



Foreign Bank Account Reporting (FBAR)

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Introduction

Foreign Bank Account Reporting (FBAR), the 2011 amendment to the US Bank Secrecy Act is one of the broadest and most consequential regulations to emerge from the reaction to 9/11 terrorism and the 2008 financial crash. Superficially it is demanding: companies, individuals and US persons are required to report any foreign financial accounts if their total balances were over \$10,000 at any time during the reporting year. Beneath the surface it is even more onerous as the expansive definitions of eligible accounts, US persons and other matters ensure added complexity.

This creates two challenges for corporations. The first is where within an organization should responsibility for FBAR be vested. The second is creating the business processes and acquiring the systems to make sure that the compliance process is efficient and comprehensive. Both are challenges that have not always been fully met by impacted companies in the years since FBAR became a requirement.

FBAR originated with the Financial Crimes Enforcement Network (FinCEN) within the US Treasury and is enforced by the Internal Revenue Service (IRS). Perhaps reflecting its FinCEN roots there are significant consequences for compliance failure, negligent or otherwise. Willfully fail to report an eligible account and the penalty can be as high as the greater of \$100,000 or 50% of the balance in the account at the time of the violation, along with prison time. Even negligent failure to report can result in substantial penalties.

This article examines FBAR in non-technical language with reference to the growing body of regulatory text where required. The focus is on the two challenges noted above; vesting responsibility for compliance and providing the processes and tools to do the job.



FBAR From the Air

The regulation requires that US persons with a financial interest or signature authority over financial accounts in a foreign country report this relationship to the US Treasury. The operative terms in the regulation are US persons, financial interest and financial accounts.

- US persons includes citizens or residents of the US, entities such as corporations created or operating under US law as well as trust and estates operating under US law.
- Financial accounts include conventional bank accounts along with a wide range of financial assets including securities, insurance, futures, options and investment accounts.
- Financial interest includes control through signature authority as well as beneficial interest.

FBAR reporting is also complex. Reporting is required in any year in which the combined maximum balance in eligible financial accounts exceeds \$10,000 at any time during the reporting year. Once that threshold is reached, all accounts must be reported no matter how small their value. Mercifully the exchange rate which must be applied to the amounts can be a single end-of-year rate. While the FBAR is filed annually it is not filed with an individual or company return. Instead it must be filed electronically with FinCEN using the BSA E-Filing System. Required information includes the type of account, account number, name and address of the financial institutions and the maximum balance during the reporting year. There's good news for those with more than 25 accounts, less detailed information is required for each account, but the underlying information must be retained for five years.

Finally, the consequences for failing to properly comply with FBAR include significant civil and criminal penalties for individuals and companies. The IRS which enforces FBAR distinguishes between willful and non-willful violations. At the most benign end of the spectrum a non-willful FBAR violation can yield a civil penalty of up to \$12,459 for each violation, at the discretion of the IRS examiner. At the other end, willful failure combined with other violations can result in civil penalties of more than \$500,000 and criminal penalties of up to \$500,000 and ten years in prison for each violation.

The preceding covers highlights of the regulation for the purpose of this article. Full text of the regulation can be found at <https://www.gpo.gov/fdsys/pkg/CFR-2016-title31-vol3/pdf/CFR-2016-title31-vol3-sec1010-350.pdf>. In addition, the resources section of this article contains links to other primary sources that can help readers navigate the many nuances and exceptions to the regulation.



Corporate Compliance

There are two key elements to corporate compliance with FBAR:

1. Organizational—where should responsibility for FBAR compliance be vested?
2. Systems—what system or systems should be deployed to ensure complete and accurate compliance?

From the organizational perspective FBAR has been the law for several years so most US headquartered companies with global operations are aware of the regulation and working to comply. Their compliance efforts are not always efficient or robust suggesting that a strategic approach to FBAR compliance could yield significant cost savings while also reducing risk.

A major challenge in complying with FBAR is that the broad scope of covered persons, account types and mandated information requires the crossing of many functional boundaries within the company. This complicates the decision as to which group should be accountable for the filing. Should it be the corporate secretary, treasury, tax or some other functional area? Evidence suggests that there are currently considerable differences in the vesting of reporting responsibility from organization to organization. And while the IRS doesn't require consolidated filing, multiple decentralized filings raise the danger that accounts or individuals may fall through the cracks, since once the reporting threshold applies to the consolidated entity all accounts must be reported.

For foreign companies, compliance may be handled by local staff or an outside law firm with senior management at company headquarters potentially left unaware of corporate exposure. In these cases the fragmented nature of the information creates compliance risk that requires action from the most senior levels of executive management.

Best practice suggests a cross-functional team led by the Treasurer or Corporate Secretary with participation from business operations, investment managers, tax and accounting. Ideally the team should report to a member of the corporate C-suite on a periodic basis.

From a systems perspective the source material for FBAR filing is likely to come from multiple systems including the Treasury Management System (TMS), legal entity management software, ERP and the usual assortment of spreadsheets that are used by virtually all companies. Treasury typically owns the TMS but the TMS may not contain all the financial accounts or all the information that is required by FBAR such as investment and trust accounts. While a TMS may have FBAR filing capability and the financial information on account balances that is required, the lack of complete coverage may be an obstacle to use of the TMS by itself for FBAR purposes.



