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A Necessary Conversation: Explaining FBAR Filings to the Uninitiated

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Your father gave you some invaluable advice in your younger and more vulnerable years. He told you that when faced with a difficult decision, think of what your Uncle Bill would do, and then choose the opposite tack. You were inclined to follow this advice due to your uncle's uncanny ability to always find himself on the wrong side of the fence — literally and figuratively. Bill's haplessness is something of legend in your family and can be attested to by each one of the denizens of his small hamlet in Southeastern Maine.

Being the first lawyer in the family, you often received calls from Bill to wrest him out of one bind or another. Thus, it came as little surprise to you when you received a call from him one Monday morning, before the coffee had even finished brewing. Fully expecting Bill to be calling from jail, you were pleasantly surprised to hear your Aunt Ethel muttering in the background. You were even happier to hear her voice, as you had not been told that Bill and Ethel had reconciled after the turkey leg incident last Thanksgiving.

Bill, it seems, was filling out his income tax return when he arrived at a question on Schedule B that gave him some pause. Bill's eyes had been drawn to Part III, line 7(a), which asked whether he was required to file a Financial Crimes Enforcement Network Form 114, *Report of Foreign Bank and Financial Accounts* (''FBAR''). Having never heard of FBARs (but being well acquainted with bars of every other sort), Bill decided to search the ''interwebs'' for information, admittedly becoming more confused than he had been at the inception of his investigation. It was only then that he decided to consult his ''favorite'' nephew, the tax attorney.

To your knowledge, Bill is not the worldliest person, but his proximity to Canada and your father's lingering admonition gives you pause that Bill may have possessed a financial interest in or signature authority over a financial account in a foreign country. You dispense with the pleasantries, learn that only one of Bill's sons is in prison (Leroy having been released earlier that month on good behavior), and ask the fateful question of whether Bill has any dealings with foreign countries or financial institutions. Once Bill begins to list the numerous ties he has to Germany, Switzerland, Japan, Singapore, and even Nevis, you realize that a much deeper inquiry into FBAR filing requirements will be necessary. What follows is a rather detailed account of your discussion with Uncle Bill.

FBARS AND HIPPIES

As the purple haze of Woodstock slowly diffused into the stratosphere above rural New York, Congress enacted the Bank Security Act (BSA).[1] 20 years after the Summer of Love, the Secretary of the Treasury created the Financial Crimes Enforcement Network (FinCEN)[2] and delegated the enforcement obligations of the BSA to FinCEN.[3] In 1992 and 2003, FinCEN

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[1] The Bank Security Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (as codified in 31 U.S.C. §5311, *et seq*).

[2] *See* Treasury Order 105-08 (Apr. 25, 1990) (cancelled by Treasury Order 180-01 (Sept. 26, 2002)); 31 U.S.C. §310(a).

[3] Memorandum of Agreement and Delegation of Authority for Enforcement of FBAR Requirements dated April 2, 2003 (2003 Memorandum of Agreement); IRM Exhibit 4.26.1–2 (02-15-19).

passed the proverbial buck, redelegating the authority to enforce BSA filing compliance to the IRS.[4]

The BSA requires all citizens and residents of the United States, who engaged in any transactions with a foreign financial agency to file a report setting forth the identities of the parties to the transaction and a description of the transaction and/or relationship.[5] The edges of this filing requirement have been honed over the years, and the present reporting requirements are codified in Title 31 of the U.S. Code.[6] Regulations were promulgated in 2011.[7] The rules and regulations are further supplemented by the FBAR Filing Instructions.[8] The IRS Internal Revenue Manual (IRM) also provides helpful (albeit nonbinding) guidance.[9] It is important, here, to note that the FBAR rules and regulations operate under Title 31 of the Code, whereas the IRS operates under Title 26 of the Code. The interplay between titles is a bit tricky, but you tell Bill that you both will persevere, nonetheless.

WHAT IT MEANS TO BE A U.S. PERSON

You begin by observing that any U.S. person with a financial interest in or signature authority over foreign financial accounts must file an FBAR if the aggregate value of the accounts exceeds $10,000 at any time during the calendar year.[10] Although this requirement seems simple enough, the definitions of the terms ''U.S. person,'' ''financial interest,'' ''signature authority,'' and ''foreign financial account'' are far more complex than first meets the eye. The term ''U.S. person,'' includes not only citizens and residents of the United States, but also U.S. corporations, pass-through entities, trusts, and estates.[11]

Uncle Bill was born in Trois Pistoles, Quebec, Canada in 1950, and due to some rather ignominious circumstances (the involvement in which he denies to this day), Bill and his family moved to Biddeford, Maine in 1959. He obtained his permanent residence (green card) in 1962, and he became a citizen in 1970. Although Bill has lived most of his life in Maine, he studied abroad in Japan in the 1960s, and he spent six years in Guam before he was politely asked to leave two years ago by the U.S. Navy.

You note that under the I.R.C. the United States includes only the 50 states and the District of Columbia.[12] Thus, Guam is considered a foreign territory. Under Title 31, however, the United States encompasses all 50 states, the District of Columbia, U.S. territories, U.S. insular possessions (including Guam), and the ''Indian lands'' within the United States.[13]

Individuals Required to File

U.S. citizens or residents, no matter their age,[14] are required report their interests in most foreign financial accounts if the account's balance exceeds $10,000.[15] The FBAR regulations refer to ***citizens*** of the United States, though no cross reference to this term's definition is provided.[16] Because of the ambiguity, it is best to look to the broad definition of ''citizen'' contained in the immigration and nationality regulations of Title 8.[17]

Bill asks when an individual might be considered a ''resident'' of the United States, as his Great Aunt Helga, a German citizen, spent a fair amount of time in Sheboygan, Wisconsin over the last four years. The regulations under Title 31 define ***resident*** by reference

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[4] Treasury Directive No. 15–41 (Dec. 1, 1992) (cancelled June 5, 2017); 2003 Memorandum of Agreement.

[5] 84 Stat. 1114, §241(a).

[6] *See, e.g.*, 31 U.S.C. §5314; 31 C.F.R. §1010.350. As used herein, ''Title'' refers to titles within the United States Code and the corresponding Code of Federal Regulations.

