How Many FBARs Are Enough?

By Michael J. Miller

As many readers of this publication are no doubt aware, U.S. persons who have a financial interest in, or signature or other authority with respect to, one or more foreign financial accounts generally are required to disclose such foreign financial accounts on "FBARs," *i.e.*, foreign bank account reports. By definition, this means that more than one U.S. person may potentially be obligated to report the same foreign financial account, but, as explained below, it is much worse than that.

Background

FBAR Statute

Pursuant to 31 USC §5314, "the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency."

FBAR Regulations and Instructions

Overview of Filing Obligation

Pursuant to the applicable "FBAR Regulations" issued by FinCEN under Title 31, not the Internal Revenue Code, each "United States person" with a "financial interest in, or signature or other authority over" a foreign financial account must, for each year in which such relationship exists, provide such information as is required on the form prescribed pursuant to 31 USC §5314 (the "FBAR"). 31 CFR §1010.350(a). The current FBAR form is FinCEN Form 114, which imposes such a filing requirement only if the reportable foreign financial accounts have an aggregate balance that exceeds $10,000 at any time during the calendar year.

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United States Person

The FBAR Regulations define the term "United States person" as follows:

> (b) *United States person*. For purposes of this section, the term "United States person" means—
> (1) A citizen of the United States;
> (2) A resident of the United States. A resident of the United States is an individual who is a resident alien under 26 U.S.C. 7701(b) and the regulations thereunder but using the definition of "United States" provided in 31 CFR 1010.100(hhh) rather than the definition of "United States" in 26 CFR 301.7701(b)–1(c)(2)(ii); and
> (3) An entity, including but not limited to, a corporation, partnership, trust, or limited liability company created, organized, or formed under the laws of the United States, any State, the District of Columbia, the Territories and Insular Possessions of the United States, or the Indian Tribes.[1]

The FBAR Regulations do not specifically address the treatment of an estate, but the instructions to the FBAR define the term "person" to include an estate and define the term "United States person" as follows:

> **United States Person.** United States person means United States citizens (including minor children); United States residents; entities, including but not limited to, corporations, partnerships, or limited liability companies created or organized in the United States or under the laws of the United States; and trusts or estates formed under the laws of the United States.

Financial Interest

For purposes of determining which U.S. person, or persons, have a financial interest in a foreign account, the FBAR regulations provide as follows:

> (2) *Other financial interest*. A United States person has a financial interest in each bank, securities or other financial account in a foreign country for which the owner of record or holder of legal title is—
> (i) A person acting as an agent, nominee, attorney or in some other capacity on behalf of the United States person with respect to the account;
> (ii) A corporation in which the United States person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares, a partnership in which the United States person owns directly or indirectly more than 50 percent of the interest in profits or capital, or any other entity (other than an entity in paragraphs (e)(2)(iii) through (iv) of this section) in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits;
> (iii) A trust, if the United States person is the trust grantor and has an ownership interest in the trust for United States Federal tax purposes. *See* 26 U.S.C. 671–679 and the regulations thereunder to determine if a grantor has an ownership interest in the trust for the year; or
> (iv) A trust in which the United States person either has a present beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.[2]

Notably, nothing in the above rule prevents two or more U.S. persons in the chain of ownership from having a financial interest in the same foreign financial account.

Consolidated FBAR

In order to reduce, somewhat, the potential cascade of duplicative FBAR filing requirements with respect to the same foreign financial accounts, the FBAR regulations permit "consolidated FBARs" to be filed in certain circumstances. In particular, those regulations provide that "An entity that is a United States person and which owns directly or indirectly more than a 50 percent interest in one or more other entities required to report under this section will be permitted to file a consolidated report on behalf of itself and such other entities."[3] For convenience, this provision of the FBAR Regulations is referred to below as the "Consolidated FBAR Rule".

