



Salome J. Tinker, CPA
Director of
Financial Accounting
and Reporting, AFP

Raising the Bar

Tougher Reporting Requirement for Foreign Bank Account Holders

Salome J. Tinker, CPA

By now treasury and finance professionals should have seen the recently amended Foreign Bank Account Report (FBAR) rules and determine whether they are affected by them. This paper will discuss the recent amendments and dispel many of the myths about them.

Background

Since the passage of the Bank Secrecy Act in the early 1970s, the U.S. government has taken an interest in detecting and deterring money laundering. The Act established reporting requirements for cash purchases of negotiable instruments of \$10,000 or more, and reporting suspicious activity that might signify money laundering, tax evasion or other criminal activities. However, with the passage of the Patriot Act after the terrorist attacks that took place on 9-11, the focus expanded to include deterring the financing of terrorist activities. The Financial Crime Enforcement Network (FinCEN) and the Internal Revenue Service (IRS) are charged with writing and enforcing the regulations from the Act.

On February 24, 2011, FinCEN published final rules amending the Bank Secrecy Act surrounding FBAR. The amended rules became effective on March 28, 2011 and apply to all reports required to be filed by June 30, 2011. The FBAR rules have created several myths that need to be dispelled in order to best follow them.

Myth Number 1: Our money is with safe banks and we review regulations frequently. So we are fine.

FBAR is not new. The guidance has been in place since 1972. However, it has not been strictly enforced until recently. In 2009, the Justice Department entered into a Deferred Prosecution Agreement with UBS AG, Switzerland's largest bank. UBS admitted to assisting thousands of U.S. taxpayers in committing tax evasion by maintaining secret Swiss bank accounts. In a settlement agreement, UBS provided the Justice Department its client's records of all U.S. account holders with unreported offshore accounts. This action led to over 20 criminal prosecutions filed against UBS account holders, bankers and investment advisors. In all, 15,000 individuals came forward admitting to having offshore bank accounts.

Myth Number 2: None of our accounts carries a \$10,000 balance so we do not have to file a report.

The amended FBAR requires all U.S. citizens, corporations and individuals, to report to the IRS any amounts held in banks outside of the U.S. if the total of all foreign bank accounts is \$10,000, or greater, at any time in the reporting year. For clarification, the rule imposes a filing requirement on corporations or individuals that have deposits in a foreign branch of U.S. bank. However, corporations or individuals have no filing requirement if the funds were located in a U.S. branch of a foreign bank. Additionally, the fact that any one account is not greater than \$10,000 does not exempt a corporation or person from filing if it has multiple foreign accounts and all of them total, in aggregate, more than \$10,000. The reporting requirement still exists even if the account did not have \$10,000 at the end of the reporting year. Account totals reaching \$10,000 at any time in the year triggers a reporting requirement. Finally, the reporting requirement exists even if you did not withdraw any of the cash from the account or they do not generate any taxable income.

Myth Number 3: This only affects companies and those individuals trying to conduct illegal activities.

It was once thought that the changes would only affect companies and influential individuals that could put \$10,000 in a foreign account, which excludes many people. But it is now clear that the rules could leave some treasury personnel at all levels with an individual reporting responsibility.

The scope imposes a reporting burden on any U.S. citizen that has signature authority or influence over a foreign account whether or not they have a direct financial interest. Signature or other authority means 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. While the objective of the requirement is to deter terrorist funding and money laundering, the reporting burden reaches deeper than those the IRS is targeting.

Signature or other authority is further defined by the regulation 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. Thus, lower level through senior level corporate treasury employees could be impacted: anyone from the accounts payable/receivable clerk to the treasurer to the CFO. If you have the ability to authorize a wire at a foreign bank for payment on behalf of your company you may meet this requirement. Everyone within the treasury function should perform an analysis to ensure that they are not scoped in for mandatory reporting compliance.

Myth Number 4: This amendment does not apply to me because my company is the reporter.

FBAR impacts both the corporate entity and the individual. The FBAR rules provide exceptions for certain individuals that do not have any financial interest, such as treasury employees. Many will qualify but some will not. Here are the two exceptions granted to most of the reading population as stated in the federal register:

1. 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 need not report he or she has signature or other authority over a foreign financial account of such entity if the officer or employee has not financial interest in the account. An officer or employee of a U.S. subsidiary of a U.S. entity with a class of equity securities listed on a U.S. national securities exchange 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 U.S. subsidiary is included in a consolidated report of the parent filed under his sections.
2. 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 12(g) of the Securities Exchange Act need not report that he or she has signature or other authority over the foreign financial accounts of such entity or if he has no financial interest in the accounts.