[7] Amendment to the Bank Secrecy Act Regulations — Reports of Foreign Financial Accounts, 76 Fed. Reg. 10,234 (Feb. 24, 2011); Amendment to the Bank Secrecy Act Regulations — Reports of Foreign Financial Accounts; Correction, 76 Fed. Reg. 37,000 (June 24, 2011).

[8] BSA Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts (FinCEN Form 114) (hereafter, ''FBAR Instructions'') (Jan. 2017).

[9] *See* IRM 4.26.16.1, *et seq.* (06-24-21).

[10] FBAR Instructions, 4.

[11] 31 C.F.R. §1010.350(b)(3). Later regulations observed that pension and welfare benefit plans were likewise U.S. persons for FBAR filing purposes. *See* 76 Fed. Reg. 10,234, 10,237 (declining to exclude pension plans and welfare benefit plans from the FBAR filing requirements). Neither the FBAR regulations nor the IRM lists an estate of a U.S. person as a required filer. *See* 31 C.F.R. §1010.350(b); IRM 4.26.16.2.1.3 (06-24-21). However, the FBAR Instructions affirmatively list estates of U.S. persons as a qualifying ''U.S. person'' required to file an FBAR reporting its foreign financial relationships. *See* FBAR Instructions, 5–6, 13.

[12] §7701(a)(9). All section references herein are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

[13] 31 C.F.R. §1010.350(b), 31 C.F.R. §1010.100(hhh). The FBAR instructions clarify that territories and insular possessions of the United States include American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands; and the ''Indian lands'' include those lands defined in the Indian Gaming Regulatory Act (25 U.S.C. §2701).

[14] FBAR Instructions, 6 (observing that a 'person' means an individual including a minor child, among others). Although a minor is responsible for filing his or her own FBAR, if the child cannot file his or her own FBAR for any reason, the child's parent, guardian, or other legally responsible person may file it for the child and sign it as ''Parent/Guardian filing for child.'' FBAR Instructions, 6.

[15] 31 C.F.R. §1010.350(b)(1), 31 C.F.R. §1010.350(b)(2).

[16] 31 C.F.R. §1010.350(b)(1).

[17] *See* 8 U.S.C. §1401; IRM 4.26.16.2.1.1(1) (06-24-21).

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to Title 26.[18] Although the tests for U.S. residency are set forth in Title 26, you remind Bill that the FBAR regulations apply the broader Title 31 definition of ''United States.''[19] As such, even though he would not have been a U.S. resident under Title 26, when he lived in Guam, Bill would have been a U.S. resident for FBAR purposes. Helga will likewise be a U.S. resident if she obtains her green card, if she meets the substantial presence test under §7701(b)(3), or if she elects to be treated as a U.S. resident.[20]

A green card holder (also known as a ''permanent U.S. resident'') will be treated as a resident for the portion of the calendar year beginning on the day that the individual first arrived in the United States.[21] What's more, even if an individual elects to be taxed as a resident of *another* country under the terms of a treaty, if the person otherwise qualifies as a U.S. resident, he must file a FBAR.[22]

Under the substantial presence test, Helga will be considered a U.S. resident if she was present in the United States for at least 31 days during the calendar year,[23] and she was present in the United States for 183 days or more during the current year and the preceding two years.[24] You note, however, that the calculus for the prior years' presence is not so straightforward.

Instead, the prior presence test is measured by the sum of (i) the number of days she was present in the United States in the current year; (ii) the number of days she was present in the United States for the immediately preceding year divided by three; and (iii) the number of days she was present in the United States for the second preceding year divided by six. Although there are a number of individuals whose days present in the United States are ignored for purposes of the test,[25] Helga does not fit within any of these categories.

Helga stayed with a childhood friend from the Hinterland, Wilhelm Müller, in Sheboygan for 46 days in 2021 before returning to Germany. The spark of a childhood romance having been rekindled in 2018, Helga cohabitated with Herr Müller in Wisconsin for 267 days in 2020 and 270 days in 2019. You run a quick calculation and determine that, under the substantial presence test, Helga will be considered to have been present in the U.S. in 2021 for 180 days (46 + 267/3 + 270/6). Because Helga's presence in the United States during both 2019 and 2020 exceeded 183 days, she was a U.S. resident in those years, and if she spends more than two additional days with her Bavarian beau in 2021, she will be a resident of the United States in 2021.

You caution Bill that being physically present in the United States ''at any time during the day'' counts as presence for the substantial presence test,[26] absent a few limited exceptions.[27] Thus, if Helga as much has a single cheese curd in Sheboygan before flying back to Germany at 12:01 in the morning, she would be one day closer to meeting the residency requirement. With great admiration for his dear old relation, Bill informs you that Helga died in a tragic pike fishing accident in April 2021. As such, she will not be a U.S. person for 2021.

You note offhand that although the FBAR statute provides that a person ''in, and doing business in, the United States'' is subject to the FBAR filing requirements,[28] neither the FBAR regulations nor the FBAR instructions provide *any* further guidance.[29] Thus, it's your opinion that foreign citizens, and nonresident aliens that ''do business in the United States'' *likely* will be exempt from the FBAR filing requirements. In your research, you found no case that has been decided on the subject, which leads you to believe that the IRS has not challenged it . . . *yet.* Nonetheless, the provision remains like something of a vestigial statutory tail.

Entities Required to File

Having been accosted by one of his larger hens in your youth, you are painfully aware that Bill has a successful emu farm in Biddeford, Stunning Sheilas, LLC. Recently, Bill acquired stock in a German ostrich farm, Riesenvögel, A.G., a German Aktiengesellschaft (a *per se* German corporation) in the name of a single-member Maine LLC.

Because the stock is held in the LLC, Bill reasons that it need not be reported. You explain, however,

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[18] 31 C.F.R. §1010.350(b)(2) (referencing §7701(b) (definition of ''resident alien'')).

[19] §7701(b)(3) (substantial presence test), §7701(b)(1)(A) (lawfully admitted for permanent residence or ''green card'' test), §7701(b)(4) (first-year election to be treated as resident).

[20] §7701(b)(4)(A)-§7701(b)(4)(F); Reg. §301.7701(b)-4.

[21] §7701(b)(2)(A)(i); Reg. §301.7701(b)-1(b)(2).

