The Report of Foreign Bank Account (FBAR) regulations are not based any reasonable interpretation of 31 USC § 5314

Summary

The claimed FBAR Statute, 31 USC § 5314 was NOT a part of the Bank Secrecy Act of 1970. Rather, The Currency and Foreign Transactions Reporting Act – was a stand-alone law that was intended to regulate foreign agency transactions involving the importing and exporting of monetary instruments in and out of the United States.

The law was later amended and incorporated into the Bank Secrecy Act of 1970 (herein "the Act"). However, the substance of the underlying statute has barely changed. Yet, because this law was later inserted into the Bank Secrecy Act, there is a mythology that the law intends to regulate the ownership of a foreign bank account.

Yet the FBAR, aka "Report of Foreign Bank Accounts" has been a nightmare for Americans. The Form and its arbitrary, ruinous penalties are nothing less than financial terrorism. The FBAR, with such unbelievably devastating consequences, which has actually no intelligence value to FinCEN, thus administration is shipped off to the IRS to administer. The FBAR has been totally impotent in detecting crimes but it does open the door to confiscate wealth, in an inequitable manner.

The Financial Terror FBAR Administration Has Caused

Indeed, the FBAR has caused, its unequal and unjust enforcement, it has been a depraved "penalty bonanza" that forces the IRS *civil* exam divisions to make determinations of huge *criminal* penalties against people who did nothing wrong other than fail to file a piece paper when their foreign bank accounts, or even pension accounts, go over $10,000 in the aggregate.

FBAR penalties are far beyond draconian. The IRS can impose a 50% penalty – based on account value – again, just because didn't file a piece of paper. There need not be any tax non-compliance, nor anything else wrong to face this extreme FBAR penalty exposure.

For instance, a US person who doesn't report their ownership of an Australian retirement account worth $2 million can be assessed a $1 million penalty. While Treasury is currently only assessing one willful 50% penalty at a time, there is nothing to stop them from assessing up to six FBAR penalties whenever they decide to. The failure to file a FBAR could take a huge net worth and turn it in to a negative equity position.

We are told FBAR penalties would to take down international criminal syndicates. Yet that never happened. But instead FBAR penalties are assessed against the softest targets, like retired school teachers hit with FBAR penalties for not reporting a modest UK teacher's pension. (See US v. Jane Boyd https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/19-55585.pdf)

The words of Attorney Anthony Parent, "I have talked people out of suicide. I talked down a young father in Japan who had a rope around his neck, in his garage, ready to make a fatal leap and leave his children fatherless. Because he did not file a FBAR for his Japanese accounts and he was afraid what would happen to him would be worse than death."

Practitioners have noted that the IRS has a goes after the elderly who often have dementia, health problems, and tire easily. The IRS go after these people the hardest because the IRS knows they don't have the stamina or ability to defend themselves properly.

There are two penalty regimes. One if you are a large taxpayer with plenty of money to "lawyer-up." Meanwhile those with fewer resources get different treatment. The SAME exact appeals officer will deliver wildly different result depending on their marching order they received from the national FBAR penalty coordinator - that is the FBAR administration but the IRS has destroyed the claimed independence of the IRS Office of Appeals. If the National FBAR Penalty Coordinator believes a taxpayer should be destroyed by FBAR penalties, the IRS Office of Appeals must follow those marching orders.

The Actual Law; The Actual Intent

So how could Congress enact such terrifying law? How did President Richard Nixon sign this into law? Well, in fact the FBAR law does not exist. Rather the FBAR requirement appears to be wholly a creation of regulation.

The fact is, upon closer analysis, the legal authority claimed by Treasury to impose to require an FBAR and to impose FBAR penalties is completely missing. That is, the FBAR is not something that Congress ever voted for. The FBAR does not reflect the will the people, but rather the Department of Treasury, who appears to have invented the "FBAR law" via regulation.

In the words of Attorney John Richardson, "this is a case where the regulation defines the statute."