Signature or Other Authority

The FBAR Regulations generally provide that "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

institution by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained."[4] The FBAR Regulations provide various special exceptions, including for certain officers or employees of (i) a bank, (ii) a financial institution registered with the Securities and Exchange Commission ("SEC") or Commodity Futures Commission, (iii) an "Authorized Service Provider" registered with the SEC, (iv) an entity with equity securities (or American Depositary Receipts ("ADRs") listed on a U.S. national securities exchange (or a subsidiary thereof), or (v) an entity with equity securities registered under section 12(g) of the Securities Exchange Act, in each case if, among other requirements, such officer or employee has no financial interest in the account.[5]

Other Exceptions and Special Rules

There are also a number of other exceptions. For example, the FBAR Regulations provide that a U.S. person with a financial interest in, or signature or other authority over, 25 or more foreign financial accounts need only disclose the number of accounts and certain other basic information on the FBAR, provided that more detailed information is disclosed upon request.[6] The FBAR Regulations also allow exceptions for (1) participants and beneficiaries of certain retirement plans and individual retirement accounts (IRAs), and (2) beneficiaries of trusts, provided, in the latter case, that the trust, the trustee of the trust, or an agent of the trust is a U.S. person that discloses the trust's foreign financial accounts.[7]

The instructions to the FBAR provide for various additional exceptions, including for certain "correspondent or nostro accounts" and for accounts of any governmental entity of the United States.

Discussion and Case Study

Presumably, it is obvious that the same foreign financial account may need to be reported twice, because one U.S. person may have a financial interest while another may have signature authority. For example, a domestic corporation would have a reportable financial interest in its own account, while an officer with the authority to write checks on the account (or to direct the bank to make wire transfers from the account) would have a reporting obligation on account of having signature or other authority.

But the cascade of potential FBAR filing obligations may extend much further. For example, let us consider the following fact pattern.

> Eddie owned 100% of the stock of a Delaware limited liability company, Eddie Holdings, from January 1, 2025, until he passed away on May 1, 2025. Eddie Holdings has never made (nor has anyone ever made on its behalf) an entity-classification election, so at all times Eddie Holdings has been disregarded as an entity separate from its owner for U.S. federal tax purposes.
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> Eddie Holdings had a wholly owned Delaware corporate subsidiary, Eddie Opco. Eddie's Will named his wife, Edie, as his executor and directed that all of the stock of Eddie Holdings be given to his (and Edie's) son, Ed. At all times during 2025, Eddie Opco had (or will have) a foreign financial account with a balance in excess of $10,000 (the "Account"). Eddie's two brothers, Freddy and Teddy, are the officers of Eddie Opco and the signatories on the Account, but the bank transfers funds from the Account only upon the receipt of written instructions from both Freddy and Teddy. The relevant probate court issued Letters Testamentary naming Edie as Eddie's executor on August 1, 2025. The membership in Eddie Holdco will not be distributed by Eddie's estate (the "Estate") to Ed until 2026.
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> Who is obligated to file an FBAR with respect to the Account for 2025?[8]

Let us first consider signature authority. Given that the bank transfers funds only upon the receipt of written instructions from both Freddy and Teddy, it might appear that neither has any real authority, but the FBAR Regulations provide otherwise. As noted above, the FBAR Regulations generally define signature or other authority as the requisite authority "of an individual (alone or in conjunction with another)" with respect to a foreign financial account.[9] It seems clear that Freddy has authority over the Account in conjunction with Teddy and *vice versa*, since both have signature or other authority and thus both must file FBARs with respect to the Account for 2025.

This result is somewhat aggravating, but it ought not come as a huge surprise. Neither Freddy nor Teddy has any more authority than the other. So, given a choice between defining signature authority so that Freddy and Teddy *both* need to file and defining it so that *neither* needs to file, it is not a surprise that the Treasury Department chose the former.

