

F.B.A.R. COMPLIANCE AND CONTROVERSY

FOREIGN ASSET REPORTING FOR INDIVIDUALS AND ENTITIES

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Title 31 U.S.C. / Title 26 U.S.C.

- The Bank Secrecy Act (B.S.A.), P.L. 91-508
 - Financial Crimes Enforcement Network (FinCEN) Form 114, *Report of Foreign Bank and Financial Accounts* (F.B.A.R.)
- The Foreign Account Tax Compliance Act (F.A.T.C.A.), P.L. 111-147
 - Form 8938, *Statement of Specified Foreign Financial Assets*
- FinCEN has delegated enforcement authority to the I.R.S. for the F.B.A.R. rules, including the assessment of penalties for violation of the rules.

Purpose of the F.B.A.R.

- Overseas financial accounts are maintained by U.S. persons for a variety of legitimate reasons, including convenience and access.
- The F.B.A.R. is required because foreign financial institutions may not be subject to the same reporting requirements as domestic financial institutions.
- The F.B.A.R. is also used by the U.S. government to identify persons who may be using foreign financial accounts to circumvent U.S. law.
- Information contained in F.B.A.R.'s can be used to identify or trace funds used for illicit purposes or to identify unreported income maintained or generated abroad.

FILING REQUIREMENTS

Who must file an F.B.A.R.?

- A U.S. Person must file an F.B.A.R. if they have:
 - a financial interest in or signatory authority over a financial account located outside of the United States, and
 - the aggregate value of all foreign financial accounts exceed \$10,000 at any time during the calendar year reported.

Who is a U.S. Person?

- U.S. Persons include:
 - U.S. Citizens
 - U.S. Resident aliens
 - Entities
 - Corporations, partnerships or limited liability companies, trusts and estates created or organized in the United States or under the laws of the United States.
 - Disregarded Entities
 - Entities that are disregarded for tax purposes may be required to file an F.B.A.R.

Who is a U.S. Person?

- U.S. Resident
 - The “Residency Test” – 26 U.S.C. §7701(B)
 - Examples:
 - Luiz is a citizen of Brazil. He has been physically present in the United States every day of the last three years. Luiz is required to file an F.B.A.R.
 - James is a permanent legal resident of the United States. James is a citizen of the United Kingdom. Under a tax treaty, James is a tax resident of the United Kingdom and elects to be taxed as a resident of the United Kingdom. James is required to file an F.B.A.R. (Tax treaties with the United States do not affect F.B.A.R. filing obligations.)

Financial Accounts

- Financial accounts include:
 - Bank accounts such as savings accounts, checking accounts, and time deposits
 - Securities accounts such as brokerage accounts and securities derivatives or other financial instruments accounts
 - Commodity futures or options accounts
 - Insurance policies with a cash value
 - Mutual funds or similar pooled funds
 - Any other accounts maintained in a foreign financial institution or with a person performing the services of a financial institution

Financial Interest

- Financial interest – a financial interest in an account for which the U.S. person is the owner of record or has legal title
- Signatory authority – control of the disbursement of money or other property in the account using signature
- Other authority over an account – exercise of power over an account by communicating directly, orally, or otherwise to the financial institution or other person maintaining the account
 - Example:
 - A U.S. person with a more than 50% interest, by value or vote, in a corporation or entity that has reportable accounts

Maximum Value

- The greatest value of currency or nonmonetary assets in the account during the calendar year.
- Convert the maximum account value for each account into U.S.D. using the exchange rate on the last day of the calendar year.
 - Use the Treasury Reporting Rates of Exchange for the last day of the calendar year.

Joint Account

- If joint account is with partial interest, each person must report the entire value of the account.
- If joint account is with spouse, the spouse does not have to file separate FinCEN Form 114 if:
 - all the financial accounts are jointly owned with the filing spouse,
 - the filing spouse reports the jointly owned accounts on a timely filed F.B.A.R. electronically signed (PIN) in item 44, and
 - the filers have completed and signed Form 114a, *Record of Authorization to Electronically File F.B.A.R.'s* (maintained with the filers records).
- Otherwise, both spouses must file separate F.B.A.R.'s.

