although U.S. taxpayers must affirmatively request an extension of time to file their *income* tax return, FinCEN announced that FBAR filers will *automatically* receive a six-month extension of time to file their FBAR. Thus, no action by an FBAR filer is required to receive the extension of time to file. This effectively moves the FBAR due date to October 15. Accordingly, U.S. individuals and entities have until October 15, 2020, to timely file their calendar year 2019 FBAR.

E-Filing Is Mandatory

Paper filings of old Form TD F 90-22.1 are no longer permitted because filers must e-file their FBAR, including any delinquent or amended FBARs for prior years, using the BSA E-Filing System (or other approved electronic system).[18]

U.S. entities that are new to the FBAR-filing world must first register and create an account on the website and designate a "Supervisory User" who will serve as the initial and primarily responsible user for the entity.[19] After the FBAR is submitted, an immediate confirmation page is displayed and an email confirmation is also sent. Generally, within two business days, an additional email is sent listing the BSA Identifier assigned to the filed FBAR. This BSA Identifier should, if necessary, be used to amend or correct the FBAR filing. As in the past, transmission of the FBAR report is not sufficient; filers must ensure that their FBAR is *received* by Treasury by the due date (i.e., filers should maintain the electronic confirmation of filing dated on or before the due date).

FinCEN Form 114 generally requires detailed information about each foreign account being reported, including maximum account value during the calendar year, type of account, account number, and the financial institution's name and address. Filers with a financial interest in 25 or more accounts or having signature authority over 25 or more accounts need not submit detailed information on those accounts, but rather need only check the appropriate box in Part I of the form and retain that detailed information for FinCEN's review upon request.

Importantly, the e-filing system permits individuals with signature or other authority over their employer's foreign financial accounts to report such accounts separately from any personal accounts the individual is required to report. Although FinCEN did not highlight this change in its e-filing announcement, the modified rule is explained in a posting under "FBAR E-Filing FAQs."[20] Thus, more

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[18] FinCEN has issued line-by-line e-filing instructions for FBAR, which provide much useful information. *See* BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) (Release Date Jan. 2017), available at https://www.fincen.gov/sites/default/files/shared/FBAR%20Line%20Item%20Filing%20Instructions.pdf. As of March 15, the instructions have not been updated for 2019 filings.

[19] When reporting their own accounts, individuals are not required to register and login before completing and submitting their individual FBAR into the system.

[20] https://bsaefiling.fincen.treas.gov/docs/FBAR_EFILING_FAQ.pdf.

than one FBAR can be filed by an individual for a particular calendar year (in contrast to the requirement to file a single tax return for a taxable period).

FinCEN's rules permit a third party, such as a CPA or attorney, to sign and submit FBARs on behalf of their clients through the BSA E-Filing System (or other approved electronic system) upon the client's signing of FinCEN Form 114a, *Record of Authorization to Electronically File FBARs.* This authorization is *not* to be filed with the FBAR or otherwise submitted to Treasury but rather should be retained by the parties (the client and the authorized party). Filing as an authorized filer on behalf of an individual requires the authorized party to register and set up an account on the e-file website (i.e., an authorized party cannot file using the *No Registration* FBAR page reserved for individuals but must instead file as an institution). Combining the ability to authorize a third party with the option to file more than one FBAR allows individuals to authorize their employers (using FinCEN Form 114a) to file an FBAR on their behalf reporting the accounts over which the individuals have authority without the employers being involved in the reporting of individuals' personal financial accounts. Generally, companies prefer to limit the filings performed on behalf of officers and employees to the company accounts over which they have authority, in order to ensure the privacy of the individuals.