The two major problems with the current FBAR regulations are:

1. The authority to impose an FBAR filing requirement as claimed by Treasury in 31 USC § 5314 is not present.
2. The legally-mandated report that 31 USC § 5314 appears to be ignored by Treasury.

That is, the current regulations ignore what the law actually requires, but also, legislates an entirely new law not found the Act.

There are four major ways in which the Regulation wildly deviates from the law:

1. "**Foreign agency**" has been perverted to mean "financial institution." The Act specifically and methodically defines both foreign agency and financial institution as two separate and distinct things.
2. "**Monetary Instrument**" has been perverted to mean "account balance." The Act specifically regulates monetary instruments. The Act defines "Monetary Instruments." A Monetary instrument is not a financial account.
3. The current regulation ignores the international trade requirement, the "**Import and Export**" requirement in order to be subject to regulation.
4. The current regulation ignores the requirement that a "**Transaction**" occur.

The Statute

31 USC § 5413 mandates that the Secretary of Treasury create a report of foreign agents to "avoid impeding or controlling the [1] export or import of [2] monetary instruments and the need to avoid burdening unreasonably a person making a [3] transaction with a [4] foreign financial agency[.]"

However, the Regulations are quite different:

> **§ 1010.350 Reports of foreign financial accounts.**
> (a) In general. Each 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 shall report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 to be filed by such persons. **The form prescribed under section 5314 is the Report of Foreign Bank and Financial Accounts** (emphasis added) (TD–F 90–22.1), or any successor form. See paragraphs (g)(1) and (g)(2) of this section for a special rule for persons with a financial interest in 25 or more accounts, or signature or other authority over 25 or more accounts.

Incredibly, we see the Regulations point to 31 USC § 5314 as the authority for the FBAR! But Section 5314, which is titled "Records and Reports on Foreign Financial Agency Transactions" has no such language that "prescribes" an FBAR. Rather, as we examine the clear definitions and structure of the Act, we know that Section 5314 does not mandate anything like the FBAR. But rather, it only mandates that Treasury create report of foreign agents who handle the import and export of monetary instruments for US persons in and out of the United States.

So let's break down the Statute piece-by-piece starting with financial agency. What is a financial agency? As only financial agencies are subject to Section 5314 reporting.

A "**Financial Agency**" is defined by the Bank Secret Act at 31 USC § 5312(a)(1)

(1) "financial agency" means a **person** (emphasis added) acting for a person (except for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the United States Government is a member) as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, a transaction in money, credit, securities or gold, or a service provided with respect to money, securities, futures, precious metals, stones and jewels, or value that substitutes for currency.

So can a financial agency also be a financial institution? Yes. If we review the financial institution definition below and there are numerous encounters where a financial agent can be a financial institution:

The Bank Secrecy Act (herein "Act") defines "Financial Institution" as

(2) "financial institution" means—
(A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));
(B) a commercial bank or trust company;
(C) a private banker;
(D) an agency or branch of a foreign bank in the United States;
(E)any credit union;
(F) a thrift institution;
(G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);
(H) a broker or dealer in securities or commodities;
(I) an investment banker or investment company;
(J) a currency exchange, or a business engaged in the exchange of currency, funds, or value that substitutes for currency or funds;
(K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;
(L) an operator of a credit card system;
(M) an insurance company;
(N) a dealer in precious metals, stones, or jewels;
(O) a pawnbroker;
(P) a loan or finance company;
(Q) a travel agency;
(R) a licensed sender of money or any other person who engages as a business in the transmission of currency, funds, or value that substitutes for currency, including any person who engages as a business in an informal money transfer system or any network

of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system;
(S) a telegraph company;
(T) a business engaged in vehicle sales, including automobile, airplane, and boat sales;
(U) persons involved in real estate closings and settlements;
(V) the United States Postal Service;
(W) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this paragraph;
(X) a casino, gambling casino, or gaming establishment with an annual gaming revenue of more than $1,000,000 which—
(i) is licensed as a casino, gambling casino, or gaming establishment under the laws of any State or any political subdivision of any State; or
(ii) is an Indian gaming operation conducted under or pursuant to the Indian Gaming Regulatory Act other than an operation which is limited to class I gaming (as defined in section 4(6) of such Act);
(Y) any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or
(Z) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

