



Brigham Young University–Hawaii
Office of Compliance & Ethics Research Memo
Reports of Foreign Bank and Financial Accounts (FBARs)

Law/Act:	Reports of Foreign Bank and Financial Accounts (FBARs)	
U.S. Code Citation:	31 U.S.C. §§ 5311–5312, 5314	
Code of Federal Regulations Citation:	31 C.F.R. §§ 1010.306, 1010.350, 1010.420, 1010.810, 1010.820, 1010.821	
Responsible Regulator:	Dep’t of the Treasury: Internal Revenue Service, Financial Crimes Enforcement Network	
BYU–Hawaii Responsible Officer:	Director – Financial Services	
	Updated: Nov. 2017	Updated By: MB
	Version 2.0	Effective Date: Oct. 26, 1970

PURPOSE

A Report of Foreign Bank and Financial Accounts (FBAR) is a document regularly submitted by certain citizens to help the government with criminal investigations, tax proceedings, antiterrorism intelligence, and other regulatory matters.¹

HISTORY

Requirements for foreign bank account reports were presented by the Bank Secrecy Act of 1970² and eventually finalized in federal statute.³ FBARs have been filed separately from federal tax returns since 1978,⁴ and the Internal Revenue Service (IRS) was officially designated as the FBAR enforcement authority in 2003.⁵ Requirements for FBARs were amended in 2011,⁶ and the Code of Federal Regulations was reorganized soon after, thus transferring the FBAR requirements to a new section of the U.S. Code.⁷ Additional amendments to the requirements were then proposed in 2016.⁸

APPLICABILITY TO BYU–HAWAII

A. Regulated Entities

The requirement to file an FBAR applies to “a resident or citizen of the United States or a person in, and doing business in, the United States . . . when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency.”⁹ Federal regulation further specifies that FBARs generally apply to “[e]ach **United States person** having a **financial interest** in, or **signature or other authority** over, a bank, securities, or other financial account in a foreign country.”¹⁰ The

¹ 31 U.S.C. §§ 5311, 5314 (2017); 31 C.F.R. § 1010.350 (2017).

² Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114, 1124 (1970).

³ 31 U.S.C. § 5314; see also *Internal Revenue Manual*, IRS § 5.21.6.1 (Feb. 18, 2016), https://www.irs.gov/irm/part5/irm_05-021-006.html.

⁴ Financial Recordkeeping and Reporting of Currency and Foreign Transactions, 42 Fed. Reg. 63,774 (Dec. 20, 1977); see also *Report of Foreign Bank and Financial Accounts (FBAR)*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar> (last updated Sep. 25, 2017) [hereinafter *FBAR IRS*] (see the section “Reporting and Filing Information,” showing that they are still filed separately).

⁵ Financial Crimes Enforcement Network; Delegation of Enforcement Authority Regarding the Foreign Bank Account Report Requirements, 68 Fed. Reg. 26,489, 26,489 (May 16, 2003).

⁶ Amendment to the Bank Secrecy Act Regulation—Reports of Foreign Financial Accounts, 76 Fed. Reg. 10,234 (Feb. 24, 2011) (codified at 31 C.F.R. 103.24).

⁷ Transfer and Reorganization of Bank Secrecy Act Regulations, 75 Fed. Reg. 65,806 (Oct. 26, 2010) (reorganizing the Code of Federal Regulations on Mar. 2011, with 31 C.F.R. § 103.24 being moved to 31 C.F.R. § 1010.350).

⁸ Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts, 81 Fed. Reg. 12,613, 12,613–12,618 (Mar. 10, 2016); see also *FBAR Filing Requirement for Certain Financial Professionals: FinCEN Notice 2016-1*, FinCEN (Dec. 16, 2016), https://www.fincen.gov/sites/default/files/2016-12/FBAR%20Notice%202016%20%28FINAL%2012-8-16%29_0.pdf [hereinafter *FinCEN 2016-1*].

⁹ 31 U.S.C. § 5314(a) (2017); see 31 C.F.R. § 1010.350(a) (2017) (expounding on the reporting requirements).

¹⁰ 31 C.F.R. § 1010.350(a) (emphasis added). Exemptions are provided for certain types of accounts. 31 C.F.R. § 1010.350(c)(4)(i)–(iv). Further applicability criteria are listed in section (IV)(B) of this memo, *Account Balance Requirements*. See 31 C.F.R. § 1010.306(c) (showing additional applicability requirements).