[22] Amendment to the Bank Secrecy Act Regulations — Reports of Foreign Financial Accounts, 76 Fed. Reg. 10,234, 10,238 (Feb. 24, 2011) (observing that ''[a] legal permanent resident who elects under a tax treaty to be treated as a non-resident for tax purposes must still file the FBAR'').

[23] §7701(b)(3)(A)(i).

[24] §7701(b)(3)(A)(ii).

[25] §7701(b)(3)(B). Importantly, in order to claim a ''closer connection'' to a foreign country, this individual cannot have applied for permanent U.S. residency (i.e., a U.S. green card).

[26] §7701(b)(7)(A).

[27] Such as commuters from Canada and Mexico under §7701(b)(7)(B), transit between two foreign points under §7701(b)(7)(C), and the temporary presence of a foreign vessel's crew in the United States under §7701(b)(7)(D).

[28] 31 U.S.C. §5314(a).

[29] *See* 31 C.F.R. §1010.350(b).

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that entities, including corporations, partnerships, limited liability companies, estates,[30] and trusts can also be ''U.S. persons'' for FBAR filing purposes, so long the entities were ''created, organized, or formed'' under the laws of the United States.[31] You note also that the tax treatment of an entity under Title 26 does not determine whether the entity has an FBAR filing obligation under Title 31, meaning that disregarded entities have independent FBAR filing requirements.[32]

Bill utters a rather disconcerting groan, and he explains that when Helga died, she left a German estate with multiple foreign accounts. Bill is the executor of the estate, and he and his family are beneficiaries of the estate. To complicate matters even more, Bill created a grantor trust in Nevis into which he transferred a skosh over $1 million in precious metals held in safety deposit boxes in Switzerland and Singapore. You take some rather labored breaths before explaining that these new facts implicate a plethora of filing requirements. Bill informs you that, other than his curling bonspiel later that evening, his day is wide open. You look at the deadlines on your calendar, sigh resignedly, and continue down the FBAR rabbit hole.

NAVIGATING THE ''FOREIGN FINANCIAL ACCOUNT'' MORASS

The Account Requirement

You remind Bill that the requirement to file an FBAR is triggered when a U.S. person has an interest in or signature authority over numerous types of ''foreign financial accounts.'' At its most basic, a ''foreign'' account must be geographically located outside the United States.[33] An account held in a foreign branch of a U.S. bank will be considered a foreign account, whereas an account held with a U.S. branch of a foreign bank will not be considered foreign for FBAR purposes.[34] Further, even if a domestic account holds assets of foreign entities, foreign securities, pension funds, life insurance policies, or annuities; so long as the account is physically located within the United States, it will not be considered a reportable foreign financial account.[35]

Bill tells you that he owns stock of an Irish whiskey conglomerate, which is held in a brokerage account in the Portland, Maine branch of an Irish bank. In this case, Bill does not have an interest in a foreign financial account, because he holds the foreign assets in a U.S.-based account. If, on the other hand, Bill held and traded securities at a Dublin branch of a U.S. bank, this account would be reportable. Bill is encouraged by this news, and so you continue.

Types of Accounts

Reportable accounts include bank accounts and securities accounts, unless a specific exception applies.[36] A bank account is a savings deposit account, a demand deposit account, a checking account, or ''any other account *maintained with a person engaged in the business of banking*.''[37] If this last definition seems overly broad, it was absolutely meant to be. Because the BSA is based in U.S. law and terminology, the regulations include this final ''catch-all'' to ensure that as many foreign financial arrangements as possible would be covered, despite the vagaries of the banking systems and terminology of foreign countries.[38] You tell Bill that the IRM also includes certificate of deposit accounts (CDs) in the reportable account list.[39] Even if the IRM had not specifically included CDs, the catch-all provision would have encompassed them.[40]

Uncle Bill explains that he has two personal Swiss holdings: a brokerage account with UBS in Geneva, through which he actively buys and sells stock on a foreign market; and a safety deposit box in Zürich, which physically holds 50 paper shares of Helga A.G., a German corporation. Bill has held these accounts since the early 1990s. Having quickly become numb to Bill's global holdings, you explain that the brokerage account would be a ''securities account,'' meaning that it is held with a person engaged in the business of buying, selling, holding, or trading stock or other securities.[41]

Anticipating his next question, you observe that accounts held with a person that acts as a broker or dealer for futures or options transactions in any commodity are reportable.[42] No additional guidance is

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[30] *See* FBAR Instructions, 5–6, 13.

[31] 31 C.F.R. §1010.350(b)(3) (using the Title 31 definition of United States).

[32] FBAR Instructions, 6.

[33] 31 C.F.R. §1010.350(a), 31 C.F.R. §1010.100(hhh) (using the Title 31 definition of United States).

[34] *See* FBAR Instructions, 4.

[35] 31 C.F.R. §1010.100(v); 76 Fed. Reg. at 10,235.

[36] 31 C.F.R. §1010.350(c)(1)–(3) (reportable accounts), 31 C.F.R. §1010.350(c)(4) (exceptions).

[37] 31 C.F.R. §1010.350(c)(1).

[38] Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations — Reports of Foreign Financial Accounts, 75 Fed. Reg. 8844, 8846.

[39] IRM 4.26.16.2.2 (11-06-15); *see also* 76 Fed. Reg. at 10,238 (referring to such accounts as ''time deposit'' accounts).

[40] 31 C.F.R. §1010.350(c)(1).

[41] 31 C.F.R. §1010.350(c)(2).

[42] 31 C.F.R. §1010.350(c)(3)(iii). The commodities must be

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provided as to this subset of accounts;[43] therefore, you beseech Bill to proceed with caution when determining whether to not report an account that might fall under the broad penumbra of securities accounts. Although Bill will absolutely be required to report the brokerage account, simply holding the certificates for safekeeping would not, itself, require Bill to report the safety deposit box.[44] You tell Bill that you'll return to this ''account'' in a moment.

