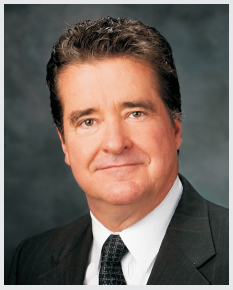
The Fifth Amendment FBAR Lives!

By Edward M. Robbins Jr.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The 2012 foreign bank account report is due June 30; the practitioner community is struggling with the concept of Fifth Amendment FBARs in light of the government's overwhelming success in the required records cases. This article addresses applicable cases and issues that must be considered in the FBAR filing decisions facing practitioners between now and June 30.

Criminal tax practitioners are struggling with whether, in light of recent developments in the required records cases, the landscape has changed regarding Fifth Amendment current-year foreign bank account reports.[1] Historically, practitioners have maintained that following the cases in the tax return area (*Sullivan*, etc.),[2] the privilege against self-incrimination is not a basis to simply refrain from filing. Thus, they have typically advised clients to file so-called Fifth Amendment FBARs, which provide the foreign account holder's name, address, and Social Security number but assert privilege even as to the obligation to file.[3] Most criminal tax practitioners have apparently adopted that view, although they have varied in their method of filing the FBAR.

Now, however, four circuits have held that the required records doctrine trumps the act of production privilege as to the data called for on the FBAR.[4] So the question arises whether the Fifth Amendment FBAR is now improper. In short, the question is whether the required records doctrine, which now unquestionably applies to a subpoena for offshore account information, somehow equally applies to the annual FBAR reporting requirement. As a result, can the foreign account holder continue to lawfully file a Fifth Amendment FBAR claiming the privilege against self-incrimination for specific line items on the FBAR? As discussed below, Fifth Amendment FBARs are still viable.

The Act of Production Doctrine

The Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." As the Supreme Court explained in *Fisher*, this provision bars the government from "compelling a person to give 'testimony' that incriminates him."[5] Because the privilege against self-incrimination "protects a person only against being incriminated by his own compelled testimonial communications,"[6] it does not protect the contents of documents that the person prepared

[1]Under the Bank Secrecy Act of 1970 (31 U.S.C. sections 5311-5330), U.S. residents or a person in and doing business in the United States must file a report with the government if they have a financial account in a foreign country with a value exceeding $10,000 at any time during the calendar year. Taxpayers comply with this law by noting the account on their income tax return and by filing Form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts." Willful failure to file an FBAR can result in criminal sanctions (*i.e.*, imprisonment) and civil penalties equivalent to the greater of $100,000 or 50 percent of the balance in an unreported foreign account, per year, for up to six tax years. The FBAR for calendar year 2012 is due June 30.

[2]In *United States v. Sullivan*, 274 U.S. 259 (1927), the Supreme Court held that the privilege against compulsory self-incrimination is not a defense to prosecution for failing to file. The Court indicated, however, that a taxpayer may refuse to answer specific questions or disclose specific information if that disclosure would be incriminating. *Id.* at 263. *See also Garner v. United States*, 424 U.S. 648, 650 (1976). To validly assert a Fifth Amendment privilege against self-incrimination, a taxpayer must claim the privilege on his return (*Garner*, 424 U.S. at 665; *Sullivan*, 274 U.S. at 263-264); as an objection to a specific

(Footnote continued in next column.)

question (*Heligman v. United States*, 407 F.2d 448, 450-451 (8th Cir. 1969)); demonstrate a real and substantial danger of self-incrimination (*Daly v. United States*, 393 F.2d 873, 878 (8th Cir. 1968)); and submit to the reviewing court's arbitration of the claim (*Heligman*, 407 F.2d at 450-451).

[3]This seems circular, but it renders at least the form itself unusable for prosecution purposes.

[4]*In re Grand Jury Proceedings*, No. 4-10 (11th Cir. 2013); *In re Grand Jury Subpoena*, 696 F.3d 428 (5th Cir. 2012); *In re Special February 2011-1 Grand Jury Subpoena*, 691 F.3d 903 (7th Cir. 2012); and *In re M.H.*, 648 F.3d 1067 (9th Cir. 2011).

