



To Our Clients and Friends

April 6, 2011

Highlights of the New FBAR Regulations and Revised FBAR for 2010 Filings Due June 30, 2011

On February 24, 2011, the Financial Crimes Enforcement Network issued final regulations regarding the requirement to file TD F 90-22.1, Report of Foreign Bank and Financial Accounts, commonly referred to as the “FBAR.” The FBAR is required to be filed by U.S. persons to report a financial interest in, or signature or other authority over, financial accounts outside the United States. On March 26, 2011, the Internal Revenue Service published a revised FBAR with updated instructions reflecting the guidance provided by the final regulations. The final regulations and updated FBAR are both effective for the 2010 FBAR filings due June 30, 2011.

Background

A U.S. person who has a financial interest in, or signature or other authority over, one or more foreign financial accounts with an aggregate value of more than \$10,000 at any time during a calendar year generally must report such accounts on an FBAR on or before June 30 of the following year. The penalties for failing to disclose a foreign financial account on an FBAR can be substantial, particularly if the failure is determined to be willful.

Over the last several years, questions have arisen regarding the FBAR rules, including in particular who is a U.S. person and what is a foreign financial account. The final regulations provide guidance on these points, as well as other FBAR issues. The provisions of the final regulations generally are reflected in the updated FBAR and instructions.

Who is a U.S. Person?

The final regulations define a U.S. person as:

- A U.S. citizen,
- A U.S. resident, or
- Any entity created, organized, or formed under the laws of the United States, any State, the District of Columbia, the Territories and Insular Possessions of the United States, or the Indian Tribes.

A trust may be a U.S. person for FBAR purposes under the definition above, even if it is not a U.S. person for federal tax purposes under Code section 7701(a)(30).

The revised FBAR instructions provide that the federal tax treatment of an entity does not determine whether the entity has an FBAR filing requirement. Thus, an entity that is disregarded for purposes of the Internal Revenue Code (the “Code”), such as a single-member U.S. limited liability company or a grantor trust, must file an FBAR if it is otherwise required to do so.

A U.S. resident (to whom the FBAR filing requirements apply) is any individual who is a resident alien for federal income tax purposes under Code section 7701(b), with one modification.

Under this definition:

- A lawful permanent resident (i.e., the holder of a so-called “green card”) is considered a U.S. person for FBAR purposes, even if he or she elects to be taxed as a nonresident under a U.S. income tax treaty.
- An alien who elects to be treated as a resident for U.S. tax purposes under Code section 7701(b) should file FBARs only for accounts held during the period covered by the election.
- The determination of whether an individual is a U.S. resident is made without regard to any election to be treated as a U.S. resident for certain federal income tax purposes under Code section 6013(g) or (h).

A foreign corporation that elects to be treated as a domestic corporation for certain purposes under Code section 897(i) or 953(d) is not considered a U.S. person for FBAR purposes under the final regulations.

A foreign person will not be considered a U.S. person for FBAR purposes by reason of conducting business activities in the United States. A 2008 revision to the FBAR instructions had created much confusion by expanding the definition of U.S. person to include a foreign person “in and doing business in” the United States, but the expanded definition was not included in the final regulations.

What is a Foreign Financial Account?

Under the final regulations, a financial account includes:

- A bank account, defined as a savings deposit, demand deposit, checking or any other account maintained with a person engaged in the business of banking.
- A securities account, defined as an account with a person engaged in the business of buying, selling, holding or trading stock or other securities.
- An account with a person engaged in the business of accepting deposits as a financial agency.
- An account that is an insurance or annuity policy with a cash value.
- An account with a person who acts as a broker or dealer for futures or options transactions in any commodity on or subject to the rules of a commodity exchange or association.
- Any account with a mutual fund or similar pooled fund that issues shares available to the general public with a regular net asset value determination and regular redemptions.

The final regulations emphasize that the definition of a mutual fund includes the requirement that the shares be available to the *general public* in addition to having a regular net asset value determination and regular redemptions. Thus, interests in hedge funds and private equity funds that do not meet these requirements should not be considered financial accounts and thus should not be subject to FBAR reporting.