Uncle Bill has a Luxembourg life insurance policy for the benefit of Aunt Ethel with a cash surrender value of approximately $800,000 at present. Bill has never taken any distributions from the policy, nor does he plan to. Nevertheless, because Bill *could* cash out his Luxembourg life insurance policy, he must report the cash surrender value of the policy on his FBAR. The obligation to file an FBAR for life insurance rests with the policy holder, not the beneficiary.[45] Consequently, even though Ethel is the 100% beneficiary of his whole-life policy, the reporting obligation lies with Bill.[46] The FBAR requirement applies only to life insurance and annuity policies with a cash value or an income stream to the policy holder. Actual payments from the policy or annuity are not necessary.[47] It is enough that the policy holder or annuitant is *entitled* to a payment.[48]

Bill next launches into a flurry of questions about his foreign hedge fund holdings. Calmly, you explain that, to be reportable, the shares of ''mutual funds'' and ''similarly pooled funds'' must be available to the general public, and they must have a regular net asset value determination and redemption feature.[49] Because their shares are not available to the general public, foreign hedge funds and private equity arrangements are not included in the definition of ''mutual funds'' or ''similarly pooled funds.'' At present, foreign hedge funds and private equity funds are specifically excluded from FBAR reporting.[50] This pleases Bill greatly. However, you caution that the regulations leave open the door to ''other investment funds'' being reportable; thus, these foreign funds may be swept into the definition of ''other investment funds'' in the future.[51] This pleases Bill far less.

Testing the Relationship with a Foreign Financial Institution

Returning to Bill's question about the safety deposit box holding the physical shares of Helga, A.G. and the trust's holdings of precious metals, you note that although the ''A'' in FBAR stands for ''accounts,'' the historic purpose of the BSA was to compel U.S. persons to disclose their foreign financial ''relationships.'' To this end, the regulations defines a *foreign financial agency* as any ''person'' that assumes the role of ''a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, or gold; or a transaction in money, credit, securities, or gold.''[52] In order to be reportable, the relationship with the formal financial agency must be ''formal,'' and the agency must provide ''regular'' services to the U.S. person.[53]

When Bill purchased Riesenvögel two years ago, the bank in München that assisted with the purchase opened an escrow account for the limited purpose of holding his funds before they were wired to the erstwhile German ostrich farmer. Although this escrow account is a ''relationship'' between the Bill and the foreign financial agency, no ''reportable account'' was created simply by wiring money or purchasing a money order ''where no relationship ha[d] otherwise been established.''[54]

Bill explains that he has the physical keys for his personal Swiss account and the trust's Swiss account, and the bank may not access the 50 shares of Helga, A.G. or the gold without Bill being physically present with his key. Precious metals, jewels, or collectibles, held in a safety deposit box for *safekeeping* by a foreign financial institution will not be considered to be held in a reportable foreign financial account. Instead, such assets are considered to be ''held directly by the U.S. person.''[55] Similarly, stocks, bonds, or similar financial instruments held directly by a U.S. person in

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''on or subject to the rules of a commodity exchange or association'' to qualify.

[43] Neither in the regulations, in the FBAR Instructions, nor in the IRM.

[44] IRM 4.26.16.2.2(3) (11-06-15).

[45] IRM 4.26.16.2.2(3) (11-06-15).

[46] IRM 4.26.16.2.2(2)(B) (11-06-15).

[47] IRM 4.26.16.2.2(2)(B) (11-06-15).

[48] 76 Fed. Reg. 10,239.

[49] 76 Fed. Reg. 10,239; 31 C.F.R. §1010.350(iv)(A); *see also* FBAR Instructions, 4.

[50] IRS FBAR Reference Guide, 3.

[51] 31 C.F.R. §1010.350(c)(3)(iv)(B).

[52] 31 U.S.C. §5312(a)(1). Except for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the U.S. Government is a member.

[53] 31 U.S.C. §5312(a)(1). Except for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the U.S. Government is a member.

[54] 31 U.S.C. §5312(a)(1). Except for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the U.S. Government is a member.

[55] IRM 4.26.16.2.2(3)(C) (11-06-15).

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a foreign financial account are not reportable,[56] nor is an account solely holding real estate reportable.[57]

On the other hand, Bill's trust holds silver bullion in a lockbox in a bank in Singapore, which provides insurance and other services as the trust's agent. You note that a reportable account *may* exist where the financial institution providing the safety deposit box has access to the contents and can dispose of them upon instruction from the account holder.[58] Bill explains that although he also has a key to the Singapore box as the trustee of the trust, the Singapore bank has the ability to remove silver from the box and sell it at his direction. Under these circumstances, Bill's Swiss account would not be reportable, whereas the Singapore account would be.[59]

Bill's 401(k), his Roth IRA, and his nonqualified U.S. and Dutch deferred compensation plans hold assets overseas. Although you question how a farmer of flightless birds has such extensive retirement planning, the thought is fleeting. Qualified U.S. retirement plans,[60] including traditional IRAs or Roth IRAs,[61] may hold assets in foreign financial accounts without participants or beneficiaries being required to file an FBAR.[62] On the other hand, owners of *foreign* retirement or pension funds are required to file FBARs to report such foreign funds.[63] Moreover, if a retirement or pension plan is not qualified, U.S. participants and beneficiaries would be required to file an FBAR reporting such foreign holdings.[64] As such, Bill must report the foreign holdings of his Dutch and nonqualified U.S. deferred compensation plans.

DEFINING A "FINANCIAL INTEREST" FOR FBAR PURPOSES

Bill observes that he is not the *owner of record* of Helga's estate's account. Instead, he and Ethel are only *holders of legal title* to the estate's Swiss brokerage account. Even so, Bill and Ethel have a financial interest in each bank, securities, or other financial account in a foreign country for which they are the owners of record *or* the holders of legal title — whether the account is maintained for their own benefit or for the benefit of others.[65]

What's more, because the foreign account is maintained in the name of Bill and Ethel, both have a financial interest in it.[66] When a foreign account is held jointly, each account holder must report the *entire* value of the account on his individual FBAR, meaning that no proration is permitted based on the relative ownership of the assets in the account.[67] However, because Bill and Ethel remain married after last Thanksgiving, they may file a single joint FBAR, as you promise to discuss in a moment.[68]

In an effort to prevent Bill from falling under the spell of the hippie counterculture, your grandparents sent him to study abroad in the late 1960s. During his three years in Okinawa, Japan, he befriended an elderly woman named Miyuki, who thought of Bill as the son she never knew she wanted. When Miyuki died in 1994, she left a Japanese bank account in Bill's name for the benefit of his daughters Jennie and Jaime.

