

Kluwer International Tax Blog

U.S. Persons Foreign Assets and Entities Reporting for the FATCA, FBAR and BE-10 Forms Due in June (Part II)

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1. FBAR Filing Requirement

The FBAR refers to [Form 114](#), Report of Foreign Bank and Financial Accounts. The FBAR must be filed annually by a U.S. person that has a financial interest in or signature authority over foreign financial accounts if the aggregate value of the foreign financial accounts exceeds \$10,000 at any time during the calendar year. The FBAR is due by June 30, 2015 and cannot be extended. Non-compliance with FBAR filing requirements attracts substantially more severe civil penalties than tax filing non-compliance.

The FBAR is not part of a taxpayer's income tax return and is not submitted with the tax return. Financial Crimes Enforcement Network (FinCEN) is a distinct bureau of the U.S. Treasury Department from the IRS. The FBAR statutory authority was enacted as a provision of U.S. Code Title 31 "Money and Finance" and addresses financial crime prevention, whereas the filing requirement of Form 8938 derives from Title 26 "Internal Revenue Code". Although FBAR compliance is administered by the IRS by an intra-department agreement between the IRS and FinCEN, the FBAR is filed electronically through FinCEN's [BSA E-Filing System](#).

FBAR Civil Penalties

A civil penalty up to \$10,000 may be imposed by the IRS upon a U.S. person per incidence of non-compliance with the FBAR filing requirements although the IRS may waive the penalty when there is reasonable cause for the non-compliance and the FBAR properly reports the balance held in a foreign account. However, where the IRS determines willfulness for the FBAR non-compliance, it may increase the civil monetary penalty to the greater of \$100,000 or 50 percent of the balance in the account at the time of the violation.

According to the Government Accountability Office (GAO) [Report of 2013](#) regarding the application of FBAR civil penalties, small financial accounts with balances of less than \$100,000 and that over a six year period had only an average of \$103 tax owing (which equates to \$17 a year additional tax revenue), the IRS imposed a FBAR penalty of \$13,320 (i.e. \$2,220 a year). The twenty-fifth percentile paid on average a \$5,945 FBAR civil penalty for an average annual \$277 tax understatement. The median FBAR civil penalty imposed was \$17,991 a year for a median \$2,125 a year tax understatement. The GAO analysis found that taxpayers with the smallest non-reported foreign financial accounts (i.e., those in the tenth percentile with accounts of \$78,315 or

lower) paid FBAR penalties as high as 575 percent of the actual tax, interest, and tax penalty owed.

By example in 2013, Mary Estelle Curran, a 79 year old former UBS client pled guilty to two criminal counts of filing false tax returns for seven years by failing to report her offshore accounts left to her by her deceased husband (2001–2007). Mrs. Curran, uneducated beyond high school, owed \$667,716 in taxes plus interest and penalties over the seven year period in question, thus on average, \$95,388 of lost tax revenue per year (including the 40 percent understatement penalty and interest on the understatement). The IRS imposed an additional FBAR civil penalty of \$21,666,929, calculated based upon 50 percent of the high balance of her foreign accounts, for failure to report the foreign bank accounts on her FBAR forms. (The IRS also requested a criminal sanction of a lengthy prison sentence, but the judge imposed only a one-day suspended sentence).

In the June/July 2014 Journal of Tax Practice & Procedure, tax attorney Charles Rettig stated that several taxpayers who opted out of the IRS' offshore voluntary disclosure program ("OVDP") had received IRS notices asserting multiple, *cumulative*, FBAR penalties of 50 percent *for each year* under audit.

Who is considered an individual FBAR filer?

An individual FBAR filer is a natural person who owns a reportable foreign financial account or has signature authority but no financial interest in a reportable foreign financial account that requires the filing of an FBAR for the reportable year.

An individual who jointly owns an account with a spouse may file a single FBAR report as an individual filer for that joint account. However, the FBAR instructions state that a spouse included as a joint owner, who does not file a separate FBAR, must also sign the FBAR. This is not possible with FinCEN's BSA E-File system capability because it only allows for one digital signature. In this situation, FinCEN allows the spouses to designate, using [Form 114a](#), which spouse will be designated as the FBAR signatory on the behalf of both.

What is considered a FBAR reportable financial account?

