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Anti-Deferral and Anti-Tax Avoidance

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2010 FBAR Update

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On February 26, 2010, the Treasury and the IRS issued several pronouncements pertaining to the Report of Foreign Bank and Financial Accounts ("FBAR").[1] First, the Treasury's Financial Crime Enforcement Network ("FinCEN") released a notice of proposed rulemaking setting forth proposed changes to the applicable regulations under Title 31, to the FBAR, and to the FBAR instructions.[2] The IRS issued Notice 2010-23[3] and Announcement 2010-16,[4] which extend certain administrative relief, previously granted for 2008 FBARs, to 2009 FBARs due June 30, 2010. These pronouncements address, among other things, the definitions of "United States person" and "foreign financial account" that are critical to the determination of whether an FBAR filing obligation exists.

Background

Filing Requirement

All "United States persons" (hereinafter, "U.S. persons") that have a financial interest in, or signature or other authority over, one or more "foreign financial accounts" with an aggregate value that exceeds $10,000 at any time during the calendar year are required to file an FBAR on or before June 30 of the following year.[5] The FBAR is a separate form that is not attached to the income tax return, and an extension of a taxpayer's deadline for filing its income tax return does not extend the June 30 deadline for filing the FBAR. The FBAR must be filed even if the account generates no income.

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Since the FBAR filing obligation only applies to foreign financial accounts, the definition of this term is, of course, crucial. The FBAR instructions have long provided that the term "financial account" includes any bank, securities, securities derivatives or other financial instruments accounts, as well as any savings, demand, checking, deposit or time deposit account maintained with a financial institution or other person engaged in the business of a financial institution. The FBAR instructions have also long provided that the term generally includes "any accounts in which the assets are held in a commingled fund" if the account owner holds an equity interest in the fund. For the most part, this amorphous "commingled fund" language was ignored for a long time.

Penalties

A nonwillful violation is subject to a civil monetary penalty of up to $10,000. A willful failure to file the FBAR may result in both civil and criminal penalties. The civil penalty for willful violations is the greater of $100,000 or 50 percent of the balance in the account at the time of the violation (*i.e.,* the June 30 filing deadline).[6] Criminal violations of the FBAR rules can result in a fine of not more than $250,000, imprisonment for up to five years, or both.[7] If the failure to file an FBAR occurs while violating another U.S. law, or in connection with a pattern of illegal activity involving more than $100,000 over a 12-month period, the criminal penalty may be increased to a fine of up to $500,000, imprisonment for up to 10 years, or both.[8] Unsurprisingly, there is no reasonable cause exception for willful violations.[9] The civil penalty can be imposed even if a criminal penalty is imposed with respect to the same violation.[10]

October 2008 Revision to the FBAR

In October 2008, the Treasury revised the FBAR, which was previously of July 2000 vintage. The 2008 revision included, most notably, an expanded definition of who constitutes a "U.S. person" potentially required to file the FBAR.[11] The 2000 FBAR had defined a U.S. person to include only U.S. citizens, U.S. residents, domestic corporations, domestic partnerships, and domestic trusts or estates. The 2008 FBAR, however, expanded the definition to include "a citizen or resident of the United States, or a person in and doing business in the United States."[12] The new form also clarified the definition of "person" to include an individual, a corporation, a partnership, a trust or estate, an association or other unincorporated organization or group, and "all entities cognizable as legal personalities."[13]

The expansion of the FBAR filing requirement to foreign persons "in and doing business in the United States" came as a great surprise, since it had not previously occurred to foreign taxpayers, or their advisors, that they might be deemed U.S. for FBAR purposes. Further, there was great confusion as to the meaning of "in and doing business in" the U.S. for this purpose. For example, would certain safe harbors that are applicable for federal income tax purposes apply for FBAR purposes?[14] Furthermore, there was no definitive guidance as to the scope of the reporting necessary in such circumstances. For example, if a foreign corporation has 20 foreign accounts, but only one of them is used by the U.S. branch, would all 20 foreign accounts need to be reported? Or just the one used by the U.S. branch? What if the U.S. branch didn't use any foreign accounts? The 2008 FBAR answered none of these questions.