When an owner or holder of legal title of an account is the agent, nominee, attorney, or otherwise holds a foreign account on behalf of a U.S. principal, this account is reportable by the principal,[69] and if the agent is a U.S. person, it is reportable by the agent as well. Thus, Bill, Jennie, and Jaime have a reportable financial interest in the Japanese account.[70] If, instead, Uncle Bill held an account for the benefit of Aunt Helga's German nephew, Klaus, even though Bill had no pecuniary interest in the account, he would still be considered the owner of the account (and likely Klaus' agent) under the FBAR rules and regulations; therefore, Bill would have an FBAR filing requirement.[71]

There is a long pause, and you can almost hear the hamsters spinning on the wheels inside his head. With some pride in his voice, Bill asks whether he could create a German entity to hold all of the accounts and avoid the FBAR filing requirements altogether. Unfortunately, you explain, the FBAR regulations *specifically* provide for just such shenanigans. A U.S. person, who creates an entity — foreign or domestic — for purposes of evading the reporting requirements, will be treated as having a financial interest in the en-

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[56] IRM 4.26.16.2.2(3)(A) (11-06-15).

[57] IRM 4.26.16.2.2(3)(B) (11-06-15) (like a Mexican "fideicomiso").

[58] IRM 4.26.16.2.2(3)(C) (11-06-15) (note).

[59] IRM 4.26.16.2.2(3)(D) (11-06-15).

[60] Arising under §401 and §403.

[61] Arising under §408.

[62] 31 C.F.R. §1010.350(g)(4).

[63] IRM 4.26.16.3.3(1) (11-06-15) (note) (e.g., a Canadian Registered Retirement Savings Plan (RRSP) and accounts managed by Mexico's Administrators of Retirement Funds (AFORES)); *see also* IRS FBAR Reference Guide, 3.

[64] *See, e.g.*, 31 C.F.R. §1010.350(g)(4); *see also* 76 Fed. Reg. at 10,243.

[65] 76 Fed. Reg. at 10,240; 31 C.F.R. §1010.350(e)(1); IRM 4.26.16.2.3(1)(A) (11-06-15).

[66] 76 Fed. Reg. 10,234 at 10,240; 31 C.F.R. §1010.350(e)(1); IRM 4.26.16.2.3(1)(A) (11-06-15).

[67] IRM 4.26.16.2.3(1)(B) (11-06-15) (note).

[68] FBAR Instructions, 6; IRM 4.26.16.3.4(1) (06-24-21).

[69] 31 C.F.R. §1010.350(e)(2)(i).

[70] *See* IRS FBAR Reference Guide, 4.

[71] Klaus would not, as he was a foreign person.

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tity's financial accounts.[72] Given the U.S. person's ownership or control over the entity, a financial interest will be imputed upon the person.[73] Bill is troubled by this, as he owns a Maine LLC, which in turn owns a New Zealand corporation that he formed for the protection and restoration of the incredibly rare, flightless kākāpō parrot.

You tell him not to fret, as the regulations intend only to capture those ''instances of abuse or arrangements designed to obfuscate ownership,'' whether in the context of trusts (including the use of a trust protector to evade an FBAR reporting obligation) or in the contexts of shell companies.[74] As such, the regulations do not appear to require the reporting of a foreign account for which an independent foreign entity holds financial assets for the benefit of a U.S. person, so long as the entity was formed for a legitimate purpose, like breeding kākāpōs.[75] You caution, however, that the inclusion of the phrase ''other financial interest'' in the regulations may, nevertheless, capture such entity-held accounts.

If a U.S. person ''controls'' a foreign entity, then the person will have a reportable interest in the entity's accounts.[76] Thus, if Uncle Bill owned 75% of the shares of the Helga A.G., ownership of the corporate accounts would be attributed to Bill for FBAR reporting purposes. If, however, he owned only 49.9% of the shares of Helga A.G., then he would have no reporting requirements. You observe also that the family attribution rules under Title 26 do not apply to FBAR reporting.[77] Thus, if Ethel owned the other 50.1% of Helga A.G., only Ethel would have a reportable financial interest, even though she and her husband collectively own and control 100% of the foreign corporation. Nonetheless, a U.S. person's control over the owner of record or legal title holder may ''rise to such a level,'' that such person will be ''be *deemed* to have a financial interest in the account,''[78] which interest is reportable.

Coming finally to Bill's Nevis trust, you explain that if a U.S. person is the owner/grantor of a trust under the grantor trust rules of Title 26,[79] both the U.S. grantor and the trust will be required to file an FBAR if the trust holds foreign financial assets — whether the trust is foreign or domestic.[80] The anti-avoidance rules discussed above with regard to shell entities apply equally in a situation where an entity is formed to ''disguise the fact that a trust has a U.S. grantor.''[81]

Bill is also a beneficiary of Aunt Helga's German trust, which holds a German brokerage account. The trust document requires 50% of the income to be distributed to Bill, and the trustee, Klaus, may distribute the remainder of the income at his discretion annually to Ethel. Bill and Ethel's idiot son Jethro is entitled to 100% of the remainder of the trust at his parents' death. You explain that for non-grantor trusts a U.S. person must have either a ''present beneficial interest'' in *more than* 50% of the assets or must receive *more than* 50% of the current income.[82] Further, ''a beneficiary of a discretionary trust [does not] have a financial interest in a foreign account simply because of his status as a discretionary beneficiary.''[83] Finally, U.S. persons with only a remainder interest in the trust do not have a reportable interest, as remainders are not *present* beneficial interests.[84]

Because Bill and Ethel do not own *more than* 50% of the trust, nor do they receive *more than* 50% of the current trust income, they do not have a reportable interest. Further, Ethel is merely a discretionary beneficiary, and Jethro's interest is only a ''remainder'' interest. Bill, Ethel, and Jethro need not file an FBAR reporting their interests in the foreign trust's accounts, nor will the trust itself need to file, because it is foreign. If Helga's trust were domestic (if it had U.S. trustees, all trust decisions were made in the U.S., and the trust were subject to U.S. court control),[85] then the trust would be required to file an FBAR because it is a U.S. person holding a reportable foreign brokerage account. If a nongrantor trust is required to and does, in fact, file an FBAR, even if the beneficiary would otherwise have a filing requirement, such beneficiary need not file a separate FBAR.[86]

There is another telling pause at the other end of the receiver, and before he has the chance to ask the question, you tell Bill that arrangements designed to obfuscate ownership in the context of trusts, including the use of a trust protector to evade an FBAR report-

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[72] 31 C.F.R. §1010.350(e)(3).