[5]*Fisher v. United States*, 425 U.S. 391, 409 (1976); *see also United States v. Doe*, 465 U.S. 605, 610 (1984) ("The Fifth Amendment protects [a] person . . . from compelled self-incrimination.") (emphasis omitted).

[6]*Fisher*, 425 U.S. at 409.

voluntarily or that were prepared by someone else.[7] Content in those documents is not protected because it is not compelled testimony: The papers already exist, and so, while forcing someone to hand them over may implicate the Fourth Amendment, it does not implicate the Fifth Amendment.[8]

Nevertheless, although the contents of subpoenaed documents may not be protected, the act of responding to the subpoena may be. The *Fisher* Court explained that ''the act of producing evidence in response to a subpoena'' may sometimes constitute testimony within the meaning of the Fifth Amendment, ''wholly aside from the contents of the papers produced.''[9] That rule is known as the act of production doctrine. A subpoena for records commands its recipient to perform specified tasks — namely, to gather up and produce the records. If the very act of complying with the subpoena's commands would cause someone to incriminate himself, the Fifth Amendment's privilege against self-incrimination may apply. According to *Fisher*, a subpoenaed witness's act of production may implicitly admit (1) the existence of the papers demanded; (2) that the papers are in the witness's possession or control; and (3) that the papers are authentic, that is, the papers are those described in the subpoena.[10] If any of those admissions would be incriminating based on the facts of a particular case, the Fifth Amendment may allow the subpoena recipient to refuse to comply with the subpoena.

The Required Records Exception

The required records doctrine prevents people from invoking the Fifth Amendment to disobey record-keeping or reporting requirements when the government imposes such a requirement on an activity within its power to ''regulate or forbid,''[11] and when that activity is a bona fide regulated activity — that is, an activity that has not actually been made criminal, although it could be forbidden.[12]

Recently, the Fifth, Seventh, Ninth, and Eleventh circuits have held that the required records doctrine applies to a subpoena for records required to be kept and subject to inspection under the Bank Secrecy Act.[13] Each of those four cases involved a substantively identical subpoena, which demanded:

> any and all records required to be maintained pursuant to 31 C.F.R. section [1010.420] relating to foreign financial accounts that you had/have a financial interest in, or signature authority over, including records reflecting the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during each specified year.[14]

Each court concluded, unanimously, that the subpoena fell within the required records doctrine — and that, accordingly, the recipient could not invoke the privilege against self-incrimination to refuse to comply with the subpoena. All four courts of appeals agreed that ''there is nothing inherently illegal about having or being a beneficiary of an offshore foreign banking account.''[15]

Accordingly, a foreign account holder may be compelled, over his Fifth Amendment objection, to ''testify'' through his response to the required records subpoena that:

> (1) the records I am producing in response to the subpoena exist, (2) the records are in my possession or control, and (3) that the records are authentic, that is, the records are those described in the subpoena.

As noted above, the contents of the records, no matter how incriminating they might be, have not, since *Fisher*, been protected under the Fifth Amendment.

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[7] *See id.* at 409-410; *see also United States v. Hubbell*, 530 U.S. 27, 35-36 (2000); *Doe*, 465 U.S. at 610-611.

[8] *See Fisher*, 425 U.S. at 411 (''The question is not of testimony but of surrender.'' (quoting *In re Harris*, 221 U.S. 274, 279 (1911))).

[9] *Fisher*, 425 U.S. at 410.

[10] *Id.*

[11] *Shapiro v. United States*, 335 U.S. 1, 32 (1948). In *Shapiro* the Supreme Court held that the Fifth Amendment did not prevent a fruit and produce wholesaler from being prosecuted based on documents that he was required to keep under the Emergency Price Control Act. *Shapiro* is generally cited as the origin of the required records doctrine, although the Court cited a prior case — *Wilson v. United States*, 221 U.S. 361, 381 (1911), which involved a witness's refusal to comply with a grand jury subpoena — as the origin of the required records doctrine. *Shapiro*, 335 U.S. at 18 n.24.

[12] *See Marchetti v. United States*, 390 U.S. 39, 57 (1968) (holding that the record-keeping or reporting requirement may not be ''directed to a selective group inherently suspect of criminal activities'' (internal quotations omitted)).