The final regulations also emphasize that a financial account will not be considered foreign if it is maintained with a financial institution in the United States. Thus, for example, the mere fact that an account may contain holdings or assets of foreign entities does not render the account “foreign” for FBAR purposes. The updated FBAR instructions provide that a financial account maintained with a branch of a U.S. bank that is physically located outside the United States is considered a foreign financial account; conversely, a financial account maintained with a U.S. branch of a foreign bank that is physically located in the United States is not a foreign financial account.

Exceptions for Certain Persons with Signature or Other Authority, But No Financial Interest

Certain individuals who have signature or other authority with respect to foreign financial accounts, but no financial interest, are not required to file FBARs with respect to such accounts. These individuals who qualify for such exceptions include the following, provided in each case that they have no financial interest in the accounts:

- An officer or employee of a bank that satisfies certain requirements, with respect to a foreign financial account owned or maintained by such bank.
- An officer or employee of a financial institution that is registered with the SEC or CFTC with respect to a foreign financial account owned or maintained by such financial institution.
- An officer or employee of an “authorized service provider” with respect to a foreign financial account owned or maintained by an investment company that is registered with the SEC. For this purpose, an authorized service provider is an entity that is examined by the SEC and that provides services to an investment company registered under the Investment Company Act of 1940.
- An officer or employee of an entity that has a class of equity securities (or American Depositary Receipts) listed on any U.S. national securities exchange with respect to a foreign financial account of such entity.
- An officer or employee of a U.S. subsidiary of a U.S. entity with a class of equity securities listed on a U.S. national securities exchange, with respect to a foreign financial account of such U.S. subsidiary, if the U.S. subsidiary is included in a consolidated FBAR (described below).
- An officer or employee of an entity that has a class of equity securities (or American Depositary Receipts) registered under section 12(g) of the Securities Exchange Act, with respect to a foreign financial account of such entity.

Consolidated FBARs

Any entity that is a U.S. person may file a consolidated FBAR on behalf of itself and each entity in which it owns, directly or indirectly, a greater-than-50% interest. Note that the filing of such consolidated FBAR would not relieve any individual who is otherwise required to file an FBAR with respect to the same foreign financial accounts of such filing obligation.

Exception for Participants and Beneficiaries of Certain Retirement Plans and Other Trust Beneficiaries

The final regulations also provide an exception to the FBAR filing requirement for:

- Participants and beneficiaries of qualified retirement plans described in Code sections 401(a), 403(a), and 403(b).
- Owners and beneficiaries of IRAs described in Code section 408 and Roth IRAs described in Code section 408A.
- A beneficiary of a trust who is considered to have a financial interest in one or more foreign financial accounts of the trust, if the trust, trustee of the trust, or agent of the trust is a U.S. person that files an FBAR with respect to the trust's foreign financial accounts.

Clarification of Signature or Other Authority

The final regulations clarify that an individual will have signature or other authority with respect to a foreign financial account only if he or she (alone or in conjunction with others) can control the disposition of money, funds or other assets held in the account by *direct* communication (whether in writing or otherwise) to the person with whom the account is maintained. This definition does not apply to an individual who merely participates in the decision to allocate assets or has the ability to instruct or supervise others with signature or other authority over a foreign financial account.

Modified Reporting Requirements for Certain Officers and Others Employed Outside the United States

Under the updated FBAR instructions, modified reporting requirements apply in the case of an individual who (1) resides outside the United States; (2) is an officer or employee of an employer that is "physically located" outside the United States; and (3) has signature or other authority over one or more foreign financial account maintained by the individual's employer. An individual meeting these requirements must provide identifying information about the individual and the employer, but need not provide account numbers, maximum account values, or any other information about the employer's foreign financial accounts.

Planning for the June 30 Deadline

U.S. persons who may potentially have a financial interest, or signature or other authority, with respect to one or more foreign financial accounts are urged to carefully consider the applicable provisions of the final regulations, and the revised FBAR with updated instructions, to determine

whether or how the current FBAR rules apply to them. Gathering the necessary information may take a significant amount of time, so early action is strongly recommended.

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