[73] 76 Fed. Reg. 10,240.

[74] 76 Fed. Reg. 10,240.

[75] *See, e.g.*, 31 C.F.R. §1010.350(e)(2)(i)–§1010.350(e)(2)(iv).

[76] 31 C.F.R. §1010.350(e)(2)(iii), 31 C.F.R. §1010.350(e)(2)(iv) (i.e., a corporation (foreign or domestic) in which the U.S. person owns directly or indirectly more than 50% of the voting power or the total value of the shares; and a partnership in which the United States person owns directly or indirectly more than 50% of the interest in profits or capital, or any other entity (other than a trust) in which the United States person owns directly or indirectly more than 50% of the voting power, total value of the equity interest or assets, or interest in profits).

[77] IRM 4.26.16.2.3(3) (11-06-15).

[78] 76 Fed. Reg. 10,240 (emphasis added).

[79] §671–§679.

[80] 76 Fed. Reg. 10,239; 31 C.F.R. §1010.350(e)(2)(iii).

[81] 76 Fed. Reg. 10,241; 31 C.F.R. §1010.350(e)(3).

[82] 31 C.F.R. §1010.350(e)(2)(iv).

[83] 76 Fed. Reg. at 10,240.

[84] 76 Fed. Reg. 10,234, 10,240.

[85] Thereby meeting the definition of a domestic trust under §7701(a)(30).

[86] 31 C.F.R. §1010.350(g)(5).

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ing obligation, are captured through the anti-avoidance provisions of the FBAR regulations.[87] Thus, if Bill established a trust, and appointed a trust protector subject to Bill's direct or indirect instruction, the anti-avoidance rules would ''catch'' this trust, and Bill (and the trust itself) would be required to report the trust's foreign financial accounts, even though Bill might not otherwise have been required to do so under the regulations.[88]

SIGNATURE OR OTHER AUTHORITY

Bill next explains that when he bought Riesenvögel, the former owner transferred the signature authority over the account to Bill, but the account remained held in the name of the entity itself. You reply that U.S. individuals, who have ''signature or other authority'' over a foreign financial account, are required to report the account on his or her FBAR.[89] For FBAR filing purposes, ''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 to the person with whom the financial account is maintained.[90] The test for determining whether Bill has signature or other authority over Riesenvögel's account is whether the German bank will act upon his direct communication (whether in writing or otherwise) to dispose of assets in the foreign account.[91] The phrase ''other authority'' simply means that a U.S. individual can direct the bank to act orally or by means other than a written request directly or indirectly.[92]

The phrase ''in conjunction with another'' addresses situations in which a foreign financial institution requires a direct communication from more than one individual regarding the disposition of assets in the account.[93] If the bank in which the Helga, A.G. account is held requires both Bill and Klaus' signature to move money or make investments, Bill has signature authority over the account for FBAR purposes.

Between stints in the hoosegow, Uncle Bill's son Leroy works at a tannery near Biddeford. In an error of judgment, the tannery's owner, Rutherford, gave Leroy signature authority over the tannery's accounts held in Amsterdam. Rutherford, who instructs Leroy on all financial matters related to the tannery, does not have the ability to *directly* control the disposition of the money and other assets held in the Amsterdam accounts, but Leroy must do as Rutherford says if he wants to keep his job.

A person may have authority that triggers the filing requirement even when such authority is nominal, as in the case of a high-level employee having signature authority over his or her employer's foreign bank accounts. Interestingly, however, U.S. persons who control individuals with signature authority over an account do not, themselves, have an FBAR filing requirement.[94] As such, only Leroy must report the accounts on his personal FBAR. The tannery will also have an FBAR filing requirement. Rutherford will not have to list the accounts on his personal FBAR, even though he instructs Leroy in all matters.

Your grandfather (Bill's father) died in a tragic, though not wholly unforeseen, moose-related (non-hunting) accident, leaving Bill as the executor of his will. The estate's only asset is a Canadian bank account with more looneys in it than Bill can shake a maple leaf at. Because Bill is the executor of the estate, he is considered to have control over the disposition of the estate's assets — even if the will specifically provides that Bill has no discretion over where the estates' funds are to be distributed (such as if the will provides that 100% of the assets pass to the Canadian Mountie Fund). As such, Bill has signature or other authority over the estate's account. If Bill's father-in-law, a U.S. citizen and resident, dies owning a Bahamian bank account, Bill's wife Ethel (the executor of her father's estate) will have an FBAR filing requirement on account of the estate's ownership of a foreign asset, over which she has signature or other authority. As noted above, the U.S. estate will likewise have an FBAR filing requirement.

With respect to your grandmother, Uncle Bill has a power of attorney over her bank account in Canada. Bill is required to file an FBAR because the power of attorney gives him the ability to dispose of the money or other assets in the account through his authority of signing a form or a check,[95] whether or not Bill actually exercises his authority over the account.[96]

Certain individuals will *not* have signature or other authority over a foreign account. For instance, indi-

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[87] 76 Fed. Reg. 10,240; 31 C.F.R. §1010.350(e)(3).

[88] 76 Fed. Reg. 10,240; 31 C.F.R. §1010.350(e)(3).

[89] 31 C.F.R. §1010.350(f). The preamble to the final regulations makes it clear that the ''signature or other authority'' requirement applies only to individuals. *See* 76 Fed. Reg. 10,236.

[90] 31 C.F.R. §1010.350(f)(1).

[91] 76 Fed. Reg. 10,235–10,236.

[92] 31 C.F.R. §1010.350(f)(1).

[93] 76 Fed. Reg. 10,236.

[94] 76 Fed. Reg. 10,235. Note, however, that an officer or employee who files an FBAR to report signature or other authority over an employer's foreign financial account is not required to personally retain records regarding the accounts. *See* FBAR Instructions, 8.