Legal entity management software is likely to be comprehensive in terms of in-scope businesses but may lack required financial information such as account balances. ERPs often have detailed financial information but are not noted for their easy accessibility or reporting flexibility. Spreadsheet management solutions, often referred to as corporate performance management systems have the flexibility, auditability and collaborative capabilities to make them good choices but the nature of the FBAR challenge points to the need for a more formal system.

In this case Bank Account Management (BAM) systems are the preferred choice because of their ability to manage all the elements of FBAR—serving all corporate functions and all corporate data sources. BAM systems generally have the advantage of reasonable cost in addition to the relative ease with which they can be integrated into other systems during implementation. A single source of truth created in a BAM system provides the most robust assurance of efficient and complete compliance.

Summary

It is best to understand FBAR as the consequence of two significant systemic shocks; the terrorism of 9/11 and beyond and the 2008 financial crisis. Both of these shocks have generated significant regulatory response from AML to Basel III—both of which are complex in their own right. What makes FBAR unique and therefore a significant corporate risk are the broad definitions of covered persons, financial accounts and financial interest.

One FBAR risk deserves special note—the personal liability of those with signature or beneficial interest over their company’s foreign accounts. The regulation requires filings from both the company and selected individuals making FBAR compliance more than simply the actions that will protect the company. FBAR is also very personal with significant personal consequences for filing errors.

Including FBAR as a part of overall corporate risk profiles and deploying effective systems to assist with compliance are essential to mitigating the risks and challenges of FBAR compliance. The fact that FBAR has been in existence for several years does not mean current systems and workflows are effective. Far too many manual processes and instances of decentralized responsibility are in place at most companies for management to feel secure about current compliance. The current manual and decentralized nature of FBAR compliance also creates a cost reduction opportunity for companies embarking upon a strategic reassessment of their FBAR compliance approach. To this end, the checklists and resource links provided below can be used to develop a set of business requirements for an FBAR compliance system or to diagnose potential problem areas with the current processes and systems.



The shocks that led to the creation of FBAR are still fresh in many minds which means that moderation of the rules is unlikely. Companies should take advantage of this relative calm to properly address the core risk that is FBAR.

Check Lists

Three check lists are provided below to assist with reviews of current FBAR compliance processes, divided into types of accounts, reporting and records.

1. The following types of foreign financial accounts are within the scope of FBAR:

- ✓ Bank accounts such as current accounts, time deposits and savings accounts held at foreign financial institutions
- ✓ Securities accounts such as brokerage accounts and securities derivatives or other financial instruments accounts held at foreign financial institutions
- ✓ All of the above held at foreign branches of a US financial institution
- ✓ Commodity futures or options accounts, mutual funds accounts with a stated value and regular redemptions and foreign life insurance or annuity contracts with a cash value
- ✓ Foreign stock or securities accounts held at a foreign financial institution
- ✓ Foreign accounts and investment assets held by a foreign or domestic trust

Pro Tip: All accounts must be reported, even zero-dollar accounts, if the aggregate balance is ever over \$10,000.

Pro Tip: Physical foreign currency, precious metals and personal property are exempt from FBAR reporting.

2. The determination of the need to report and reporting requirements includes the following:

- ✓ Check to see if the aggregate balance of foreign financial accounts exceeds \$10,000 at any time during the calendar year
- ✓ If eligible for reporting, ensure that the capability to file FBAR Form 114 electronically is possible
- ✓ If there are more than 25 accounts to be reported detailed information on each account is not required—although record keeping for the details is a requirement
- ✓ FBAR must be filed for all persons—corporate or individual—that have ownership, control, beneficial interest or signing authority over foreign financial accounts



- ✓ There are certain cases in which individuals who only have signing authority may be exempt from filing if the accounts are held by a publicly traded US company and the company files an FBAR
- ✓ FBARs may be filed by attorneys or corporate agents but all individuals must complete a Form 114a, record of authorization to electronically file FBARs
- ✓ Information to be filed includes the type of account, account number of other identifications, financial institutions name and address and the maximum balance during the year

Pro Tip: If there is any doubt it is advisable to file an FBAR given the severe penalties for failing to file.

Pro Tip: If you have unfiled FBARs for prior years and have not been contacted by the IRS, file them as soon as possible along with an explanation of why you originally failed to file.

3. Records associated with FBAR filing must be kept by year for a period of five years from filing. These include:

- ✓ Name and address of the US owner of the financial account
- ✓ Date of birth and taxpayer identification number (TIN) of the US owner
- ✓ Type of financial account such as current account, investment account or trust account
- ✓ Name and address of the financial institution holding the account
- ✓ Bank account number or other identifying number
- ✓ Highest balance in the account during the calendar year
- ✓ Names and addresses of all other account holders with more than 50% ownership, beneficial interest or control of the account
- ✓ Names, addresses and corporate employment (the business entity) of all account signers
- ✓ Copy of statement indicating the high balance in the account.
- ✓ Copy of relevant FBAR
- ✓ Copies of all authorizations to electronically file FBARs
- ✓ Filing date of FBAR

Pro Tip: A robust bank account management system (BAM) can help track all required information and generate the required reports.



Resources

IRS:

<https://www.irs.gov/pub/irs-utl/irsfbarreferenceguide.pdf>

<https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar>

FinCEN:

<https://www.fincen.gov/report-foreign-bank-and-financial-accounts>

BSA E-Filing site:

<https://bsaefiling.fincen.treas.gov/main.html>

Third Party Authorization Form:

<https://www.fincen.gov/sites/default/files/shared/FBARE-FileAuth114aRecordSP.pdf>

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