The 2008 FBAR also added, with little fanfare, a parenthetical to the "commingled fund" language, specifically identifying "mutual funds" as subject to FBAR reporting. Following the 2008 revision, the instructions provide that financial accounts "generally also encompass any accounts in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund (including mutual funds)."

Announcement 2009-51

On June 5, 2009, the IRS issued Announcement 2009-51.[15] Announcement 2009-51 acknowledged that the IRS "has received a number of questions and comments from the public concerning the new filing requirement that may require additional guidance[,]" and stated that, for purposes of the FBAR due June 30, 2009, with respect to 2008, the IRS was temporarily suspending the FBAR filing requirement for persons other than U.S. citizens, residents, and domestic entities. The announcement further provided that to "reduce the burden on the public with respect to FBARs due on June 30, 2009, all persons may rely on the definition of 'United States person' found in the instructions for the prior version of the FBAR (the July 2000 version) to determine whether they have an obligation to file an FBAR." As indicated above, the 2000 FBAR had defined a U.S. person to include only a citizen or resident of the United States, a domestic partnership, a domestic corporation, or a domestic estate or trust. Thus, Announcement 2009-51 restored

the old definition, but solely for purposes of 2008 FBARs due June 30, 2009.

Hedge Fund Hullabaloo: The Teleconference

In June 2000, less than three weeks to the filing deadline for 2008 FBARs, an IRS official publicly stated, in a now-infamous teleconference hosted by the American Bar Association and the American Institute of Certified Public Accountants, that the FBAR reference to "financial account" also includes interests in hedge funds "that function like mutual funds."[16]

Reports of this teleconference spread like wildfire, and thousands of hedge fund investors called their tax advisors in a panic. Many tax advisors believed that hedge fund interests *should not* be characterized as financial accounts, but nevertheless advised that the prudent course of action was to file, *e.g.,* due to the threat of a potential 50-percent penalty for being wrong.[17] In some instances, this then led to further handwringing about who needed to file with respect to each hedge fund interest.[18] For example, if a tax-exempt organization owns a hedge fund interest, and any officer of the organization has the legal authority to give instructions regarding such interest to the hedge fund, then it would appear that each officer has signature or other authority with respect to such "financial account." People were not happy.

On June 24, 2009, the IRS published the following FAQ on its public Web site in connection with guidance regarding an offshore voluntary disclosure initiative that was in effect from March 23, 2009, through October 15, 2009.[19]

> Q43. Re: Q&A 9 A taxpayer recently learned that they have an FBAR filing obligation but they do not have sufficient time to gather the information necessary to properly file the FBAR by the June 30, 2009 due date. How should the taxpayer proceed?
>
> A43. Taxpayers who reported and paid tax on all their 2008 taxable income but only recently learned of their FBAR filing obligation and have insufficient time to gather the necessary information to complete the FBAR, should file the delinquent FBAR report according to the instructions (send to Department of Treasury, Post Office Box 32621, Detroit, MI 48232-0621) and attach a statement explaining why the report is filed late. Send a copy of the delinquent FBAR, together with a copy of the 2008 tax return, by September 23, 2009, to the Philadelphia Offshore Identification Unit at the address in Q&A 9.
>
> In this situation, the IRS will not impose a penalty for the failure to file the FBAR.
>
> Additionally, if all 2008 taxable income with respect to a foreign financial account is timely reported and a United States person only recently learned they have a 2008 FBAR obligation and there is insufficient time to gather the necessary information to complete the FBAR, the United States person may follow the procedures set forth above and no penalty will be imposed.
>
> For 2008 tax returns due after September 23, 2009, the tax return does not need to accompany the 2008 FBAR.

Although more broadly applicable, this guidance was specifically intended to provide an extension for reporting with respect to foreign hedge funds. Thus, the agony for taxpayers with FBAR-related hedge fund issues was prolonged.

Notice 2009-62

On August 7, 2009, the IRS issued Notice 2009-62,[20] which was significantly more helpful. Pursuant to the notice, persons with "a financial interest in, or signature authority over, a foreign commingled fund" were granted until June 30, 2010, to file their FBARs for 2008 and all prior years.[21] Thus, for example, persons with interests in foreign hedge funds could rest easy—at least until June 30, 2010. The notice also provided broad relief for all persons with signature authority, but no financial interest in foreign financial accounts, granting such persons an extension until June 30, 2010, to file FBARs for 2008 and all prior years. The FBAR filing requirement for persons with signature authority was nothing new, but many taxpayers and their accountants were nevertheless oblivious of this requirement.

