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Max Reed is a U.S. and Canadian tax lawyer at SKL Tax, a boutique U.S. and Canadian tax advisory firm in Vancouver. E-mail: max@skltax.com

This article explores the FBAR's signatory authority regulations, identifies why they cause problems, and offers some strategies for complying while not running afoul of domestic privacy or other legislation.

The IRS has two ways of getting information about foreign financial accounts — the foreign bank account report and the Foreign Account Tax Compliance Act. Lots of attention has been paid to FATCA; much less to FBARs.

The Currency and Foreign Transactions Reporting Act (commonly referred to as the Bank Secrecy Act), passed by Congress in 1970, directs the Treasury secretary to require that U.S. persons disclose information regarding records and reports on foreign financial agency transactions.[1] Under this act and the corresponding regulations,[2] Treasury requires a U.S. person to file an FBAR if that person has a financial interest in, or signature or other authority over, foreign financial accounts in which the aggregate value of these financial accounts exceeds $10,000 at any time during the calendar year.[3]

The financial interest branch of the FBAR regulations is widely known, and compliance with it is relatively straightforward. The signatory authority branch of the FBAR regulations is less well known, and compliance is more challenging. Compliance with the signatory authority branch may cause domestic law problems similar to the ones that existed with FATCA before implementation of the various intergovernmental agreements. This article explores the signatory authority regulations, identifies why they cause problems, and offers some strategies for complying while not running afoul of domestic privacy or other legislation.

The FBAR Signing Authority Regulations

All U.S. persons, no matter where they reside, are subject to the FBAR regulations. As in the U.S. Internal Revenue Code, the definition of "U.S. person" under the FBAR regulations is broad. It includes a U.S. citizen, a U.S. resident, and an entity (such as a trust, corporation, or partnership) organized under the laws of the United States.[4]

The definition of what accounts are reportable is also broad. It includes bank accounts, accounts with a person in the business of accepting deposits as a financial agency, accounts that hold securities, some insurance accounts that have a cash value, accounts with a mutual fund, and commodity brokerage accounts.[5] Importantly, U.S. persons must report *all* financial accounts over which they have signatory authority (no

[1] 31 U.S.C. section 5314.

[2] 31 CFR section 1010.350.

[3] *Id.*

[4] 31 CFR section 1010.350(b).

[5] 31 CFR section 1010.350(c).

matter the nationality of who they belong to) on their annual FBAR form. Signatory authority is defined as the:

> authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained.[6]

There is scant authority detailing what this means. The preamble to the final FBAR regulations state:

> The test for determining whether an individual has signature or other authority over an account is whether the foreign financial institution will act upon a direct communication from that individual regarding the disposition of assets in that account.[7]

The IRS offers the example of a U.S. resident who has power of attorney over her Canadian parents. She must report these accounts regardless of whether she has exercised that authority.[8] This much seems clear from the plain text.

Beyond this, the precise contours of what constitutes signatory authority are unclear. Consider the fairly common example of an asset manager who has the power to buy and sell assets held in a financial account in order to manage a client's portfolio. One possible interpretation of the signatory authority regulation would mean that the asset manager would have to report all accounts that he controls. The word ''disposition'' is generally meant to mean the sale of the property.[9] The property that is being bought and sold is ''held in a financial account.'' On this reading, since the asset manager would be able to sell the property in the account, he would have to report that account. The IRS once held the opposite view. A 2012 IRS FAQ suggests that those who have the power to direct investment do not have to file an FBAR form.[10] However, this FAQ is no longer online and the most recent version of it has removed this reference. Further, neither the instructions to the FBAR form nor the preamble to the regulations mention this distinction. An outdated FAQ that is no longer present on the IRS website is not the most robust authority on which to base a legal position.

Another possible interpretation is that the phrase ''control the disposition'' means only the power to remove money from the account. This reading may exclude most asset managers. The final words of the definition (''by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained'') support this view. If the person with purported signing authority must be able to communicate with the person who maintains the account, this suggests that they are not meant to be the same person. However, this could easily be applied to a different person at the same financial institution. This more restrictive reading of the definition would limit the scope of what accounts need to be reported on the FBAR form. While this may be the intended definition, a broader reading is possible.

Consider the following common additional situations that might create difficulties for U.S. persons outside the United States. A U.S. person lawyer holding money in trust for his clients may have to report those trust accounts on his annual FBAR form. A U.S. person chief financial officer may have to report all of his organization's bank accounts on his FBAR form. A professional trustee may have to report all of her clients on the FBAR form. Finally, a U.S. person civil servant who holds money in trust for minors or those with mental disabilities may have to report all of his clients to the IRS. Domestic privacy or other legislation may not allow this disclosure in all cases. Even if domestic law allows the U.S. person to report the information, the beneficial owners of the accounts in question may be unhappy that their information is being reported to the IRS.

Exceptions

The FBAR regulations contain five exceptions to the signatory authority regulations if the person with signatory authority has no financial interest in the account.[11] These are likely largely inapplicable to those residing outside the United States.

First, employees or officers of a bank that is supervised by the U.S. Board of Governors of the Federal Reserve System or another similar regulator do not have to file FBARs for accounts owned or maintained by that institution.[12] However, the term ''bank'' is defined to mean only those branches or offices that are ''within the United States,'' so this will likely be of limited use.[13]

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[6] 31 CFR section 1010.350(f).

[7] Department of the Treasury, Amendment to the Bank Secrecy Act Regulations — Reports of Foreign Financial Accounts, 76 *Fed. Reg.* 37, at 10236.

[8] *See* http://www.irs.gov/pub/irs-utl/IRS_FBAR_Reference_Guide.pdf.