U.S. Persons Have a "Financial Interest" in Accounts of Their Greater-Than-50-Percent-Owned Subsidiaries and Other Entities

In addition to having a financial interest in a foreign financial account when a U.S. person is a named owner of record or a named holder of legal title, a U.S. person is also treated as having a financial interest through indirect ownership, such as when the owner of record or holder of legal title is:

- A corporation in which the U.S. person owns directly or indirectly more than 50 percent of the voting power or total value of the shares;
- A partnership in which the U.S. person owns directly or indirectly more than 50 percent of the profits interest or capital; or
- Any other entity in which the U.S. person owns directly or indirectly more than 50 percent of voting power, total value of the equity interest or assets, or interest in profits.[21]

Thus, if a U.S. corporation owns a 51-percent profits interest in a foreign partnership and that partnership has a foreign bank account at any time during the 2019 calendar year, the U.S. corporation is considered to have a financial interest in the partnership's account and should include the foreign account on the corporation's FBAR (assuming the aggregate value of all foreign financial accounts of the U.S. corporation exceeded $10,000 at any time during the calendar year).

Having a financial interest in a foreign financial account through indirect ownership can result in multiple U.S. entities in an organizational structure having to report the same account (plus any U.S. individual with authority over the account with an obligation to report the account). In such cases, companies generally opt to file a consolidated FBAR, which is discussed below. Note, however, that a

[21] 31 C.F.R. § 1010.350(e)(2)(ii).

consolidated report filed by a company does not relieve officers and employees from their obligation to report a financial interest in, or authority over, a foreign account on their individual FBAR.

Relief for Certain Delinquent FBAR Filers

U.S. persons who inadvertently failed to file FBARs but properly reported all income related to their foreign financial accounts on their U.S. tax returns and paid all tax can take advantage of a penalty-free option currently being offered by the IRS.[22] Delinquent FBARs can be filed on a penalty-free basis if two further conditions are met: (1) the U.S. person is not under IRS examination (or criminal investigation), and (2) the U.S. person has not been contacted by the IRS about missing FBARs. The delinquent FBARs should be filed electronically using the BSA E-Filing System (or other approved electronic system). Because there is a six-year statute of limitations for FBAR penalties (with the statute starting whether or not an FBAR is filed), the relevant years for missing FBARs are currently calendar years 2013-2018 (with the statute for 2013 closing on June 30, 2020).

FBARs filed under this delinquent submission procedure should select "Other" (in the drop-down menu) as the reason for the late filing on the cover page of the electronic form. Selecting "Other" will open a window that will allow the delinquent filer to provide a statement indicating that the criteria for penalty relief have been met: The filing failure was inadvertent; all income related to the foreign account(s) has been reported; all U.S. income tax has been paid; and the late FBAR is being filed before IRS contact.

Filing a Consolidated FBAR

A U.S. entity that owns directly or indirectly a greater-than-50-percent interest in another U.S. entity (such as a corporation or partnership) is permitted to file a consolidated FBAR on behalf of itself and the other entity.[23] Significantly, in order for the lower-tier U.S. entity's filing obligation to be satisfied through its parent's consolidated FBAR filing, the lower-tier U.S. entity must be identified in Part V of the consolidated FBAR as the owner of at least one foreign financial account. *Foreign* subsidiaries that directly own a foreign financial account should *not* be reported in Part V. They themselves face no FBAR requirement; rather, the U.S. entity that has a financial interest in such a foreign account (through its more than 50 percent ownership of the foreign subsidiary) should be reported as the owner of the account in Part V.

When a consolidated FBAR is filed, all reportable accounts are shown in Part V, even those directly owned by the filer. In other words, accounts should not be reported in Part II if a consolidated report is filed. Nevertheless, if the filer has a direct or indirect financial interest in 25 or more foreign financial

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[22] For a discussion of other options available to taxpayers with delinquent FBARs or other international information returns (*e.g.,* Form 5471, 5472, 8858, 8865, etc.), see Steven Friedman, *Have Undisclosed Foreign Assets? IRS Offers Options,* What's News in Tax (July 28, 2014). The delinquent FBAR submission procedures were related to and initially part of the IRS's Offshore Voluntary Disclosure Program (OVDP). This broader program was closed (effective September 28, 2018), but the IRS's Delinquent FBAR Submission Procedures remain in effect. *See* Closing the 2014 Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers, https://www.irs.gov/individuals/international-taxpayers/closing-the-2014-offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers; Delinquent FBAR Submission Procedures, https://www.irs.gov/individuals/international-taxpayers/delinquent-fbar-submission-procedures.