[95] IRS FBAR Reference Guide, 5. You must look both to the power of attorney and local laws to determine whether or not the power of attorney provides the U.S. individual with the right to dispose of the money or assets in the account.

[96] IRS FBAR Reference Guide, 5. You must look both to the power of attorney and local laws to determine whether or not the

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viduals with only the authority to buy or sell investments within the account, but no authority to disburse assets from the account do not have signature authority over the accounts.[97] The FBAR regulations provide that if an employee otherwise has signature authority over the foreign accounts owned by certain regulated entities,[98] the employee will be excepted from the personal reporting requirements.[99]

An employee or officer of a U.S. entity, who lives outside of the United States (but is a U.S. person, e.g., a U.S. citizen) is not required under the FBAR regulations to report accounts of its employer for which the person has signature or other authority.[100] Such nonresident officer or employee need only report the employer's information.[101] According to the FBAR filing instructions, to qualify for this quasi-exemption, the employee or officer must (1) reside outside the United States; (2) be an officer or employee of an employer physically located outside the United States; and (3) have signature or other authority over a foreign financial account owned or maintained by the employer.[102]

When it comes to *former* employees or officers of a U.S. entity, things get a bit trickier for the filer. Although former officers and employees are required to file FBARs to report their signature or other authority that they had over their employer's account during the previous calendar year,[103] they are not expected to personally maintain records of the foreign financial accounts of their employer. Further, employers are not required to furnish financial information to a former employee despite the employee's reporting requirement.[104]

In such instances, a former employee must provide ''as much information as possible when filing an FBAR.'' At a minimum, FinCEN requires that the former officer or employee include the fact that he or she had signature or other authority over a foreign financial account and must provide information about his or her former employer for whom he or she was acting, including the name of the former employer, as well as his or her title with the former employer.[105]

VALUING FOREIGN FINANCIAL ACCOUNTS

Having walked Bill through the various and sundry filing requirements, he thanks you for your time. Before he unceremoniously hangs up, you quickly exclaim that there is a filing threshold and that not all of Bill's financial accounts may need to be reported. He perks up at the news, and you remind him that only accounts with an aggregate value that exceeds *$10,000* at any time during the calendar year must be reported.[106] The maximum value of an account is the largest amount of currency and non-monetary assets that appear on a quarterly (or more frequent) account statement issued for the applicable year.[107]

Uncle Bill raises a question about Great Aunt Helga's German account. Although, the January account statement reports 25,000 euros (roughly equivalent to $30,000 at the time), the December balance was only 5,000 euros (approximately $6,000). Uncle Bill (who has signature authority over the account) must report the maximum value of the account shown on the statements during the year, converted to U.S. dollars ($30,000), using the official U.S. Treasury rates in effect for the *last calendar day* of the year at issue.[108]

Bill notes, rather sheepishly, that he accidentally transferred 75,000 euros at midnight on July 4th after glutting himself on patriotism and apple moonshine, but he withdrew the amount from the account at noon the same day when he realized the error(s) of his ways. Nonetheless, Bill would have to report $100,000 euros ($120,000) if the transfer is shown on the account statement, even though the 75,000 euros was in the account only for a short time. Arguably, if the ''quarterly or more frequent'' account statement did not reflect the instant transfer, Bill would report only the $30,000 account balance.

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power of attorney provides the U.S. individual with the right to dispose of the money or assets in the account.

[97] IRM 4.26.16.2.4(2)(a) (11-06-15).

[98] 31 C.F.R. §1010.350(f) (including financially regulated banks, financial institutions regulated by the SEC, investment companies regulated by the SEC, publicly traded companies, and companies with securities registered with the SEC).

[99] 31 C.F.R. §1010.350(f)(2); *see also* IRM 4.26.16.2.4.1(1)(a)–(e) (11-06-15).

[100] 76 Fed. Reg. 10,236; *see also* FBAR Instructions, 18.

[101] 76 Fed. Reg. 10,236; see also FBAR Instructions, 18.

[102] FBAR Instructions, 18 (Part IV).

[103] FinCEN, Reports on Foreign Financial Accounts FBARs Requirements, FIN-2011-G003 (Oct. 11, 2011).

[104] FinCEN, Reports on Foreign Financial Accounts FBARs Requirements, FIN-2011-G003 (Oct. 11, 2011), https://www.fincen.gov/resources/statutes-regulations/guidance/reports-foreign-financial-accounts-fbars-requirements.

[105] FinCEN, Reports on Foreign Financial Accounts FBARs Requirements, FIN-2011-G003 (notice also that if employment is changed to avoid the FBAR filing requirement, this guidance does not apply).

[106] FBAR Instructions, 4, 10; IRM 4.26.16.2.2.2(1) (06-24-21); IRM 4.26.16.2.6(1) (06-24-01).

[107] IRM 4.26.16.2.2.2(1)(A) (06-24-01). If periodic statements are not issued, then the maximum account value is the largest amount of currency and non-monetary assets in the account at any time during the year.

[108] FBAR Instructions, 10; IRM 4.26.16.2.2.2(1)(B) (06-24-21). The historic conversion rates can be found at https://fiscal.treasury.gov/reports-statements/treasury-reporting-rates-exchange/historical.html.

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Each account (including solely owned accounts; jointly owned accounts, direct and indirect financial interest accounts, and signature authority accounts)[109] must be valued separately. After the individual valuations, the values are then aggregated.[110] If the account holds non-monetary assets, a ''reasonable approximation'' of the value of such assets during the year must be reported. Neither the FBAR instructions nor the IRM provide any further instruction as to how to value non-monetary assets.

If a person is unable to determine whether the maximum value of these accounts exceeded $10,000 at any time during the calendar year, it is assumed that the value exceeds $10,000, and the person must report such accounts and indicate ''value unknown'' on Item 15a of the FBAR.[111] A U.S. person with signature or other authority over 25 or more foreign financial accounts must only provide the number of financial accounts and certain other basic information on the report, but the person will be required to provide detailed information concerning each account if the IRS or FinCEN requests it.[112]

JOINT ACCOUNTS

Uncle Bill notes offhand that he and Aunt Ethel jointly own 75% of an Australian cassowary breeding conglomerate, with Leroy owning the remaining 25%. Bill, Ethel, and Leroy share in the profits, which are deposited and held in an outback bank account, in the same percentages, and all three has signature authority over the account. You explain that joint owners of foreign financial accounts must file separate FBARs reporting the entire value of the account.[113] As such, the account value reported on an FBAR may not be prorated to reflect the filer's limited joint interest.[114] As such, Bill, Ethel, and Leroy must report 100% of the maximum value of the Aussie bank account during the year.