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Reports of Foreign Bank and Financial Accounts (FBARs)

regulations define the key terms “United States person,” “financial interest,” and “signature or other authority” as follows.¹¹

1. United States Person

A “United States person” is defined as either (1) a U.S. citizen or resident or (2) a U.S. company, trust, corporation, etc.¹²

2. Financial Interest

For a person to have “financial interest,” the person can either (a) be the owner or title holder of a foreign account¹³ or (b) be involved in one of the following situations¹⁴:

1. The person is being represented by a third party, and the third party is the account owner or title holder for a foreign account.¹⁵
2. The person controls a corporation or similar establishment by controlling over half of its capital, profits, votes, or share value, and the establishment is the account owner or title holder for a foreign account.¹⁶
3. The person owns a trust as reported on the person’s federal taxes and acts as the grantor of the trust, and the trust is the account owner or title holder for a foreign account.¹⁷
4. The person owns most of the income from a trust or “has a present beneficial interest” for most of the trust’s assets, and the trust is the account owner or title holder for a foreign account.¹⁸

3. Signature or Other Authority

Persons have “[s]ignature or other authority” if they can directly authorize distributions from the foreign account, even if they must collaborate with other individuals to make the authorization valid.¹⁹

Exemptions are available for persons employed by certain banks, financial institutions, and other entities.²⁰

B. Brigham Young University–Hawaii

Because Brigham Young University owns no foreign account, it is not subject to FBAR reporting. Should the university establish foreign accounts as defined by the status, BYU–Hawaii would be required to file an FBAR for those foreign accounts (and any other accounts in which it has interest or authority) for years during which BYU–Hawaii’s combined foreign accounts contain more than \$10,000.²¹

REQUIREMENTS

¹¹ 31 C.F.R. § 1010.350(b), (e)–(f).

¹² *Id.* § 1010.350(b).

¹³ This provision applies regardless of who the account was set up for. *Id.* § 1010.350(e)(1).

¹⁴ 31 C.F.R. § 1010.350(e).

¹⁵ *Id.* § 1010.350(e)(2)(i).

¹⁶ *Id.* § 1010.350(e)(2)(ii).

¹⁷ *Id.* § 1010.350(e)(2)(iii); *see also* 26 U.S.C. § 671 (2017) (discussing tax responsibilities related to trust owners).

¹⁸ 31 C.F.R. § 1010.350(e)(2)(iv).

¹⁹ *Id.* § 1010.350(f)(1).

²⁰ *Id.* § 1010.350(f)(2)(i)–(v). Additionally, in 2016, FinCEN proposed certain amendments to the exemptions. Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts, 81 Fed. Reg. 12,613 (Mar. 10, 2016); *see also* FinCEN 2016-1, *supra* note 8.

²¹ *See infra*, note 27 (giving the account balance requirements).



Brigham Young University–Hawaii
Office of Compliance & Ethics Research Memo
Reports of Foreign Bank and Financial Accounts (FBARs)

C. Reports of Foreign Bank and Financial Accounts

According to the Financial Crimes Enforcement Network, “[t]he FBAR must be filed electronically through FinCEN’s BSA [Bank Security Act] E-Filing System.”²² The reports contain information about a person’s foreign accounts, including the value of the accounts.²³ An additional form must be filled out if a third party submits the report on behalf of another person.²⁴

D. Account Balance Requirements

The FBAR needs to be filed only for years during which a person’s combined foreign accounts contain more than \$10,000 “at any time during the calendar year.”²⁵ Further, IRS guidance notes that “[a] person who holds a foreign financial account may have a reporting obligation even when the account produces no taxable income.”²⁶

E. Alternative Filing Arrangements

1. Simplified Reports for Several Accounts

An entity that would be required to file FBARs for at least twenty-five foreign accounts based on “financial interest” or twenty-five foreign accounts based on “signature or other authority” is allowed to file simplified reports consisting of “the number of financial accounts and certain other basic information.”²⁷

2. Consolidated FBARs for Owned Entities

If a parent entity owns (either directly or indirectly) more than a fifty percent interest in a subsidiary entity, the parent entity may “file a consolidated [FBAR] report” for itself and the subsidiary entity.²⁸