[23] 31 C.F.R. § 1010.350(g)(3).

accounts, detailed information regarding the accounts is not required to be reported but U.S. entities participating in the consolidated report must still be identified in Part V.

The Reporting Exception for Employees and Officers

Certain U.S. persons may be required to file an FBAR even if they do not have a financial interest in a foreign financial account. FBAR reporting is required by a U.S. person who is an individual and who (alone or in conjunction with another) has signature or other authority over bank, securities, or other financial accounts in a foreign country. The preamble to the current regulations clarifies that an officer or employee who merely has supervisory control over a foreign financial account (i.e., the person can instruct others within the company to transfer or withdraw funds, but cannot directly transfer or withdraw funds) is *not* required to report such an account on an FBAR. This is because reporting is limited to those individuals who have control over the account *through direct communication to the person with whom the financial account is maintained*.[24] The preamble also confirms that only an individual (and not an entity) can have signature or other authority over an account (so a corporation should never complete Part IV of its FBAR).

Exceptions to the filing requirement for individuals with signature authority may apply to the officers and employees of six categories of entities subject to specific types of federal regulation, so long as the officers or employees have no financial interest in the reportable account *and* the foreign financial account is *directly* owned by the U.S. entity in which they serve as an officer or employee.[25] Officers and employees of the following "regulated entities" may qualify for the reporting exception:

- 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;
- A financial institution that is registered with and examined by the Securities and Exchange Commission ("SEC") or Commodity Futures Trading Commission;
- An "Authorized Service Provider"[26] that provides services to investment companies (U.S. mutual funds) registered with the SEC;
- An entity with a class of equity securities listed (or American depository receipts listed) on any U.S. national securities exchange;

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[24] 31 C.F.R. § 1010.350(f)(1).

[25] 31 C.F.R. § 1010.350(f)(2)(i)-(v). [since the citation is to 4 subsections of the regs, should the second section symbol be retained?]

[26] An "Authorized Service Provider" is defined as an entity that is registered with and examined by the SEC and provides services to an investment company registered under the Investment Company Act of 1940.

— A U.S. subsidiary of a U.S. entity with a class of equity securities listed on a U.S. national securities exchange, as long as the U.S. subsidiary is included in a consolidated FBAR report filed by the U.S. parent; and

— 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 (i.e., in general, corporations with more than $10 million in assets and at least 500 shareholders of record).

Although this listing seemingly exempts from the FBAR filing requirements U.S. individuals who are officers and employees of a broad range of regulated entities, the reporting exception is, in reality, quite limited. For example, it is *not* available to the following individuals:

— *Accounts directly owned by a CFC*—Officers and employees of U.S. or foreign subsidiaries of U.S. publicly traded corporations who have signature authority over foreign financial accounts directly owned by controlled foreign corporations ("CFCs"), even though the U.S. parent company is obligated to report the CFC's foreign financial accounts in its own FBAR;

— *Accounts directly or indirectly owned by a foreign parent corporation*—Officers and employees of U.S. subsidiaries of foreign corporations who have signature authority over foreign financial accounts, since the foreign parent itself is not required to file an FBAR and the U.S. subsidiary's stock is not publicly traded. This rule applies even if the foreign corporation voluntarily files an FBAR report; and

— *Accounts directly owned by an entity other than the entity the U.S. individual is an employee or officer*—Officers and employees of a U.S. parent corporation who have signature authority over a foreign financial account of a U.S. or foreign subsidiary with regard to the subsidiary's account. Similarly, officers and employees of a U.S. or foreign subsidiary who have signature authority over a foreign financial account of its U.S. parent do not qualify for the exception from reporting on the FBAR with regard to the U.S. parent company's account. These exclusions from the reporting exception apply regardless of whether a consolidated FBAR report is filed.