Announcement 2010-16

On February 26, 2010, the IRS issued Announcement 2010-16, supplementing and superseding Announcement 2009-51. The new announcement provides that the requirement to file an FBAR due on June 30, 2010, is "suspended for persons who are not United States

citizens, United States residents, or domestic entities. Additionally, all persons may rely on the definition of 'United States person' found in the July 2000 version of the FBAR instructions to determine if they have an FBAR filing obligation for the 2009 and earlier calendar years." The new announcement also reiterates that, under the instructions accompanying the 2000 FBAR, a U.S. person means "(1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust."

As intended, the new announcement relieves foreign persons who may have been considered "in and doing business" in the United States in 2009 from the obligation to file an FBAR for 2009 by June 30, 2010. Of course, the rules may change again for 2010 FBARs due June 30, 2011.

It is interesting, however, that Announcement 2010-16 goes so far as to restore the old definition of U.S. person from the 2000 FBAR.[22] This definition includes domestic partnerships and domestic corporations, but does not specifically reference limited liability companies ("LLCs"). If one chooses to apply tax definitions,[23] the reference to domestic "partnerships" can easily be read to cover domestic LLCs, but what about single-member domestic LLCs that are characterized as disregarded entities for federal tax purposes? Even under the old definition, the IRS considers such single-member LLCs to be U.S. persons with FBAR-filing obligations, but support for this position is elusive. A single-member LLC is not a partnership for federal tax purposes; and if we invoke our commercial, nontax lexicon, LLCs are neither partnerships nor corporations. Like it or not, an LLC is a different type of entity. Indeed, the New York State Bar Association has issued a report taking the position that even multi-member LLCs are not U.S. persons under the 2000 FBAR instructions.[24]

Although the IRS is understandably predisposed to always prefer more disclosure, losing out (for now) on single-member LLCs probably won't do all that much harm. If the sole member of the LLC is domestic, then the sole member will still be required to file an FBAR to report any foreign financial accounts of the LLC. Even if the sole member is foreign, a U.S. person that direct or indirectly owns a majority interest in the sole member would then be required to file. It may, of course, be that there is no such U.S. person, but in such cases, it doesn't seem that anyone is getting away with very much.

For example, suppose that a nonresident alien forms a single-member Delaware LLC as a vehicle for investing in non-U.S. real estate, because Delaware LLCs are a useful (and legal) means for achieving deferral in his home jurisdiction. In this scenario, no one should be required to file an FBAR, but since the only U.S. connection is the place of organization of the single-member LLC, the "failure" to file an FBAR in this instance does not seem particularly troubling.

Notice 2010-23

On February 26, 2010, the IRS issued Notice 2010-23, modifying and supplementing Notice 2009-62. The new notice contains three kinds of administrative relief. First, U.S. persons who had signature authority, but no financial interest in, a foreign financial account in 2009 or prior years are given a further a further extension until June 30, 2011, to file FBARs for such years. Second, the notice provides that, with respect to FBARs for 2009 and all prior years, the IRS will not interpret the term "commingled fund" to apply to funds other than mutual funds. The notice expressly points out that interests in foreign hedge funds and private equity funds are covered by such administrative relief. U.S. investors and their advisors are cautioned, however, that this may change in the future. Finally, the notice states that, if a taxpayer has no other reportable foreign financial accounts, a taxpayer that qualifies for the relief set forth in Notice 2010-23 "should" check the "no" box on such taxpayer's federal tax forms for 2009 and prior years, to indicate that the taxpayer has no financial interest in, or signature authority over, any foreign financial accounts.

It is interesting that the notice says "should" as opposed to "may." Perhaps the IRS is so focused on dealing with taxpayers with financial interests in foreign financial accounts that it does not wish to waste its time on taxpayers that merely have signature (or other) authority over such accounts. In any case, the IRS presumably cannot be too annoyed at taxpayers who, particularly in the current enforcement environment, are reluctant to deny having signature authority over foreign financial accounts when such denial would be incorrect.