We now move on to financial interest. As the direct owner of the Account, Eddie Opco clearly has a financial interest. But, of course, we cannot stop there. As set forth in the definition of financial interest in the FBAR Regulations, a U.S. person is considered to have

a financial interest in a foreign financial account if the owner of record is "[a] corporation in which the United States person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares[.]"[10] Moreover, even though Eddie Holdco is considered a so-called "disregarded entity" for U.S. federal tax purposes, it is still a separate "United States person" for FBAR purposes.[11] Therefore, since Eddie Holdco is a U.S. person and directly owns 100% of Eddie Opco, Eddie Holdco is also considered to have a reportable financial interest in the Account.

But it does not stop there. The same rationale applies to the Estate, which came into existence upon Eddie's death on May 1, 2025. Since the Estate indirectly acquired 100% of Eddie Opco (through Eddie Holdco) as of May 1, 2025, the Estate is also considered to have a financial interest in the Account as of that date. The separate legal personality of a trust or estate is often somewhat questionable, but, as noted above, the instructions to the FBAR define the term "person" to include a trust or estate and define the term "United States person" to include "trusts or estates formed under the laws of the United States." Accordingly, assuming that those instructions are valid, it seems clear that the Estate is yet a third entity that had a financial interest in the Account during 2025 and that therefore must disclose the Account on a 2025 FBAR.

With respect to potential FBAR penalties, we can only hope that the IRS will adopt a rule of reason.

As noted above, however, the FBAR Regulations provide a Consolidated FBAR Rule, pursuant to which a U.S. person that directly or indirectly owns a greater-than-50% interest in one or more other entities is permitted to file a consolidated FBAR on behalf of both itself and such other entities. Accordingly, it should be possible to reduce the number of entity FBARs required with respect to the Account by filing a consolidated FBAR.

At a minimum, it appears that Eddie Holdco should be permitted to file a consolidated FBAR on behalf of both itself and Eddie Opco. Further, the Estate may potentially file a consolidated FBAR on behalf of itself, Eddie Holdco, and Eddie Opco, but this is not entirely clear. The Internal Revenue Service ("IRS"), which is charged with the enforcement of the FBAR rules and the imposition of life-altering penalties for those who fail to comply, may consider it problematic that Eddie Holdco and Eddie Opco had financial interests in the Account for the entire year, but were owned by the Estate for only a portion of the year. Nothing in the language of the Consolidated FBAR Rule expressly precludes the use of a consolidated FBAR in such circumstances, but the rule is admittedly ambiguous as to when the greater-than-50% ownership requirement must be met.[12]

But the fun is not over yet. We still have three individuals to consider. The first is Eddie, who indirectly owned all of the stock of Eddie Opco, and thus had a financial interest in the Account, through the date of his death on May 1, 2025. Clearly, Eddie would have an obligation to file a FBAR for the Account if he were still alive on the FBAR due date. The IRS presumably would like Edie to file that FBAR on Eddie's behalf, by reason of her status as Eddie's executor, but whether she has a legal obligation to do so (and, more generally, what obligations of a decedent an executor is legally required to fulfill) is a fascinating question that is not addressed herein.

It may also be that Ed has a reportable financial interest in the Account by reason of his status as a beneficiary of the Estate. As noted above, pursuant to the definition of financial interest set forth in the FBAR regulations, a U.S. person is considered to have a financial interest in an account owned by the owner of record if the owner of record is "A corporation in which the United States person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares[.]"[13] Due to his beneficial interest in Eddie Holdco under Eddie's Will, Ed may be considered to have a reportable financial interest in the Account, by reason of indirectly owning more than 50% of the voting power or total value of Eddie Opco.