FinCEN Grants a Deferral to Certain Individuals

As a result of questions raised regarding the limited scope of the reporting exception, in 2011 FinCEN provided certain officers and employees of these regulated entities who fall outside the reporting exception with an extension of time to report those accounts on their FBARs.[27] Moreover, since the issues surrounding the reporting exception remain unanswered, the extension (or deferral) granted by FinCEN has been annually extended each successive year, in general, for the officers and employees delineated in the prior three bullet points.[28] Thus, individuals who take full advantage of the deferral

[27] FinCEN Notices 2011-1 and 2011-2.

[28] *See* FinCEN Notices 2012-1, 2013-1, 2014-1, 2015-1, 2016-1, 2017-1, 2018-1, and 2019-1.

granted by FinCEN could have FBARs due for calendar years 2014-2019[29] on April 15, 2021 (along with calendar year's 2020 FBAR, making a total of seven FBARs due next year).[30]

Important

The extension does *not* apply to foreign financial accounts in which officers or employees have an *actual* financial interest or to personal accounts over which they have signature or other authority. Thus, an FBAR filing may be required to report calendar year 2019 accounts by October 15, 2020 (the original due date of April 15, extended automatically by six months). In these situations, an amended FBAR would need to be filed later to report any corporate accounts not originally required to be reported because of the extension of the FinCEN deferral.

Penalties

U.S. persons required to file an FBAR—whether a U.S. corporation reporting its financial interest in foreign financial accounts or individuals reporting their authority over such accounts—should not forget that civil penalties can be imposed for non-willful reporting failures. Delegated with the responsibility to enforce compliance, the IRS has discretion in determining the penalty for FBAR reporting violations. For circumstances when a penalty is deemed appropriate, the IRS has established mitigation guidelines to promote uniformity in the assertion of penalties.[31] Manager approval is required to assert more than one $10,000 non-willful penalty per year (adjusted for inflation to $13,481[32]), and in no event can the aggregate penalty amount exceed 50 percent of the highest aggregate balance of all accounts to which the violations relate during the years at issue.[33] Notwithstanding the reduced exposure under the IRS's mitigation guidelines, qualifying U.S. persons can achieve an even better result—filing delinquent FBARs on a wholly penalty-free basis; see *Relief for Certain Delinquent FBAR Filers*, above.

Harsher penalties can be imposed for *willful* reporting failures. If willfulness is found, the total penalty for all years under examination will generally be limited to 50 percent of the highest aggregate balance of all unreported foreign financial accounts during the affected years (but in no event will the penalty exceed 100 percent of the highest aggregate balance of such accounts).[34] For purposes of this penalty,

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[29] In general, filers need not file FBARs for calendar years 2010-2013 next year because the six-year statute of limitations for these years has closed. IRM 8.11.6.4.1 (09-27-2018) discusses the six-year statute of limitations for FBARs.

[30] The FinCEN notices issued in 2011 through 2014 set the deferred filing deadline as June 30 of the next succeeding year (e.g., Notice 2011-1 extended the due date from June 30, 2011, to June 30, 2012). Because Congress in 2015 passed legislation changing the due date of the FBAR from June 30 to April 15, FinCEN Notice 2015-1 advanced the deferred filing deadline to April 18, 2017; FinCEN Notice 2016-1 reset the deferred filing deadline to April 15, 2018, FinCEN Notice 2017-1 announced the deferred deadline would be April 15, 2019; FinCEN Notice 2018-1 announced the deferred deadline would be April 15, 2020; and FinCEN Notice 2019-1 further extended the deadline to April 15, 2021.

[31] IRM 4.26.16.6.6.1 (11-06-2015) specifies four threshold conditions for a reduced penalty that focus on the lack of prior criminal tax convictions, whether the money passing through the account was from an illegal source, the person's level of cooperation during the examination, and whether a civil tax fraud penalty was sustained for the year in question.