FinCEN Notice of Proposed Rulemaking

On February 23, 2010, yet another development took place. FinCEN released a notice of proposed rulemaking (the "proposed rules") setting forth proposed changes

to the applicable regulations under Title 31 and to the FBAR instructions. These proposed changes would address many of the issues discussed above, including the definition of U.S. person, the definition of financial account, and relief from duplicative filing requirements.

U.S. Person

The proposed rules would update the definition of "U.S. person" as follows:

> FinCEN proposes to define a United States person as a citizen or resident of the United States, or an entity, including but not limited to a corporation, partnership, trust or limited liability company, 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. This definition applies to an entity regardless of whether an election has been made under 26 CFR 301.7701-3 or 301.7701.3 to disregard the entity for federal income tax purposes.[25]

Under the proposed definition, all domestic LLCs would be covered. A single-member LLC's status as a disregarded entity for federal tax purposes clearly would not prevent it from being considered a "person" subject to the FBAR filing requirement. Along similar lines, the proposed FBAR instructions would further provide that a domestic trust's status as a grantor trust will not prevent it from being required to file an FBAR if it is otherwise required to do so. It should be emphasized, however, that, at present, this expanded definition is only proposed. Thus, for example, a domestic LLC that has failed to file an FBAR may reasonably argue that it is not a U.S. person to which the filing obligation applies under the applicable definition from the 2000 FBAR instructions. This argument is also open to LLCs with more than one member, because, as indicated above, it is not clear that tax definitions apply and, therefore, not clear that such LLCs are "partnerships" within the meaning of such instructions.

In contrast with the 2008 FBAR instructions, however, the proposed definition would not cover foreign persons. Thus, the authors are hopeful that the uncertain standard of "in and doing business in the United States" will properly fade into oblivion. Curiously, the discussion in the proposed rules, which comments on a great many issues, says nothing on this point.

Financial Account

The proposed rules would clarify, and generally expand, the types of arrangements considered to be foreign financial accounts for FBAR purposes.

Mutual Funds, Hedge Funds, PE Funds, etc. The proposed rules would add definitions to 31 C.F.R. §103.24 to define the foreign financial accounts subject to reporting. Pursuant to 31 C.F. R. §103.24(a), the reporting obligation applies to any "bank, securities or other financial account" in a foreign country to the extent provided by the Secretary. The proposed rules would add 31 C.F.R. §103.24(c) to provide definitions of these terms including, in particular, "other financial account." Under proposed 31 C.F.R. §103.24(c), this term would include the following:

> (i) An account with a person that is in the business of accepting deposits as a financial agency;
>
> (ii) An account that is an insurance policy with a cash value or an annuity policy;
>
> (iii) An account with a person that 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; or
>
> (iv) … A mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions[.]

With respect to category (iv), and the great panic of 2009, it is noteworthy that hedge funds do not appear to be included. The proposed FBAR instructions similarly provide that a financial account includes "shares in a mutual fund or similar pooled fund (*i.e.,* a fund with a regular net asset value determination and redemptions)." Indeed, proposed 31 C.F.R. §103.24(c) reserves on the treatment of other investment funds, and the preamble to FinCEN's notice of proposed rulemaking (the "Preamble") states that "Treasury remains concerned about the use of, for example, hedge funds to evade taxes and FinCEN will continue to study this issue."[26] In this regard, note that most interests in offshore hedge funds will soon be subject to other disclosure requirements, since virtually any offshore hedge fund characterized as a corporation for U.S. federal tax purposes should be a passive foreign investment company (PFIC) within the meaning of Code Sec. 1297. Section 521 of the

Hiring Incentives to Restore Employment (HIRE) Act (the "HIRE Act") added Code Sec. 1298(f), which requires owners of PFIC stock to make annual reports including such information as the Secretary may require.[27]

A brief word of caution may nevertheless be warranted, however, since category (iv) refers to a "mutual fund or similar pooled fund" (not just a mutual fund) if it issues shares to the general public, a regular net asset value determination is made, and regular redemptions are available. Therefore, U.S. investors and their tax advisors may need to consider in certain circumstances whether a given investment is a "similar pooled fund" even if it is not a mutual fund.

