

## Answers to Common FBAR Questions

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Recently Neil A. J. Sullivan, CPA, TEP, and I held a webinar titled, “FBAR: What’s my Corporate and Individual Exposure,” that generated a multitude of questions from interested attendees. In fact, participants asked so many smart questions that many went unanswered.

Now I have answered every question left in the queue. The answers represent my own views and are not necessarily those of AFP. You should still seek advice with your legal counsel, tax advisor and/or FinCEN for an official view or ruling on a specific fact pattern. If after you have been advised by your legal counsel, tax professional or one of the regulatory bodies on a question that is contrary to any of the responses below, please contact me so that I can update the questionnaire and make other practitioners aware of such changes.

### **Q: Who is required to file FBAR?**

- Are you saying any authorized person on a foreign bank account must report? They are not a signer, but are a designator and can designate themselves to sign?
- They are not a signer, but can be if they so choose to be.
- If a person cannot initiate, but can authorize a wire do they have authority?
- If a person can initiate wire transfer but cannot approve, do they still have to file?
- What if they’re only on the banking resolution as a designator but are not, in fact, a signer? Designators have the authority to change the signers on the account.
- Would a director or a managing officer with no signature authority but has the authority to designate signatories on the resolution be required to file?
- If someone can initiate a wire, but is not an authorized signer of the bank account, is this person required to file an FBAR?
- What if a board member is required to sign large checks that require a second signature and they only have signing ability for one calendar year? Do they need to file?
- If you can initiate stop payments or can make exception item decisions, (i.e. pay or no-pay decisions on positive pay checks do you have to file)?

**A:** The overall question that determines whether a filing requirement exists is whether the person has some form of authority over the disposition of the assets.

Title 31, section 1010.350 defines signature or other authority as the authority of in individual **(alone or in conjunction with another)** to control the disposition of money, funds or other assets held in a financial account (including bank, securities or other) by direct communication (whether in writing or otherwise) to the person with who the financial account is maintained. A

person with **other account authority** is defined as a person who can exercise power that is comparable to signature authority over an account by direct communication, either orally or by some other means to the bank or other person with whom the account is maintained.

In looking at the federal register, the individual **who has other account authority (whether in writing or otherwise) to the person with whom the account is maintained** should be determined based on whether the foreign financial institution will act upon a direct communication from that individual regarding the disposition of assets in that account. The **phrase “in conjunction with another”** is intended to address situations in which a foreign financial institution requires a direct communication from more than one individual regarding the disposition of assets in the account.

I also went to the FBAR site on the IRS and found an example that said a person who has the power to direct how an account is invested but cannot make disbursements or deposits to the account does not have to file an FBAR because the person has no power of disposition of money or other property in the account. Thus, if the power of both of your employees (either individually or in conjunction with the other) gives the authority to dispose money or other assets, they would fall within the definition. Additionally, the Federal Register indicated that it did consider situations where that authority may be from a person acting as an employee. Commenters asked for an exception, they clearly considered it, but decided against it.

**Q: Officers frequently are listed by title but not name. Are they included in FBAR?**

**A:** Yes, and your company’s policy is a good one for not only the company but also the individual. A person who holds the title but not listed specifically by name would have to file the report so long as he remains in that position. The good thing about this policy is that neither the company nor the individual would have to redo the paperwork once the person no longer holds the position. The authority should merely transfer by virtue of title onto the next employee.

**Q: How do companies track employees who had signature authority throughout the year if they’ve since left the company?**

**A:** Great question. The Financial Crimes Enforcement Network (“FinCEN”) recently issued FBAR guidance in response to this question (FIN 2011-G003 dated October 11, 2011). FinCEN ruled that it does not expect officers or employees with signature or other authority to maintain records of the foreign financial accounts of their employers personally. FinCEN also does not expect a former employee to maintain the records of the foreign financial accounts of their former employer personally. Additionally, due to proprietary and privacy concerns, FinCEN does not expect a former employer to provide information on foreign financial accounts to a former employee. In such instances, a former employee must provide as much information as possible when filing an FBAR. At a minimum, the former

employee must include the fact that the former employee had signature or other authority over a foreign financial account and must provide information about his or her former employer for whom he or she was acting, including the name of the former employer, as well as his or her title with the former employer.