[13] *See Grand Jury Proceedings*, No. 4-10; *Grand Jury Subpoena*, 696 F.3d 428; *Special February*, 691 F.3d 903; and *M.H.*, 648 F.3d 1067.

[14] *Special February*, 691 F.3d at 905.

[15] *M.H.*, 648 F.3d at 1074; *see also Grand Jury Subpoena*, 696 F.3d at 435 (quoting this observation from *M.H.*); *Special February*, 691 F.3d at 909 (adopting *M.H.*'s analysis).

Status of a Fifth Amendment FBAR

The confusion is the extent, if any, to which current law compels a foreign account holder to file a true and complete FBAR, no matter how incriminating that FBAR and its contents may be:

- In *Shapiro*, the Supreme Court held that the Fifth Amendment did not prevent a fruit and produce wholesaler from being prosecuted based on documents that he was required to keep under the Emergency Price Control Act.[16]
- In *Marchetti*, the Supreme Court held that the required records doctrine applies to regulatory reporting requirements as well as record-keeping and inspection requirements.[17]
- In *Macky*, the Supreme Court held that if a statutory scheme is "not designed to forbid certain acts, but only to require that they be done in a certain way, the Government may enforce its requirements by a compulsory scheme of reporting, directed at all who engage in those activities, and not on its face designed simply to elicit incriminating information."[18]
- In *Haynes*, the Supreme Court said, "the constitutional privilege does not prevent the use by the United States of information obtained in connection with regulatory programs of general application."[19]
- In *Bouknight*, the Supreme Court explained that a parent could not invoke the Fifth Amendment to defeat a child welfare reporting requirement because even when the state has intervened to place limits on a parent's custody of her own child, the "parent is not one singled out for criminal conduct."[20]
- In *M.H.* the Ninth Circuit said that for purposes of the required records doctrine, "it does not matter whether the production of . . . information is requested through a subpoena (as in this case and *Shapiro*), a court order (as in *Bouknight*), or the regulation itself (as in *Byers*)."[21]
- Again from the Ninth Circuit in *M.H.*: "The Supreme Court has indicated that no meaningful difference exists 'between an obligation to maintain records for inspection, and such an obligation supplemented by a requirement that those records be filed periodically with officers of the United States.' *Marchetti*, 390 U.S. at 56 n.14."[22]

In short, some might assert that the required records doctrine applies to the annual FBAR reporting requirement just as much as a subpoena for offshore account information. However, the foregoing cases stand for the proposition that the Fifth Amendment does not apply to the production of *previously existing documents*, whether they are records maintained for inspection or records required to be filed periodically with officers of the United States. They also stand for the noncontroversial proposition that the Fifth Amendment will not excuse a person from creating records required to be filed periodically with the government. These cases do not suggest that a person may be compelled to give current testimony over a Fifth Amendment objection, beyond the testimony inherent in the act of production. Recall the testimony allowed in the required records cases over a Fifth Amendment objection: (1) the records I am producing in response to the subpoena exist; (2) the records are in my possession or control; and (3) the records are authentic, that is, the records are those described in the subpoena. There is no suggestion in any of these cases that a foreign bank account holder can be hauled in front of a grand jury and compelled, over his Fifth Amendment objections, to orally answer each and every question included on the FBAR. Likewise, the foreign account holder cannot be compelled, over his Fifth Amendment objections, to file a true and complete FBAR.

Accordingly, it appears that a good-faith Fifth Amendment FBAR is currently alive and available as a defense tactic in the appropriate situation.

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[16]*Shapiro*, 335 U.S. at 17-19.

[17]*Marchetti v. United States*, 390 U.S. 39, 56 n.14. (1968).

[18]*Mackey v. United States*, 401 U.S. 667, 709 (1971) (Brennan, J., concurring).

[19]*Haynes v. United States*, 390 U.S. 85, 98 (1968).

[20]*Baltimore City Dep't of Soc. Services v. Bouknight*, 493 U.S. 549, 559-560 (1990).

[21]*M.H.*, 648 F.3d at 1077.

[22]*Id.* at 1076.