The above exception is 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. sub 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. However, if the parent is a foreign company with U.S. subsidiaries listed on a foreign exchange, the consolidated report exception does not apply because the parent has no reporting responsibility. The foreign parent entity is not allowed to voluntarily complete a consolidated form on behalf of its U.S. subs.

There are also exceptions granted to those individuals that work for banks and investment companies with no financial interests in the account. A general rule of thumb is if your company is regulated by a banking agency or the SEC you may qualify for an exemption. However, it is imperative that you check the rules to ensure an exemption applies to you. Unfortunately, for nonpublic filers there are no exemptions.

Myth Number 5: If I am late I can apply for a filing extension.

Over the last few weeks, two extensions for implementing the filing deadline have been granted to officers and employees of companies that have signature authority over foreign accounts but no direct financial interest in those same accounts. The first extension gave officers and employees of investment advisor companies a one year extension to file the FBAR. Those that fall into this extension will still need to file the current form (2010) but have one year to complete it.

The second extension is for officers and employees of corporations over foreign accounts that were not reported in calendar years ending in 2009 or earlier. Those individuals now have to November to file those reports. However, the current report is still due on June 30 for the 2010 calendar year.

Again, there is no relief offered for nonpublic companies and those individuals that work for these companies. Those that do not meet the exemption stipulations are still required to file their reports by June 30.

Myth Number 6: The penalties for non-compliance are not that material.

There is a possibility of jail time; civil and criminal penalties for non-compliance with the FBAR filing requirements are significant. Civil penalties for a non-willful violation can range up to \$10,000 per violation. Civil penalties for a willful violation can range up to the greater of \$100,000 or 50 percent of the amount in the account at the time of the violation. Criminal penalties for violating the FBAR requirements while also violating certain other laws can range up to a \$500,000 fine or 10 years imprisonment or both. Civil and criminal penalties may be imposed together.

However, if you believe you were required to file FBARs

for earlier years, you can file the delinquent FBAR reports and attach a statement explaining why the reports are filed late. No penalty will be assessed if IRS determines that the late filings were due to reasonable cause. If, however, there were any unreported taxable income related to the foreign accounts, the IRS is currently offering amnesty from criminal prosecution. This would not apply to most treasury employees since you do not have a direct financial interest. If you or your company falls into this category, you should look up the procedures for making a voluntary disclosure to IRS under the 2011 Offshore Voluntary Disclosure Initiative.

In the beginning of the year, FinCEN and the IRS started the Offshore Voluntary Disclosure Initiative offered for intentional or unintentional reporting violators that may have unreported taxable income in offshore accounts. This amnesty program, available through August 31, 2011, allows a person to file a report for all years not reported without criminal prosecution.

Myth Number 7: I have read this paper and feel I qualify for the exemption so I can pass on this topic.

NO!! The rules are very complex and every attorney or consultant we spoke with all have different opinions and interpretations about FBAR. Please don't take the words in this paper as the final authority on the matter. Let this serve as the beginning of the conversation. Hold a detailed discussion with your CFO, treasurer and corporate attorney to see if you may be required to file. If you are the treasurer and MANAGE others, obtain a clear understanding OF all that have signatory authority that are U.S. citizens under your watch. THIS rule affects the entire year, which would include those who may no longer be with the company at the time the report is being prepared.

Conclusion

The FBAR reporting requirements should be taken seriously. Treasury employees make sure you pay attention to the box on your individual tax return that should be checked alerting the IRS that you have a FBAR requirement. While the form is not considered part of your individual tax return, you do not want to commit perjury on that form if you are supposed to file a FBAR. The onus for reporting to the IRS is always on the individual. It is in your best interest to do an analysis of all accounts you think you may be on or have authority over. It is also in your best interest to ensure that your name is removed from any account upon leaving your company or changing roles within the company. You don't want an old account to come back and haunt you. It is always better to be proactive in this regard than reactive after receiving an IRS inquiry.