**Q: What if an employee leaves mid-year and has no info or access to company data? Would he need to file, and if so how? Isn't the info confidential to the company?**

**A:** If the person does not meet any of the exceptions for self filing and he had signature or other authority over the account and that account met the threshold, he would be required to fill out a FBAR report. The company could consider sending him a report of just the information he needs to fill out on the FBAR. From the individual's perspective, the person leaving the company should gather the information needed upon exiting just in case he/she does not receive the information. The reporting responsibility is on the individual. However, see the guidance recently issued discussed in the above questions to help your decision making.

**Q: By authorized person, I mean a person within a company that is authorized to act on behalf of the company with the bank.**

**A:** Yes, the person to act on behalf of the company with the bank.

**Q: What types of accounts are reportable under this guidance?**

**A:** For the purpose of this guidance, there are three categories of accounts that were mentioned in the guidance referenced above in question 1:

- Bank account—defined as a savings deposit, checking, or any other account maintained with a person engaged in the business of banking.
- Securities account—defined as an account with a person engaged in the business of buying, selling, holding or trading stock or other securities.
- Other financial account—the guidance cited the following examples:
  - An account with a person that is in the business of accepting deposits as a financial institution
  - An account that is an insurance or annuity policy with a cash value
  - An account with a person that acts as a broker or dealer for futures or options transactions in any commodity on or subject to a commodity exchange or association
  - An account with a mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions
  - Other investment fund.

**Q: Must the accounts be within the same legal entity in order to apply the \$10,000 aggregation rule?**

**A:** From the corporation's perspective, legal entity would be defined in terms of control. A company that files a consolidated return exempts those companies under the consolidated

entity from filing in certain cases. If the company is a related party, but not in the consolidated group and meets the definition, that company would be required to file a FBAR separately.

In terms of an individual, it is the total of all foreign bank accounts, belonging to your company or individually, that determines the \$10,000 aggregation level. Thus, if you work at a company and leave and start at another, you would be responsible for filing out your FBAR with all accounts that you had signature authority over that meets the definition.

**Q: Are officers for the entity (who are not listed on the account) required to file?**

**A:** Only if the officer is listed by name on the account(s), has the authority to dispose of money or other financial assets, or has authority by virtue of his position on the account(s).

**Q: If I sign on six different accounts for six different legal entities, each with \$2,000 balances, must I file**

**A:** Yes, a person in this situation would be required to file if he or she is a U.S. citizen, as the total in aggregate of all accounts exceeds \$10,000.

**Q: What about persons that are not U.S. citizens or residents but own property and file a tax return?**

**A:** The reporting responsibility is only for U.S. persons that have signatory or other authority over foreign accounts. Non-U.S. citizens or corporations are not required to fill out a FBAR report. However, the term U.S. citizen is defined term in the guidance as stated in the subsequent question.

**Q: What is meant by being a U.S. person?**

- What about a Canadian based company with a number of subsidiaries in the U.S., but are all consolidated for reporting purposes. Do the subs need to file an individual FBAR as the parent would not?
- If a U.S. corporation owns an account off shore, and certain signors and personnel of “other account authority” are not U.S. citizens, is it just the U.S. citizen authorized signors that file the FBAR?

**A:** The reporting requirement is only on U.S. persons. U.S. person is defined as (as reference in guidance in question 1:

- A citizen or resident of the U.S.
- A domestic partnership
- A domestic corporation
- A domestic trust or estate.