[32] The higher inflation adjusted penalty applies to penalties assessed on or after February 19, 2020.

[33] IRM 4.26.16.6 (11-06-2015) (FBAR Penalties, Exhibit 4.26.16-1).

[34] IRM 4.26.16.6.5.3 (11-06-2015). There have been several cases dealing with whether the 1987 Treasury Regulations capping FBAR penalties at $100,000 (31 C.F.R. § 1010.820(g)(2)) supersede legislation enacted in 2004 that mandates a maximum

the violation is considered to have occurred on the due date for filing the FBAR. Thus, the IRS will use the balance in the foreign financial account at the close of April 15 (June 30 for pre-2016 calendar years) in calculating the penalty. The IRS's *Internal Revenue Manual* provides that "[t]he test for willfulness is whether there was a voluntary, intentional violation of a known legal duty."[35] The courts, however, have applied their own standards for willfulness. For example, the Fourth Circuit Court of Appeals equated reckless conduct with willfulness for purposes of the FBAR civil penalty,[36] and the federal district court in Utah found that willfulness can be established by an individual's reckless disregard of a statutory duty.[37] More recently, the federal district court for the eastern district of Pennsylvania declined to uphold a willfulness penalty in an FBAR case when the taxpayer filed an FBAR but failed to report one of his two foreign accounts and accurately reported his ownership of foreign accounts on Schedule B of his Form 1040 return.[38]

Proposed FinCEN Regulations Would Significantly Revise FBAR Filing Requirements

On March 10, 2016, FinCEN promulgated proposed amendments to its FBAR regulations, which would make several significant changes.[39] Generally, the proposed regulations would—

- Expand and simplify the exemption for certain U.S. individuals with signature or other authority over foreign financial accounts, by eliminating the requirement for officers, employees, and agents[40] of U.S. entities to report on accounts owned by the entity (or a subsidiary, parent, or another entity within the same corporate or other business structure of such entity) for which they have signature or other authority, but no financial interest, provided the entity (or any other

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penalty of $100,000 or 50 percent of the account balance at the time of the violation (31 U.S.C. §5321(a)(5)(C)). *Compare* United States v. Colliot, No. AU–16–CA–01281–SS, 2018 WL 2271381 (W.D. Tex. May 15, 2018) (earlier Treasury Regulations trump subsequently enacted legislation, thereby capping penalty at $100,000), *with* Kimble v. United States, 141 Fed. Cl. 373 (2018) (2004 statutory amendment overrides contrary 1987 regulations); Norman v. United States, 138 Fed. Cl. 189 (2018) (same); *and* United States v. Garrity, No. 3:15-CV-243(MPS), 2019 WL 1004584 (D. Conn. Feb. 28, 2019) (same).

35 IRM 4.26.16.6.5.1 (11-06-2015). The IRS has the burden of establishing willfulness. See PMTA 2018-013 (willfulness includes not only "knowing violations of the FBAR requirements, but willful blindness to the FBAR requirements as well as reckless violations of the FBAR requirements").

36 United States v. Williams, 489 Fed. Appx. 655 (4th Cir. 2012) (taxpayer's failure to check the "foreign accounts" box on Schedule B of Form 1040 was evidence of willfulness).

37 United States v. McBride, 908 F. Supp. 2d 1186 (D. Utah 2012). *Accord* United States v. Bussell, No. 15-02034, 117 AFTR 2d 2016-439 (C.D Cal. 2015); United States v. Bohanec, 263 F. Supp. 3d 881 (C.D. Cal. 2016); United States v. Kelley-Hunter, 281 F. Supp. 3d 121 (D.D.C. 2017).

38 Bedrosian v. United States, No. 15-5853, 120 AFTR 2d 2017-5671 (E.D. Pa. 2017), *remanded*, 912 F.3d 144 (3d. Cir. Dec. 21, 2018) (remanded for consideration whether the government satisfied "the civil willfulness standard, which includes both knowing and reckless conduct").