Filing Exceptions

- Consolidated F.B.A.R.
- I.R.A. Owners and Beneficiaries
- Participants in and Beneficiaries of Tax-Qualified Retirement Plans
- Signature Authority (an office or employee in certain circumstances)
- Trust Beneficiaries

Required Recordkeeping

- Records, required by 31 C.F.R. §1010.420, must be kept for five years from the due date of the filing and should contain the following:
 - Name maintained on each account
 - Number or other designation of the account
 - Name and address of the foreign bank or other person with whom the account is maintained
 - Type of account
 - Maximum value of each account during the reporting period

PATH TO COMPLIANCE

Willfulness

- “The taxpayer made a conscious effort to avoid learning about reporting requirements, . . . and his false answers on both the tax organizer and his federal tax return evidence conduct that was ‘meant to conceal or mislead sources of income or other financial information,’ . . . It is reasonable to assume that a person who has foreign bank accounts would read the information specified by the government in tax forms. Evidence of acts to conceal income and financial information, combined with the defendant's failure to pursue knowledge of further reporting requirements as suggested on Schedule B, provide a sufficient basis to establish willfulness on the part of the defendant. This conduct constitutes willful blindness to the FBAR requirement. Intentional ignorance and actual knowledge are equally culpable under the law.”

United States v. Williams, 106 AFTR2d 2010-6150 (E. D. Va. 2010), rev'd, 489 Fed. Appx 655 (4th Cir. 2012), on remand. 114 AFTR2d 2014-5036 (E.D. Va. 2014)

Willfulness

- “For an individual to have acted ‘wil[l]fully,’ an individual need not have been subjectively aware of the foreign bank account reporting requirement or else an individual would be able to defeat liability by deliberately avoiding learning of his or her legal duties. To allow the most clever, inventive, and sophisticated wrongdoers to hide behind a constant and conscious purpose of avoiding knowledge of criminal misconduct would be an injustice in its own right.”

United States v. McBride, 908 F. Supp. 2d 1186 (D. Utah 2012).

Willfulness

- “This inquiry requires a probing of the factual circumstances of this case to determine whether Bedrosian had the requisite mental state. Having done so, it is simply not sufficiently clear from the record developed that he was willful in submitting his inaccurate 2007 FBAR. Rather, his actions were at most negligent, which does not satisfy the willfulness standard. There is no question that Bedrosian could have easily discovered that what had previously been one UBS account was now two, via the statements he occasionally received from the bank and the meetings he had annually with a UBS representative. In addition, the fact that he signed his 2007 FBAR two weeks prior to sending two separate letters to UBS to close his accounts sways in favor of an inference that he was aware of the existence of the second account at the time he filed the FBAR. Nevertheless, as discussed below, even if he did know that he had a second account yet failed to disclose it on the FBAR, there is no indication that he did so with the requisite voluntary or intentional state of mind; rather, all evidence points to an unintentional oversight or a negligent act.”

Bedrosian v. United States, 120 AFTR 2d 2017-5671 (DC.PA. 2017).

Penalties

- Failure may result in civil penalties, criminal penalties, or both.
 - Civil and Criminal Penalties may be imposed together –
31 U.S.C. §5321(d)

Civil Penalties

- For violations prior November 2, 2015 that were assessed before August 1, 2016:
 - \$10,000 per violation for non-willful violations
 - Greater of \$100,000 or 50% of the balance in the account at the time of the violation, for each violation

Civil Penalties

- For penalties that are assessed after August 1, 2016, whose associated violations occurred after November 2, 2015:
 - Negligent Violation – up to \$1,078
 - Non-Willful Violation – up to \$12,459 for each negligent violation
 - Pattern of Negligent Activity – up to \$83,864
 - Willful – up to the greater of \$124,588 or 50% of the amount in the account at the time of the violation
 - Willful plus violation of certain other laws – up to the greater of \$100,000, or 50% of the amount in the account at the time of the violation
 - Knowingly and Willfully Filing False F.B.A.R. – up to the greater of \$100,000 or 50% of the amount in the account at the time of the violation

Criminal Penalties

- F.B.A.R.
 - Willful failure to file – up to \$250,000 or 5 years in prison or both
 - Willful failure to keep records – up to \$250,000 or 5 years or both
 - Willful plus violation of certain other laws – up to \$500,000 or 10 years or both
 - Knowingly and willfully filing false F.B.A.R. – \$10,000 or 5 years or both
- Schedule B (Form 1040)
 - Filing a false return
 - Failing to report income

Due Date

- *The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015*
 - Changed filing date to April 15
 - Automatic extension for maximum six months

Delinquent Filing

- A delinquent F.B.A.R. should be filed using the current electronic report but should follow the instructions for the year the F.B.A.R. filing requirement exists.
- Select “other” from the drop-down box on page one of FinCEN Form 114 and provide an explanation for late filing.
 - Keep a copy of the F.B.A.R. for recordkeeping purposes.
- No penalty will be asserted if the I.R.S. determines that the failure to timely file an F.B.A.R. was not willful and was due to reasonable cause.