Finally, it is even possible that Edie may have been required to disclose the Account on her own personal FBAR. Historically, trusts and estates were not considered separate juridical entities under the common law, such that, among other things, a trust or estate could not own property in its own name, and it was necessary for all trust or estate property to be held in the name of the trustee or executor. Times have changed, but only to a degree. While trusts and estates currently are treated as separate entities for various specific purposes, the old common law rule may still apply to some extent, *e.g.*, with respect to property law.[14]

With the above in mind, it is possible that Edie, as the executor of the Estate, would be viewed as the owner of the Estate's membership interest in Eddie Holdings (and thus the indirect owner of Eddie Opco) following

the probate court's issuance of Letters Testamentary on December 15, 2023. This treatment may be inconsistent with the treatment of an estate as a separate United States person for purposes of requiring it to file its own FBAR, but arguably, the treatment of an estate for purposes of determining its FBAR filing obligations need not be consistent with the treatment of the estate for purposes of determining whether the executor has her own FBAR-filing obligation. And, given the historic common law treatment of trusts and estates, this may be an area where caution is warranted.

Conclusion

Unfortunately, the Treasury Department does not seem overly concerned about the burdens imposed by duplicative (and, in some cases, unclear) FBAR filing obligations. Indeed, from Treasury's perspective, this is probably not so much a bug as a feature. After all, each additional FBAR filing obligation is another opportunity to ensure disclosure of offshore accounts and another opportunity for the IRS to impose penalties in the event of noncompliance.

With respect to potential FBAR penalties, we can only hope that the IRS will adopt a rule of reason. For example, suppose that in the case study above, Edie files a 2025 FBAR disclosing the Account on behalf of Eddie Opco, the direct holder of the Account, but it never even occurs to her to file FBARs for Eddie Holdco, the Estate, Eddie, or herself. For the IRS to impose FBAR penalties because the same individual should have filed many FBARs instead of just one for the same Account would seem overzealous, particularly if Eddie Opco is (and has been) reporting its income from the Account on its U.S. federal income tax returns. Unfortunately, the IRS does not have a great track record for showing restraint in this area.

ENDNOTES

1 31 CFR §1010.350(b).
2 31 CFR §1010.350(e)(2).
3 31 CFR §1010.350(g)(3).
4 31 CFR §1010.350(f)(1). The instructions to the FBAR similarly provide that "Signature authority is the authority of an individual (alone or in conjunction with another individual) to control the disposition of assets held in a foreign financial account by direct communication (whether in writing or otherwise) to the bank or other financial institution that maintains the financial account."
5 31 CFR §1010.350(f)(2)(i) through (v).
6 31 CFR §1010.350(g)(1) & (2).
7 31 CFR §1010.350(g)(4) & (5).
8 Assume all persons are domestic and that the special rules for U.S. persons with a financial interest, or signature or other authority over, 25 or more accounts do not apply.
9 *See* 31 CFR §1010.350(f)(1).
10 *See* 31 CFR §1010.350(e)(2)(ii). The definition in the instructions to the FBAR are to the same effect.
11 *See* 31 CFR §1010.350(b)(3), defining the term "United States person" to include any limited liability company formed under the laws of any State.
12 It is also possible that the IRS does not consider an estate to be an "entity" for purposes of the Consolidated FBAR Rule, but the instructions to the FBAR define the term "person" to include "legal entities, including, but not limited to, a limited liability company, corporation, partnership, trust, and estate."
13 31 CFR §1010.350(e)(2)(ii).
14 *See* New York State Bar Association Tax Section, *Report on the Rules Governing Reports on Transactions with Foreign Financial Agencies (FBARs)*, October 30, 2009, page 113, footnote 277 ("We note that, as a technical property law matter, because estates and common law trusts are not separate juridical persons, it is often the case that property will be titled in the name of the juridical person (*e.g.*, the human being, bank or trust company) acting as executor or trustee, with a notation that such property is held in that person's fiduciary capacity as executor or trustee. For example, depending on a particular financial institution's account naming convention, an account statement may indicate (i) that the account owner is the "XYZ Trust" even though, as a technical property law matter, only the juridical person acting as trustee can hold title to the trust property, or (ii) that the account owner is "[Name of juridical person] in his/her/its capacity as trustee of the XYZ Trust." Irrespective of a particular financial institution's account naming convention, however, we suggest that a trustee be treated as the "record owner" of trust property.").