The Preamble offers some helpful guidance in this regard.

> Mutual funds and similar pooled funds are offered to the general public and typically are identifiable by the ability of the account holder to redeem shares on a daily or otherwise regular basis. FinCEN believes these types of accounts present risks for money laundering.

Thus, in determining whether an investment is in a "similar pooled fund," it seems that one key consideration is the frequency with which redemptions are permitted. Presumably, quarterly or less frequent redemptions should not be an issue. Furthermore, it should be kept in mind that the shares must be "available to the general public," regardless of how frequently investors are able to redeem.

Insurance Policies and Annuities. Under proposed 31 C.F.R. §103.24(c), the definition of "other financial account" would include "An account that is an insurance policy with a cash value or an annuity policy[.]" The proposed FBAR instructions would similarly define a financial account to include "an insurance policy with a cash surrender value (such as a variable annuity or a whole life insurance policy) [or] an annuity." As explained in the Preamble, FinCEN is concerned that "life insurance policies with a cash surrender value are potential money laundering vehicles because cash value can be redeemed by a money launderer" and "annuity contracts pose a money laundering risk because they allow a money launderer to exchange illicit funds for an immediate or deferred income stream or to purchase a deferred annuity and obtain clean funds upon redemption." FinCEN's concerns are understandable, but it is somewhat difficult to view these arrangements as financial accounts under any commonsense definition of that term.

Exceptions for Duplicative Reporting

With very limited exceptions, *each* U.S. person with a direct or indirect financial interest in a foreign financial account, and *each* U.S. person with signature or other authority over such account, must disclose such account on an FBAR.[28] Thus, there is a huge problem with duplicative reporting requirements.

> In June 2000, less than three weeks to the filing deadline for 2008 FBARs, an IRS official publicly stated, in a now-infamous teleconference hosted by the American Bar Association and the American Institute of Certified Public Accountants, that the FBAR reference to "financial account" also includes interests in hedge funds "that function like mutual funds."

The FBAR instructions currently provide exceptions for (1) officers and employees of certain banks, and (2) officers and employees of certain domestic corporations (a) whose equity securities are listed on a national securities exchange, or (b) that have assets with a value exceeding $10 million and 500 or more shareholders of record.[29] In each case, the exception applies only where the officer or employee has signature or other authority over, but no financial interest in, the employer's account. The FBAR instructions also provide a consolidated reporting exception under which a corporation that directly or indirectly owns a majority interest on one or more lower-tier entities may file a consolidated report on behalf of itself and such lower-tier entities.

In all other circumstances, however, there is presently no relief whatsoever from duplicative reporting requirements. For example, suppose that a U.S. citizen owns a controlling interest in a limited partnership with numerous lower tiers of controlled limited partnerships, and that a sixth-tier limited partnership (in which the U.S. citizen indirectly holds a majority of profits and/or capital) has several foreign

accounts. In the absence of any exception, both the U.S. citizen and six tiers of limited partnerships are required to disclose such accounts on separate FBARs. Each person with signature authority would also need to file (although Notice 2010-23 would defer their filing obligations to June 30, 2011). The consolidated reporting exception does not apply, because the entity is a limited partnership, not a corporation.

The proposed rules would reduce such unnecessary redundancies, by expanding the consolidated reporting option. Under proposed 31 C.F.R. §103.24(g)(3), and the proposed FBAR instructions, any parent entity that is a U.S. person would be permitted to file a consolidated FBAR on behalf of each lower-tier entity in which it directly or indirectly owns a majority interest. The parent entity would not need to be a corporation. Thus, in the example above, the five lower-tier limited partnerships would not need to file. Nevertheless, the same foreign accounts would need to be disclosed by both the U.S. citizen and the upper-tier limited partnership. It is not clear why this (admittedly reduced) level of duplication would still be considered necessary.