39 RIN 1506-AB26, 81 Fed. Reg. 12613 (Mar. 10, 2016).

40 The term "agent" incorporates entities and individuals, such as Authorized Service Providers and their employees if they are not owners of record or holders of legal title. An "Authorized Service Provider" is defined as an entity that is registered with and examined by the SEC and provides services to an investment company registered under the Investment Company Act of 1940.

entity within the same corporate or other business structure) has an FBAR filing obligation to report the foreign financial account;

- Remove the special rules permitting limited account information to be reported when a U.S. person has a financial interest in, or signature authority over, 25 or more foreign financial accounts, and instead require U.S. persons to report detailed account information on all foreign accounts;

- Require companies and other entities to maintain a list (for five years) of all officers, employees, and agents with signature or other authority over foreign financial accounts, making this list available to FinCEN and law enforcement authorities upon request; and

- Make other changes, including recognizing the changed due date for filing FBARs, beginning with the 2016 FBAR due in 2017, and the requirement that FBARs be filed electronically.

The proposed FBAR regulations contain both good and bad news. The proposed revision to the signature authority exemption—which would eliminate FBAR reporting for officers and employees with signature or other authority (but no financial interest) as long as their employer or other entity within the same corporate group is required to report the foreign financial account—would be welcome indeed. Moreover, since many employers prepare and file FBARs on behalf of their officers and employees with signature authority, this burden reduction would benefit them directly.

In contrast, the proposed deletion of abbreviated reporting for persons with a financial interest in, or signature authority over, 25 or more foreign financial accounts could impose significant administrative burdens on those companies and entities. Rather than simply listing the number of accounts and retaining detailed information for FinCEN's review upon request, the companies would have to enter and submit the required information through FinCEN's BSA E-Filing System for each foreign financial account.

Interestingly, the proposed regulations do not contain a proposed effective date, nor do they address the ongoing effect of FinCEN's earlier deferrals (by means of annual notices) of the FBAR filing requirements in respect of certain signature authority accounts. With respect to the deferrals, the FinCEN release issued with the regulations acknowledges that "as part of the final rule, it would need to determine the effect of the provisions of this proposed rule on earlier FBAR deferrals…."

In the preamble to the proposed regulations, FinCEN specifically requested comment on:

- Whether it should allow individuals to rely on the proposed reporting exemption, if finalized, with regard to FBAR filings properly deferred under the FinCEN Notices (the latest being Notice 2019-1);

- Whether removing the abbreviated reporting permitted for U.S. persons meeting the 25 account threshold will result in technology costs to implement systems to transfer account information to the BSA E-filing system; and

— Whether the proposed broadening of the signature authority reporting exemption combined with removal of the special abbreviated reporting for filers with 25 or more foreign financial accounts will increase or decrease a filer's burden.

The comment period on the proposed FinCEN regulations has closed, but history teaches that the Treasury Department and IRS would likely still consider comments. Whether and when final regulations will be promulgated, as well as what modifications might be made and what the overall effective date of the new regulations might be, remain unknown. Accordingly, the FBAR requirements discussed in this article and the potential for penalties continue to be relevant, not only with respect to the FBARs required to be filed by October 15, 2020, but potentially into the future.

Conclusion

Considering the severe penalties potentially at stake and the government's continuing scrutiny, companies should carefully review their procedures for complying with the FBAR reporting requirements. In particular, companies should revisit the rules applicable to individuals who are signatories or otherwise have authority over company accounts because of ongoing confusion about the limited application of the reporting exemption. Performing such a review is especially prudent at this time in light of the current opportunity for certain U.S. individuals to file delinquent FBARs on a penalty-free basis. Given the fast-approaching April 15 unextended due date that some filers may want to meet, considerations about FBAR filings for calendar year 2019 should be addressed in a timely manner.