[9] *See, e.g.*, IRC section 424(c)(1).

[10] ''Q: Does the term 'other authority over a financial account' mean that a person, who has the power to direct how an account is invested but who cannot make disbursements to the accounts, has to file an FBAR?

A: No, an FBAR is not required because the person has no power of disposition of money or other property in the account.''

[11] 31 CFR section 1010.350(f)(2).

[12] 31 CFR section 1010.350(f)(2)(i).

[13] 31 CFR section 1010.100(d).

Second, employees or officers of a financial institution that is examined by the SEC or the Commodity Futures Trading Commission do not have to file FBARs if they have signatory authority over accounts maintained by that financial institution.[14] The term ''financial institution'' means only those offices or branches within the United States.[15]

Third, employees or officers of an authorized service provider do not need to file FBARs to report accounts over a foreign financial account owned or maintained by an investment company that is registered with the SEC. Authorized service provider is defined to mean ''an entity that is registered with and examined by the SEC and that provides services to an investment company registered under the Investment Company Act of 1940.''[16] The text makes clear that the ''entity'' itself that employs the officers and employees must be registered with the SEC. This exception is narrow and so it may not be so helpful to U.S. persons operating outside of the United States.[17]

Fourth, an employee of an ''entity'' with a class of equity securities listed on a U.S. national securities exchange does not need to file an FBAR to report accounts that he has signatory authority over but no financial interest in.[18] The text makes clear that the ''entity'' itself must be listed on a U.S. securities exchange. This may limit the number of foreign companies to which this exception applies.

And fifth, an employee of an ''entity'' that has ''equity securities'' registered under section 12(g) of the Securities Exchange Act does not need to file an FBAR.[19] Again, in order to take advantage of the exception, the employee must be employed directly by the entity whose securities are registered under the Securities Exchange Act.

Put generally, these exceptions seemed designed to exempt U.S. employees of U.S. companies with foreign operations from having to file an FBAR to report financial accounts over which they have signatory authority. As such, they may be of limited use to U.S. persons residing outside the United States who are employed by purely foreign organizations.

Penalties for Failing to File

The penalties for failing for file the FBAR form can be steep. An individual might be subject to a fine of $10,000 for each bank account that he failed to report on an FBAR form.[20] If the violation is found to be willful, the penalty is increased to the greater of $100,000 or half the value of the account.[21] The FBAR penalty can be avoided if reasonable cause is shown and the balance of the account is reported.[22]

Some countries, such as Canada, have declared that they will not help the IRS collect the FBAR penalties.[23] Regardless, the potential penalty exposure is large. Employees who incur such exposure in the course of their duties may have a cause of action against their employer for putting them in this situation. As such, employers should take proactive steps to determine whether any of their employees have an FBAR reporting duty as a result of their employment.

Solutions to This Problem

Employers, particularly financial institutions, should conduct an analysis to help their U.S. person employees determine if any of the accounts they are responsible for fall under the definition of ''signing authority.'' The next step should be to determine if domestic privacy, or other legislation, prevents the employee from filing the FBAR form. If there is no barrier, the IRS offers a catch-up program for overdue FBARs.[24] This program is available as long as the individual taxpayer is not under IRS civil or criminal investigation and has not already been notified by the IRS about the delinquent FBARs. The taxpayer should include a written statement with the delinquent FBARs to explain why the submission was delayed.

If domestic legislation or other concerns prevent the employee from filing the FBAR, the employee is in a trickier spot. If the employee does not file the FBARs as required and is later audited by the IRS, the penalty exposure could be enormous. On the other hand, the employee may not be able to actually comply for fear of breaching domestic law, which may have penalties attached to it. One solution may be to file an FBAR with information only about the person who has signatory authority and attach a statement explaining the domestic legal concerns about why the FBAR could not be filed. This statement would later form the basis of a reasonable cause argument if the IRS ever investigated the failure to file. Arguably, a U.S. court would be sympathetic to the argument that one should not be required to break a domestic law in order to comply with U.S. law that is applied extraterritorially. After all, domestic legal considerations were one of the primary

[14]31 CFR section 1010.350(f)(2)(ii).

[15]31 CFR section 1010.100(t).

[16]31 CFR section 1010.350(f)(2)(iii).

[17]*Id.*

[18]31 CFR section 1010.350(f)(2)(iv).

[19]31 CFR section 1010.350(f)(2)(v).

[20]31 U.S.C. section 5321(a)(3).

[21]31 U.S.C. section 5321(a)(5)(C).

[22]31 U.S.C. section 5321(a)(5)(B)(ii).

[23]*See* http://isaacbrocksociety.files.wordpress.com/2012/03/ba481782.pdf.

[24]*See* http://www.irs.gov/Individuals/International-Taxpayers/Delinquent-FBAR-Submission-Procedures.

rationales why the United States adopted the FATCA IGAs. The same logic should hold true for individual taxpayers trying to comply with the FBAR regulations.

In sum, the FBAR signatory authority regulations put U.S. persons who reside abroad (especially those who work in the finance industry or as CFOs) in a tough spot. Unless they can avail themselves of one of the exceptions, they may be obliged to report accounts to the U.S. government over which they have signatory authority. The definition of what is a ''financial account'' is broad and the signatory authority regulations are vague as to what precise level of authority is required. As such, many accounts managed by U.S. persons abroad may have to be reported. The U.S. person abroad may thus have to choose between complying with domestic law and complying with the FBAR regulations. Explaining this choice to the IRS may be one way of mitigating the penalty risk of failing to file. The FBAR signatory authority regulations may not have received as much attention as FATCA, but they cause many of the same problems. ◆