However, and where the confusion may lay, is that yes, there are instances where an agent can be treated as a financial institution. That is, an agent CAN be a financial institution. If we look to the definition of "Financial Institution" above we can see that pawnbrokers, closing attorneys, and any business dealing with a person acting for another person with large amount of cash can be considered financial institutions under the Act.

Yet while agent may be an institution but not all financial institutions are agents. Therefore the words are not synonyms and can not be used interchangeably, as Treasury has appeared to have done.

As "financial agents" is a specific terms which means a person. So a person acting for another person as a financial institution could potentially be regulated. But that is not at all what the current regulation claims. The current form ignores the clear agency requirement that person act for another. No such requirement of any person acting for another person is present in the FBAR regulation.

Further undermining any claim that 31 USC § 5314 intended to create a Report of Foreign Bank accounts is that the Statute regulates only "**Monetary Instruments.**" The Act defines monetary instruments not as financial institutions but as:

(3) "monetary instruments" means—
(A) United States coins and currency;

(B) as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material;
(C) as the Secretary of the Treasury shall provide by regulation for purposes of sections 5316 and 5331, checks, drafts, notes, money orders, and other similar instruments which are drawn on or by a foreign financial institution and are not in bearer form; and
(D) as the Secretary shall provide by regulation, value that substitutes for any monetary instrument described in subparagraph (A), (B), or (C).

The definition of "Monetary Instrument" is indeed, broad. But all definitions of this term have one significant characteristic – all monetary instruments can move in commerce. In fact, aside from barter, monetary instruments are the only way in which commerce is known to travel.

While financial accounts use monetary instruments to transfers funds, we see not no authority from the Act to conflate a "Monetary Instrument" to also mean a "Financial Institution."

To claim that Monetary Instruments are really Financial Institutions would mean that inside every roll of pennies is fifty financial institutions.

- To put in simple terms, The Act regulates things that move. Yet Treasury's output, the FBAR Form, regulates things that do *not* move.
- To put it in even simpler terms, the Act regulates a verb, i.e., commerce. Yet, Treasury regulates a noun, i.e, ownership.

Further demonstrating that the Law did not intend to create a Report of Foreign Bank Accounts is that there is a clear requirement that Monetary Instruments be "**Imported and Exported**," in and out of the US in order to be subject to Section 5314 regulation.

The Act must be regulating monetary instruments and not foreign banks as if a foreign could somehow be imported into the United States, it would no longer be a foreign bank.

Yet, the current Regulations go well-beyond the language of the Statute and invents a horrific new powers, not given to it by Congress, by denying the very clear "Import and Export" requirement of the Law.

Additionally demonstrating that the Law did not intend to create a Report of Foreign Bank Account requirement is that no where does the the phrase of "Report of Foreign Bank Accounts" appear anywhere in the Act. Nor does Foreign Bank Account Report, or any its cognates. Rather, Section 5314 must regulate exactly what it claims to regulate. **Foreign Agents** who **Transact** to **Import and Export** in and out of the United States **Monetary Instruments** on behalf of US persons.

For these reasons, Treasury Regulation § 1010.350 must be completely withdrawn and replaced with appropriate regulations that would carry out the express intent of the Law.

There are significant notice and due process issues with the current regulation as no reasonable person could look at the law and know that the regulations impose something entirely different. All FBAR penalties that have been assessed have been done illegally and the Treasury needs to return those funds immediately if lawfulness is at all a concern.

If Treasury can legally conjure an FBAR regulation out of Section 5314, then all of our laws are subject to any interpretation by any administrative agency. Congress should just raise the white flag, go home, and leave the law-making to the unelected.

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