A financial account includes, but is not limited to, a securities, brokerage, savings, demand, checking, deposit, time deposit, or other account maintained with a financial institution (or other person performing the services of a financial institution). A financial account also includes a commodity futures or options account, an insurance policy with a cash value (such as a whole life insurance policy), an annuity policy with a cash value, and shares in a mutual fund or similar pooled fund (i.e., a fund that is available to the general public with a regular net asset value determination and regular redemptions).

What is considered a FBAR financial interest?

A U.S. person has a financial interest in a foreign financial account in the following circumstances:

1. The U.S. person is the owner of record or holder of legal title.
2. The owner of record or holder of legal title is one of the following:
 - a. An agent, nominee, attorney, or a person acting in some other capacity on behalf of the U.S. person with respect to the account;

- b. A corporation in which the U.S. person owns directly or indirectly (i) more than 50 percent of the total value of shares of stock or (ii) more than 50 percent of the voting power of all shares of stock;
- c. A partnership in which the U.S. person owns directly or indirectly (i) an interest in more than 50 percent of the partnership's profits (e.g., distributive share of partnership income taking into account any special allocation agreement) or (ii) an interest in more than 50 percent of the partnership capital;
- d. A trust whereby the U.S. person (i) is the trust grantor and (ii) has an ownership interest in the trust;
- e. A trust in which the U.S. person has a greater than 50 percent present beneficial interest in the assets or income of the trust for the calendar year; or
- f. Any other entity in which the U.S. person owns directly or indirectly more than 50 percent of the voting power, total value of equity interest or assets, or interest in profits.

2. BE-10 International Investment and Trade in Services Survey Filing Requirement

The BE-10 survey is not new, having been enacted in 1976 under the statutory authority of U.S. Code Title 22 "Foreign Relations and Intercourse" as the International Investment and Trade in Services Survey Act. But it is fair to say that it is unknown among most tax practitioners. The BE-10 survey is conducted by the U.S. Department of Commerce's Bureau of Economic Analysis (BEA).

The BE-10 survey is currently required to be filed with the BEA by *any* U.S. person that had direct or indirect ownership or control of at least 10 percent of the voting stock of an incorporated foreign business enterprise, or an equivalent interest in an unincorporated foreign business enterprise, at any time during the U.S. person's 2014 fiscal year. The BE-10 is only filed every fifth year and thus, is not an annual form.

The general deadline for the fiscal year 2014 survey passed on 29 May 2015. But U.S. persons who will be first time BE-10 form filers have an automatic BE-10 filing extension until 30 June 2015.

Non-filers are potentially subject to civil and criminal penalties. The civil penalty for non-filing is at least \$2,500 but not greater than \$25,000. Willful non-compliance may attract a fine up to \$10,000 but for an individual, additional may attract a prison sentence up to one year. Any officer, director, employee, or agent of any corporation who knowingly participates in such non-compliance may also be punished by a like fine and/or imprisonment. Moreover, the civil penalties are subject to inflationary adjustments.

A BE-10 survey is required even if the foreign business enterprise was established, acquired, seized, liquidated, sold, expropriated, or inactivated during the U.S. person's 2014 fiscal year. The amount and type of data required to be reported vary according to the size of the U.S. person or foreign affiliate, and, for foreign affiliates, whether they are majority-owned or minority-owned by U.S. direct investors. If the U.S. person had no foreign affiliates during its 2014 fiscal year, it must file a "BE-10 Claim for Not Filing".

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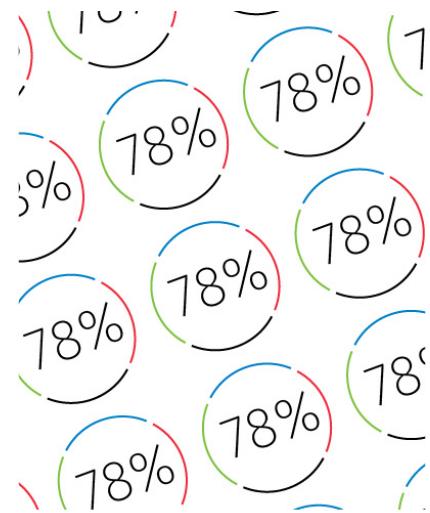
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