

CLAYTON

FINANCIAL AND TAX

April 27, 2016

FINCEN
PO Box 39
Vienna, VA 22183

Via Certified Mail
7015 1660 0000 1815 8001

**Re: Request for Public Comments
1506-AB26**

Dear Sir or Madam:

I am writing in response to your request for comments on RIN 1506-AB26. My perspective is likely different from other respondents in that my firm is a small tax practice focused on individuals. Although the practice is small (we have several hundred clients), at least one-third must file the Report of Foreign Bank and Financial Accounts (FBAR) each year. I will also be noting some other points that are mentioned in passing in your proposed rulemaking.

- 1. The deadline for filing the FBAR should be the same as for individual calendar-year tax returns.** In your proposal, you state, "Make several other changes including a change to the filing date for FBARs to be filed in 2017...." As you note in footnote 6 of your proposed rulemaking, "In accordance with section 2006(b)(11) of Public Law 114-41 the filing due date of the report will be April 15 effective with the 2016 reporting year. Extensions to October 15 of the reporting year are available upon request."

The tax deadline for calendar year individual taxpayers is the fifteenth day of the fourth month of the year (April 15th), unless that day falls on a Saturday, Sunday, or a holiday in the District of Columbia. In 2017, April 15th will fall on a Saturday, so the tax due date would normally be April 17th. However, April 17th will be a holiday in the District of Columbia¹ so the tax due date will be Tuesday, April 18th.

Currently, the FBAR is due on June 30th and there are no extensions available. This due date does not change if June 30th falls on a weekend (or a holiday in the

¹ April 17th will be the celebration of Emancipation Day. That holiday falls on April 16th; however, since April 16th falls on a Sunday the holiday will be celebrated on Monday, April 17th.

District of Columbia). This is the only tax-related deadline that does not change based on the day of the week.²

While FINCEN cannot change the current June 30th due date, the enactment of Public Law 114-41 gives FINCEN the opportunity through this rulemaking of aligning the dates in a common sense manner. It would be logical to have both the tax deadline and the FBAR deadline match (on April 18, 2017 for 2016 FBARs).

Additionally, many expatriates—almost all of whom have FBAR filing responsibilities—receive a two-month automatic extension for filing their tax returns.³ Many of these expatriates prepare their US tax returns after they prepare their home country tax returns. Thus, many of these individuals do not begin to consider their US tax returns until well after April 15th. Again, aligning the due date for the FBAR and tax returns is just common sense.

It is clear that Congress, in enacting Public Law 114-41, wanted to align the FBAR due dates with tax return due dates. This should be done in this rulemaking.

2. **FINCEN Should Follow the IRS's Gift Tax Regime for Extensions for the FBAR.** The Gift Tax⁴ is imposed on gifts over \$14,000 per year by any donor.⁵ The Internal Revenue Service (IRS) allows an extension by either an extension for the donor's individual tax return (Form 4868) or by filing Form 8892 (Application for Automatic Extension of Time to File Form 709). This is the regime that FINCEN should adopt for FBAR extensions.

First, this would make the deadline for filing the FBAR identical to the due date for filing tax returns. This was Congress's intent in enacting Public Law 114-41.

Second, many individuals do not know if they have an FBAR filing responsibility until they prepare their tax returns. Keeping the deadlines and extensions mirrored makes common sense.

Third, this procedure will lessen the workload for tax professionals and FINCEN. Tax professionals are extraordinarily busy in early April because of the tax filing deadline; having a second extension to file just adds to the burdens on our time. For FINCEN, most individuals who require extensions will be filing tax return

² It is tax professionals who end up dealing with most individual filers' FBAR responsibilities. While the FBAR is not, per se, a tax form, that an individual has an FBAR filing responsibility must be noted on the tax return (Schedule B, questions 7).

³ A two-month extension is available for any taxpayer who resides or works outside of the United States and is outside of the United States on the April due date for taxes. The extension is obtained by attaching a statement to their tax return.

⁴ 26 US Code Chapter 12.

⁵ See 26 USC § 2503(b)(1). The exclusion was set at \$10,000 for 1998 and has increased to \$14,000 based on the cost-of-living adjustment in 26 USC § 2503(b)(2).

extensions. Not having to receive the actual extension request should lessen the burden on the agency.

FINCEN can simply require a copy of the tax return extension be included with the filing of the FBAR. The IRS now allows taxpayers to attach pdf's to their tax returns when electronically filed. A simple checkbox on the FBAR ("If attaching a copy of your federal tax return extension, check this box") could be added.

An additional checkbox could be added for expatriates and others who are taking the two-month automatic extension. These individuals do not file a specific tax form to obtain their extension.

Finally, FINCEN can have a form for individuals who do not file a tax extension but need an extension of time to file their FBAR.

- 3. For Individual Filers of the FBAR, Removing the 25 Account Exemption Will Increase their Burden.** Some expatriates and others have 25 or more foreign financial accounts. These individuals have no software or other technology available to transfer this information from their records to the FBAR. Requiring these individuals to report their foreign accounts will increase the burden on them.

Additionally, you state in your proposed rulemaking that one reason for implementing this is that "...FINCEN and law enforcement [do] not have detailed account information on any of these accounts because of the exemption for FBAR filers with 25 or more foreign financial accounts." While this is technically correct, the information is generally currently available for a criminal investigation.

First, FINCEN currently has the right to request from any individual who files an FBAR with 25 or more foreign financial accounts the details on those accounts. While none of my clients who have filed FBARs in this manner have received such a request, this doesn't mean that FINCEN cannot request the information.

Second, many FBAR filers noting such foreign financial accounts will also be filing Form 8938 with the IRS.⁶ While not all accounts required to be reported on an FBAR are reported on Form 8938 (and vice versa), and the filing thresholds are higher for Form 8938 than the FBAR, in most cases the accounts reported are identical. I have no doubt that in a criminal investigation law enforcement would review the tax returns of individuals (including Form 8938).

⁶ Form 8938 is the IRS's form for reporting foreign financial accounts for individuals and others to comply with the Foreign Account Tax Compliance Act (FATCA).

For my clients, removing the exemption would add one to three hours of data-entry work (based on the number of accounts they have) in their first year of filing, with the amount possibly decreasing in future years.⁷

Thus, removing the 25-account exemption will *not* increase information that's available to law enforcement and would add to the burden of individual filers of the FBAR.

Sincerely,

A handwritten signature in black ink, appearing to read "Russell Fox, E.A.", written in a cursive style.

Russell Fox, E.A.

⁷ This depends on the tax software importing prior-year information into the current-year FBAR, and FINCEN continuing to allow the filing of FBARs via tax software. If the FINCEN/BSA efile system is used, the burden would *not* decrease year-to-year.