The proposed rules would also provide relief for officers and employees of certain registered financial institutions, as well as officers and employees of any "Authorized Service Provider." To be more precise, the new exceptions would apply to an officer or employee that have signature or other authority over, but no financial interest in, a foreign financial account, if (1) the employer is a financial institution registered with and examined by the Securities and Exchange Commission (SEC) or Commodity Futures Trading Commission, and the account is owned or maintained by such financial institution, or (2) the employer is an "Authorized Service Provider" and the account is owned or maintained by an investment company that is registered with the SEC.[30] An Authorized Service Provider would be defined as an entity that is registered with and examined by the SEC and that provides services to an investment company registered under the Investment Company Act of 1940. As explained in the Preamble, the latter exception is designed to address the fact that mutual funds do not have employees of their own.

Other exceptions under the proposed rules would include participants in qualified retirement plans, owners and beneficiaries of IRAs, and certain beneficiaries of trusts that file their own FBARs to disclose their foreign accounts.

The Preamble also suggests that some relief is on the way for U.S. persons who work in foreign countries and have signature authority for their employer's accounts. "FinCEN anticipates that in the case of United States persons who are employed in a foreign country and who have signature or other authority over foreign financial accounts owned or maintained by their employer, the instructions to the FBAR form will prescribe a modified form of reporting for such persons." When and if the new rule is adopted, it may apply only where the employer is foreign, but this is not clear from the Preamble.

Financial Interest

The current FBAR instructions include "attribution" rules that deem a U.S. person to have a financial interest with respect to any foreign account in which the owner of record or holder of legal title is (1) a person acting as an "agent, nominee, attorney, or in some other capacity on behalf of" the U.S. person; (2) a corporation, if such U.S. person owns, directly or indirectly, stock possessing more than 50 percent of the total value or total voting power of all of the corporation stock; (3) a partnership, if such U.S. person possesses a greater-than-50-percent in the profits or capital of the partnership; and (4) a trust, if such U.S. person (a) has a "present beneficial interest," either directly or indirectly, in more than 50 percent of the trust assets, (b) receives more than 50 percent of the current income from the trust, or (c) established the trust, if the trust has a "protector" who is responsible for monitoring the activities of the trustee and has the authority to influence the trustee, replace the trustee, or recommend the replace the trustee.

The proposed rules would add two more items to the list. Under proposed 31 C.F.R. §103.24(e) and the proposed revision to the FBAR instructions, a U.S. person would also be deemed to have a financial interest in any account of which the owner of record or holder of legal title is: (1) any other entity (other than a trust) in which such U.S. person owns, directly or indirectly, "more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits" and (2) any trust if such U.S. person is the trust settlor and has an ownership interest in the trust under the grantor trust rules.

Interestingly, the proposed rules would also make minor changes to the language regarding agency and other similar arrangements. Under the current FBAR instructions, a U.S. person is considered to have an interest in any financial account held in the name of

a person acting as an "agent, nominee, attorney, or in some other capacity on behalf of" the U.S. person. The vague reference to "some other capacity on behalf of" might potentially be read quite broadly, e.g., to cover a situation in which the community property rules arguably give one spouse an interest of some kind in a foreign financial account held solely in the name of another spouse (who may, for example, be a nonresident alien not subject to FBAR filing requirements).[31]

Under the proposed revision to the FBAR instructions, the U.S. person would be deemed to have a financial interest in the account only if the account holder is an "agent, nominee, attorney, or a person authorized to act on behalf of" such U.S. person. The new language seems to indicate that there must be some purposive arrangement, and express authorization, on the part of the U.S. person. An interest that arguably arises involuntarily as a result of community property rules, or other external forces outside the control of the parties, would not seem to be covered. The Preamble does not discuss the new language, and it therefore seems likely that it was intended to clarify, rather than change, the existing rule. Furthermore, the language in proposed 31 C.F.R. §103.24(e)(2)(i) is substantially identical to the language in the current FBAR instructions. Presumably, FinCEN considers the two formulations to be consistent.