Because Bill and Ethel did not divorce on account of the turkey leg incident — much to your surprise — they may file a joint FBAR.[115] For spouses, separate FBARs are not required, so long as the FBAR is filed on time and electronically, both spouses sign a FinCEN Form 114a, *Record of Authorization to Electronically File FBARs*, and all the financial accounts that the non-filing spouse is required to report are jointly owned with the filing spouse.[116]

FILING THE FBAR

As you round for home, you can hear from the stunned silence on the other end of the receiver that Bill is oversaturated with all things FBAR. Trying to cheer him up, you observe that filing the FBAR is actually the easiest part. For all of the pomp and circumstance, an FBAR is a simple, electronically filed information return. It's free, and no tax is due when you file. The form comes in a fillable PDF file, and with a couple of clicks, the form is uploaded and filed with the BSA's E-Filing System.[117] Heck, you say, you can even file the FBAR on Bill's behalf, though this does require him to sign a FinCEN Form 114a.[118] Once the FBAR is filed, you receive an immediate notice from the BSA that the form has been filed. A couple of days later, you will receive a follow-up email letting you know that the form has been accepted and processed. That is, quite literally, all there is to it.

As to the FBAR filing deadline, they are technically due on the same day as your federal income tax returns (April 15th unless it falls April 15th falls on a Saturday, Sunday, or legal holiday, in which case the FBAR must be filed on the next succeeding business day).[119] However, if Bill misses the April 15th deadline, you tell him to fret not, because there is an *automatic* extension until October 15th.[120] By automatic, you mean that no ''specific requests for an extension'' are required.[121] Importantly, however, no further extension for filing the FBAR may be obtained, no matter how nicely Bill asks.[122]

RELATIONSHIP TO OTHER FOREIGN FILING REQUIREMENTS

Although the last thing you want to do is further spook Uncle Bill, you feel inclined to explain that FBARs are just the tip of the foreign reporting iceberg. On March 18, 2010, the Foreign Account Tax Compliance Act (FATCA) was signed into law as a part of the Hiring Incentives to Restore Employment

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[109] IRM 4.26.16.2.6(3) (06-24-21).

[110] FBAR Instructions, 10; IRM 4.26.16.2.2.2(2) (06-24-21); IRM 4.26.16.2.6(3) (06-24-21).

[111] FBAR Instructions, 10–11; IRM 4.26.16.2.2.2(3) (06-24-21).

[112] IRM 4.26.16.2.3.7(1) (11-06-15); 31 C.F.R. §1010.350(g).

[113] FBAR Instructions, 6; IRM 4.26.16.2.3(1)(B) (06-24-21).

[114] IRM 4.26.16.2.3(1)(B) (06-24-21) (note).

[115] FBAR Instructions, 6; IRM 4.26.16.3.4(1) (06-24-21).

[116] FBAR Instructions, 6; IRM 4.26.16.3.4(1) (06-24-21).

[117] FBAR Instructions, 8. The application to file electronically is available at http://bsaefiling.fincen.treas.gov/.

[118] IRM 4.26.16.3.5 (11-06-15). Form 114a is not filed with FinCEN, but it must be maintained in the records of the third-party.

[119] FBAR Instructions, 8.

[120] Pub. L. No. 114-41, §2006(b)(11); FBAR Instructions, 8.

[121] Pub. L. No. 114-41, §2006(b)(11); FBAR Instructions, 8.

[122] IRM 4.26.16.3.10 (06-24-21).

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Act.[123] Unlike the FBAR reporting requirements, which *generally* operate under Title 31, FATCA operates solely under Title 26. In the final FATCA regulations, Congress observed that reporting under FATCA and on the FBAR is not duplicative, and reporting under both regimes is necessary because "different policy considerations apply to [FATCA] and FBAR reporting."[124] Therefore, although you may repeat quite a bit of information between forms, the respective filing requirements are independently important as far as Congress is and was concerned.

Bill groans audibly, and you tell him that his Form 8938, *Statement of Specified Foreign Financial Assets*, and Form 5471, *Information Return of U.S. Persons With Respect To Certain Foreign Corporations*, obligations are a subject for another day. You don't even have the heart to mention potential penalties for failing to file FBARs — the penalty for willful civil violations being the greater of $100,000 or 50% of the balance of the accounts on the last day that the FBAR was required to be filed,[125] and the non-willful penalty being $10,000, per year.[126] Although there are programs offered by the IRS to remedy non-filing, they are not without risk or cost. At the end of the day, filing is simple. Failing to do so is an unwelcome and expensive option.

CONCLUSION

Let Uncle Bill be what he has always been, a cautionary tale. In the increasingly globalized world, the likelihood of a client, like Uncle Bill, having foreign financial accounts is ever increasing. You can never truly know whether an individual or entity might have a foreign filing requirement without asking far more detailed questions than you may have in the past. The need to understand the foreign filing requirements has grown proportionally to the heightened scrutiny that the IRS has placed on foreign reporting compliance over the last decade. You never know when your Swiss godmother might yodel her last, leaving you with fortunes . . . and filing requirements.

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[123] Pub. L. No. 111-147, 123 Stat. 71, 97–118.

[124] T.D. 9706, 79 Fed. Reg. 73,817, 73,823 (Dec. 12, 2014).

[125] IRM 4.26.16.5.5(3) (06-24-21); 31 U.S.C. §5321(a)(5)(D)(ii); *see United States v. Williams*, 489 Fed. App'x 655 (4th Cir. 2012); *United States v. McBride*, 908 F. Supp. 2d 1186 (D. Utah. 2012); *United States v. Garrity*, 304 F. Supp. 3d 267 (D. Conn. 2018).

[126] IRM 4.26.16.5.4 (06-24-21); 31 U.S.C. §5321(a)(5)(B). The penalty applies per year, not per account. *U.S. v. Bittner*, 469 F. Supp. 3d 709 (E.D. Tex. 2020); *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021).

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