F.B.A.R. Examinations and Appeals

- Internal Revenue Manual:
 - 4.26.16 Report of Foreign Bank and Financial Accounts (F.B.A.R.)
 - 4.26.17 Report of Foreign Bank and Financial Accounts (F.B.A.R.) Procedures
 - 8.11.6. F.B.A.R. Penalties
- The examination and appeals' closing procedures depend on whether there is no violation, a violation without penalty, negligence or a non-willful violation, a willful violation, or a referral to Criminal Investigation.

Moore v. United States

- In *Moore*, the taxpayer challenged the assessment of non-willful F.B.A.R. penalty:
 - “The supplemental declaration of IRS Appeals Officer . . . , which includes the case memorandum that the IRS previously refused to disclose to Mr. Moore, discloses the basis for the IRS's decision to assess the FBAR penalties. That memorandum leads the court to conclude that the IRS did not act arbitrarily and capriciously or abuse its discretion in determining the amount of the penalties. In particular, the court finds that the guidelines for determining the amount of FBAR penalties contained in the Internal Revenue Manual are not arbitrary or capricious, and that it was not an abuse of discretion for the IRS to follow those guidelines in this case.”

Moore v. United States, 115 AFTR2d 2015-1375 (W. D. Wash. 2015) and 116 AFTR2d 2015-5397 (W. D. Wash. 2015);

Statute of Limitations

- A waiver of the statute of limitations for the Title 26 case will not waive the statute of limitation on the F.B.A.R. case.
 - Consent to Extend the Time of Assess Civil Penalties Provided by 31 U.S.C. §5321 for F.B.A.R. Violation

F.B.A.R. Statute of Limitations

- Title 26 statutes of limitations do not apply to F.B.A.R. cases.
- The statute of limitations on assessment of civil F.B.A.R. penalties is six years from the date of the violation.
- The statute of limitations on bringing suit to collect the assessment of civil penalties is two years from the date of assessment or the date any judgment becomes final in any criminal action under Title 31 U.S.C. §5322.
- The statute of limitations on F.B.A.R. criminal penalties is five years from the date the offense is committed.

F.B.A.R. Statute on Assessment

- The period of limitation on assessment of F.B.A.R. civil penalties is the six year period beginning on the date of the transaction with respect to which the penalty is assessed (31 U.S.C. 5321(b)(1)).
- The date of the transaction for recordkeeping purposes is the date that the examiner first requests the records required to be maintained under Title 31 C.F.R. § 103.32. Note that section 103.32 generally only requires that records be maintained for five years.
- The date that the F.B.A.R. civil penalty is assessed is the date that the I.R.S. designated official delegate stamps Form 13448, *the assessment certification form*.

F.B.A.R. Statute on Collection

- The Secretary may commence a civil action to recover a civil penalty assessed under subsection at any time before the end of the two year period beginning on the later of:
 - the date the penalty was assessed, or
 - the date any judgment becomes final in any criminal action under Title 31 U.S.C. §5322 in connection with the same transaction with respect to which the penalty is assessed.
- The date the F.B.A.R. penalty is assessed is the date that the I.R.S. designated official stamps I.R.S. Form 13448.

Waiver of Statute of Limitations

- Civil statutes of limitation on assessment and collection may be waived.
- Statute of limitations on criminal offenses:
 - No person shall be prosecuted, tried, or punished for any non-capital offense, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed (Title 18 U.S.C. §3282).

I.R.S. Letter 3708: Collection Enforcement and Costs

- Referral to the Department of Justice to initiate litigation against the taxpayer
- Referral to the Department of the Treasury's Financial Management Service (involves additional debt-servicing fee of approximately 18% of the balance due)
- Referral to private collection agencies (increases additional debt-servicing fee from approximately 18% to 28% of the balance due)
- Offset of Federal payments such as income tax refunds and certain benefit payments such as social security
- Administrative wage garnishment
- Revocation or suspension of Federal licenses, permits, or privileges
- Ineligibility for Federal loans, loan insurance, or guarantees
 - These additional costs may be imposed on noncomplying taxpayer based on 31 U.S.C. §3717(e)(1).

Important Notice

This presentation is not intended to be legal advice. Reading these materials does not create an attorney-client relationship. The outcome of each case stands on its own merits.