Endnotes

1. TD F 90-22.1 (Rev. Oct. 2008).
2. The Treasury's authority to require filing of the FBAR is found in 31 U.S.C. §5314 and 31 C.F.R. §103.24.
3. Notice 2010-23, IRB 2010-11, 441.
4. Announcement 2010-16, IRB 2010-11, 450.
5. The maximum account value is the largest amount of currency or non-monetary assets that appear on any account statement issued for the applicable year, or at any time during the year if periodic account statements are not issued. Foreign currency is converted by using the exchange rate at the end of the year, while stock, securities and other nonmonetary assets are valued at fair market value at end of year or at time of withdrawal.
6. 31 U.S.C. §5321(a)(5)(C). Prior to the 2004 JOBS Act, the penalty was the greater of $25,000 or the balance in the account at the time of violation, up to a maximum of $100,000 per violation.
7. 31 U.S.C. §5322(a); 31 C.F.R. §103.59(b).
8. 31 U.S.C. §5322(b); 31 C.F.R. §103.59(c).
9. 31 U.S.C. §5321(a)(5)(C)(ii).
10. 31 U.S.C. §5321(d).
11. For a more detailed discussion of the 2008 revisions to the FBAR, see Michael J. Miller, Anti-Deferral and Anti-Tax Avoidance, *The New FBAR is Here!* Int'l Tax J., Mar.–Apr. 2009, at 5.
12. The new form further stated that "[a] branch of a foreign entity doing business in the United States is required to file this report even if not separately incorporated under U.S. law."
13. This was accomplished through an incorporation, by reference, to 31 C.F.R. §103.11(z).
14. Section 864(b)(2) of the Internal Revenue Code of 1986, as amended (the "Code"), for example, provides that, if certain requirements are satisfied, a foreign person trading in securities or commodities will not be considered engaged in a trade or business within the United States, even if the trading activity constitutes a trade or business under U.S. tax principles and even if such trading activity is conducted entirely within the United States. Similarly, what about a foreign person that sells a United States real property interest but is not otherwise engaged in a trade or business within the United States under U.S. tax principles? Pursuant to Code Sec. 897(a), any gain or loss recognized by a foreign person upon such a sale is taxed under certain provisions of the Code *as if* the foreign person were engaged in a trade or business in the United States and as if such gain were "effectively connected" with such U.S. trade or business.
15. Announcement 2009-51, IRB 2009-25, 1105.
16. The 2008 FBAR had quietly added language treating foreign mutual funds as foreign financial accounts, but this was the first anyone had heard of such treatment being extended to hedge funds.
17. Even if the IRS ultimately prevailed on the technical issue of what constitutes a financial account, however, the uncertainty would seem to preclude a determination of that the failure to file was willful, and thus would seem to preclude imposition of the 50-percent penalty.
18. Some even wondered whether private equity funds could also be covered.
19. Internal Revenue Service, Voluntary Disclosure: Questions and Answers, available at *www.irs.gov/newsroom/article/0,,id=210027,00.html.*
20. Notice 2009-62, IRB 2009-35, 260.
21. Persons with interests in mutual funds would also appear to be covered by the notice. This seems appropriate, *e.g.,* since mutual fund interests do not intuitively "smell" like financial accounts and the parenthetical reference to mutual funds that was added to the 2008 FBAR instructions was not advertised and quite easy to miss, even by a person reading through the revised instructions looking for changes.
22. The same approach was also taken in Announcement 2009-51.
23. The authorizing statute is under Title 31, not the Code, so it is far from obvious that tax definitions are appropriate.
24. New York State Bar Association Tax Section, Report on the Rules Governing Reports on Transactions with Foreign Financial Agencies (FBARs) (Oct. 30, 2009).
25. This definition would be reflected in 31 C.F.R. §103.24 (which does not currently include a definition) as well as the FBAR instructions.
26. Footnote omitted.
27. P.L. 111-147. Prior Code §1298(f) was redesignated as Code Sec. 1298(g).
28. As indicated above, however, persons with signature authority but no financial accounts are not required to disclose such accounts until June 30, 2011, pursuant to the relief granted under Notice 2010-23.
29. In the case of category (2) above, officers or employees of certain subsidiaries of the above-described corporations may also qualify.
30. Proposed 31 C.F.R. §103.24(f)(2)(ii) and (iii).
31. When both taxpayers are U.S. citizens, the community income of one spouse is automatically treated as half earned by the other spouse, unless the special rules in Code Sec. 66(a) apply for certain spouses who do not live together. When one or both spouses is a nonresident alien individual, however, Code Sec. 879(a) overrides the community property rules for certain earned income and business income, but investment income is still split between the spouses under applicable community property laws.

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