Additionally, any non-consolidated subsidiaries of the foreign company that does business in the U.S. would not have to file because the funds are held in custody here in the country. It only applies to balances in foreign accounts.

**Q: It is the total amount over \$10,000 after being converted to U.S. dollars—correct?**

**A:** Yes, the total aggregate in U.S. dollars.

**Q: Do accounts with negative balances (pooling accounts) offset the balance requirements?**

**A:** No, those accounts would be considered to have a zero balance for purpose of the calculation. Remember, the balance determination is made based on the highest recorded balance in a calendar year. If the account was a zero balance at December 31 but had \$10,000 at September 30, it would still be considered a reportable account.

**Q: Would a sweep account that at the end of the day is always zero, but have money during the day meet the \$10,000 requirement?**

**A:** It would depend on how your reporting is structured and how the information is captured. If your banking statements show zero balances then you could make the argument that this is a non-reportable account. However, this is a case where you would need to contact the IRS or your tax group to get an interpretation.

**Q: In relation to CFO letters:**

- I thought that the new rules did not require the CFO letter?
- CFO letter was indicated in previous FBAR instructions but new instructions issued in late March do not indicate this exception with the CFO letter. Has there been an additional ruling since March 2011 or are you referring to pre-2010 instructions?
- Does it have to be CFO can it be treasurer?
- I work for a U.S. corporation, publicly held, and have signatory authority but no financial interest in all of our bank accounts, both foreign and domestic. The corporation has filed TD F90-22.1 with all required information. From a personal standpoint, do I have any filing requirements other than maintaining a letter from the CFO for each tax year?
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**A:** The new rules do not specify a CFO letter as a recordkeeping requirement, but it also did not change the exclusion that it pertained to. Thus, as a matter of practice, it would still be good to continue on with this process. It gives the employee the proof it needs to assess whether he/she has a reporting requirement should the individual is ever audited. Now, since the specific reference to the CFO is no longer there, a company can make the decision on whether the letter comes from some other officer within the organization. See the below question to see whether you qualify for the exclusion.

**Q: Who is not required to file a FBAR?**

While I have the exclusions listed in the slides and the white paper, I will also reiterate it here as a question as the following questions were received:

- If you are an employee of the parent company, but not an officer of employee of the subsidiary, but have signing authority for the subsidiary are you exempt if the parent files a consolidated return?
- Does the individual as well as the private company have to file an FBAR?
- What about a Canadian based company with a number of subsidiaries in the U.S., but are all consolidated for reporting purposes. Do the subs need to file an individual FBAR as the parent would not?
- SEC regulated co with \$10 million in assets and 250 or more shareholders are NOT required to file for individual signers, but are just required to file on behalf of the company?
- If we are a public U.S. company and we have foreign subsidiaries, if we have been advised by our CFO that the company has filed a consolidated FBAR, are we individually off the hook?

**A:** The guidance lists the following exclusions, which comes from the amendment in the federal register vo. 76. No. 37 dated February 24, 2011:

- An officer or employee of a bank that is examined by any of the banking agencies (OCC, Federal Reserve, FDIC, OTS or NCUA)
- An officer or employee of a financial institution that is registered with and examined by the SEC or CFTC
- An officer or employee of an Authorized Service Provider that is registered with the SEC
- An officer or employee of an entity with a class of equity securities listed (or American depository receipts listed) on any U.S. national securities exchange or which has assets exceeding \$10 million and 500 or more shareholders. He or she no financial interest in the account and the U.S. subsidiary is included in a consolidated report of the parent filed report.
- An officer or employee of an entity that has a class of equity securities registered (or American depository receipts in respect of equity securities registered) under section 12g of the Securities Exchange Act.

If you meet the scope exception of being a company consolidated under a parent and the parent lists your company's account in their FBAR, the company would not have to file another FBAR. If you as the individual that meet the exception for self filing you would also not have a reporting responsibility for that company so long as you can prove that you met the exception. There are no exceptions granted for private companies. Both the company and the individual will be required to file. The CFO letter only pertained to officers and employees listed in the third and fourth bullet.