F. Recordkeeping

Federal guidance requires records pertaining to FBAR accounts—namely, “the name in which each account is maintained, the number or other designation of the account, the name and address of the foreign financial institution that maintains the account, the type of account, and the maximum account value of each account during the reporting period”—to be stored for five years following each filing deadline (or five years following the actual date of filing if the report is filed late).²⁹

PENALTIES

²² FINANCIAL CRIMES ENFORCEMENT NETWORK, BSA ELECTRONIC FILING REQUIREMENTS FOR REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS (FINCEN FORM 114) 8 (Jan. 2017), <https://www.fincen.gov/sites/default/files/shared/FBAR%20Line%20Item%20Filing%20Instructions.pdf> [hereinafter 2017 BSA FILING REQUIREMENTS]; see *Welcome to the BSA E-Filing System*, BSA E-FILING SYSTEM: FINANCIAL CRIMES ENFORCEMENT NETWORK, <https://bsaeiling.fincen.treas.gov/main.html> (last accessed Nov. 3, 2017) (defining BSA).

²³ 31 C.F.R. § 1010.350; 2017 BSA FILING REQUIREMENTS, *supra* note 24, at 10.

²⁴ 2017 BSA FILING REQUIREMENTS, *supra* note 24, at 11–12; see *Record of Authorization to Electronically File FBARs*, FINCEN (May 2015), <https://www.fincen.gov/sites/default/files/shared/FBARE-FileAuth114aRecordSP.pdf> (showing the form).

²⁵ 31 C.F.R. § 1010.306(c); 2017 BSA FILING REQUIREMENTS, *supra* note 24, at 10–11 (containing the quoted material).

²⁶ FBAR IRS, *supra* note 4. Even tax-exempt organizations may need to file FBARs. See Elizabeth Mills, *Some Not-for-Profit/Exempt Organizations May Have FBAR Filing Obligations*, PROSKAUER (Mar. 29, 2010), <http://nonprofitlaw.proskauer.com/2010/03/29/some-not-for-profitexempt-organizations-may-have-fbar-filing-obligations/>.

²⁷ 31 C.F.R. § 1010.350(g)(1)–(2). The entity must divulge further information to the government upon request. 31 C.F.R. § 1010.350(g)(1)–(2). In 2016, the Financial Crimes Enforcement Network proposed expanding the reporting responsibilities of those having at least twenty-five accounts to match the detailed responsibilities of those having fewer accounts. Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts, 81 Fed. Reg. 12,613, 12,617–12,620 (Mar. 10, 2016).

²⁸ 31 C.F.R. § 1010.350(g)(3).

²⁹ 2017 BSA FILING REQUIREMENTS, *supra* note 24, at 8.



Brigham Young University–Hawaii
Office of Compliance & Ethics Research Memo
Reports of Foreign Bank and Financial Accounts (FBARs)

The FBAR penalties have changed incrementally over time.³⁰ As of January 2017, the penalty limit for intentionally forgoing a required FBAR is \$126,626 or half the balance of the unreported account (whichever is greater), and the penalty limit for non-willful failure is \$12,663,³¹ with no penalty imposed “if there was reasonable cause for the violation.”³²

COMPLIANCE CALENDAR

The regulatory FBAR deadline is April 15, with an established six-month grace period.³³ Each year’s deadline applies to accounts held any time from January to December of the previous year.³⁴

STAYING UP-TO-DATE

The following websites provide valuable information regarding this law and its applicability.

DOCUMENT/REFERENCE	DESCRIPTION
IRS Report of Foreign Bank and Financial Accounts (FBAR) web page.	IRS guidance for filing an FBAR.

³⁰ See 31 C.F.R. § 1010.820–.821 (showing different penalties for different time periods); *Internal Revenue Manual*, *supra* note 3, at § 5.21.6.3 (showing different penalties for different time periods).

³¹ 31 C.F.R. § 1010.820–.821; see 2017 BSA FILING REQUIREMENTS, *supra* note 24, at 22 (showing the penalty guidelines for 2017 and earlier).

³² *Internal Revenue Manual*, *supra* note 3, § 5.21.6.3 (showing what the penalty was before the inflated penalties were implemented); see also 31 U.S.C. § 5321(a)(5) (2017) (setting out reasonable cause exception).

³³ 2017 BSA FILING REQUIREMENTS, *supra* note 24, at 3–4.

³⁴ 31 C.F.R. § 1010.306(c); see also 2017 BSA FILING REQUIREMENTS, *supra* note 24, at 4 (noting the calendar year reporting cycle).