**Q:** Would a US citizen who is a signer need to file FBAR under the following conditions:

- 1) The U.S person is an officer of a U.S. publicly traded company,

- 2) The account is owned by a foreign subsidiary of the U.S. public company,
- 3) The U.S. person has no financial interest in the account.

If the employee is a U.S. citizen who is employed by the foreign subsidiary of a public U.S. company and has signing authority, do they need to file?

**A:** Initially in the webinar, I responded that the U.S. person would not have a FBAR filing responsibility. However, upon further research I am recanting this decision. Earlier FinCEN indicated that the February 24, 2011 was not supposed to change current practice. However, this was not the case. The recently issued guidance changed current practice in two ways. First, the recent guidance does not mention obtaining a CFO letter (as I earlier mentioned). It also changed the language in this exception, which will now create an additional filing burden on some employees that was previously not required to file. The exception in the February 24<sup>th</sup> federal register is granted to:

An officer or employee of an entity with a class of equity securities listed on any United States national securities exchange need not report that he has signature or other authority over a foreign financial account of such entity if the officer or employee has no financial interest in the account. An officer or employee of a United States subsidiary of such entity need not file a report concerning signature or other authority over a foreign financial account of the subsidiary if he has no financial interest in the account and the United States subsidiary is named in a consolidated FBAR report of the parent filed under proposed paragraph (g)(3) of 31 CFR103.24.

This exception would be available to officers and employees of entities with a class of equity securities listed upon a U.S. national securities exchange, regardless of whether the entity is domestic or foreign. Officers and employees of a U.S subsidiary of such listed U.S. entities are also covered by this exception if the U.S subsidiary is named in a consolidated FBAR report of the parent.

According to two public accounting firms, based on the new language, foreign financial accounts owned by foreign subsidiaries of U.S. public entities are no longer eligible for the exclusion. The exclusion is now applicable to foreign financial accounts owned by the entity (parent or U.S. sub) that is the same employer of the officer or employee with signature authority.

A U.S. person would be required to file a FBAR if it was a signor on a foreign financial account of any of the following entities:

- A foreign sub (even if the parent company is listed on a U.S. national securities exchange)
- Any sub of a U.S. nonexchange traded entity that has assets exceeding \$10 million and has 500 or more shareholders of record

- An entity that is not the employer of the officer or employee.<sup>1</sup>

Ironically the earlier exception was clarified in a FinCEN ruling based on a written inquiry by PwC. The American Institute of Certified Public Accountants (AICPA) urged FinCEN to clarify its intentions after the February guidance was issued.<sup>2</sup> However, FinCEN has issued no guidance in response to this comment letter. Thus, practitioners should follow the expert advices of their tax and legal professionals until clarification is issued contradicting their new interpretation.

**Q: What protections does an individual have if the corporation doesn't file all foreign bank accounts appropriately?**

**A:** The responsibility on the individual is to maintain their own adequate records and correctly report the information on their forms. Let the IRS reconcile out any discrepancies if needed.

**Q: The role of banks; the following questions came in on how banks are involved:**

- Independent from corporations/individuals reporting, how will the IRS vet this with the banking community? Are banks reporting this information to the IRS?
- How is the IRS vetting this information with the banking community?

**A:** The bank already is aware of its individual FBAR responsibilities. Banks are excluded from the provisions of this guidance. However, they are certainly willing to assist you with complying...for a fee of course.

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<sup>1</sup> Excerpt taken from PwC Global Information Reporting and Withholding (IRW) news brief dated April 18, 2011

<sup>2</sup> See AICPA letter to FinCEN dated June 27, 2011 that can be found that the following link:

<http://www.aicpa.org/InterestAreas/Tax/Resources/International/Advocacy/DownloadableDocuments/AICPA06272011FBARCFCL.pdf>