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Tax

April 2011

US Treasury Issues Final FBAR Regulations

I. Introduction

The Financial Crimes Enforcement Network ("FinCEN"), a bureau of the United States Department of the Treasury (the "Treasury"), recently amended the regulations requiring certain United States persons to file reports of foreign financial accounts on Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (the "FBAR"). The new regulations are effective as of March 28, 2011 and apply to FBARs that are required to be filed by June 30, 2011 with respect to (i) foreign financial accounts maintained in calendar year 2010 for which a person has a financial interest in, or signature or other authority over, such accounts and (ii) foreign financial accounts maintained in calendar year 2009 and prior calendar years for which a person has signature or other authority over (but no financial interest in) such accounts.

The FBAR form and its instructions were recently amended to reflect the changes made in the new regulations. This Alert provides a brief summary of the new regulations and the revised FBAR form, including a description of (i) persons considered to have a "financial interest" in a foreign financial account; (ii) individuals with "signature or other authority" over (but no financial interest in) financial accounts; and (iii) revisions to the definition of "foreign financial account."

II. Background

Under requirements imposed by the Bank Secrecy Act of 1970 and the corresponding regulations, the Treasury requires each US person having (i) a financial interest in, or (ii) signature or other authority over, a bank, securities, or other financial account in a foreign country in which the aggregate value of such account exceeds US$10,000 at any time during the calendar year to report such account to the Internal Revenue Service (the "IRS") by filing the FBAR for each year in which such account is maintained (or, in the case of a person with no financial interest in such an account, for each year in which such person has signature or other authority over such account). A US person includes (i) a citizen of the United States; (ii) a resident of the United States; (iii) an entity, including but not limited to, a corporation, partnership, or limited liability company created, organized or formed under the laws of the United States; and (iv) a trust or estate formed under the laws of the United States.

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A civil penalty for the non-willful failure to properly file the FBAR may be imposed in an amount up to US$10,000. A willful failure to report an account or account indentifying information may be subject to a civil monetary penalty equal to the greater of US$100,000 or 50 percent of the balance in the account at the time of a failure to file a complete and accurate FBAR form. Criminal penalties may also apply. Although the regulations do not provide for an extension of time to file the FBAR, FinCEN has indicated that it is in the process of modernizing its IT systems and intends to provide the ability to file FBARs electronically.

III. Persons With a "Financial Interest" in a Foreign Financial Account

A US person has a "financial interest" in a bank, securities or other foreign financial account (as defined below) for which such person is the owner of record or has legal title (whether the account is maintained for such person's benefit or the benefit of others). Furthermore, a US person has a financial interest in a foreign financial account if the owner of record or legal title of such account is: (i) a person acting as an agent, nominee, attorney or in some other capacity on behalf of the US person with respect to such account; (ii) a corporation in which the US person owns, directly or indirectly, more than 50% of the voting power or total value of the shares; (iii) a partnership in which the US person owns, directly or indirectly, more than 50% of the interest in profits or capital; (iv) any other entity in which the US person owns, directly or indirectly, more than 50% of the voting power, total value of the equity interest or assets, or profits interest; or (v) a trust (a) in which such person is the trust grantor and has an ownership interest for US tax purposes, or (b) in which such person has a present beneficial interest in more than 50% of the assets or from which such person receives more than 50% of the current income.

IV. Individuals With Only "Signature or Other Authority" in a Foreign Financial Account

Definition of "signature or other authority." A US person who does not have a financial interest in a foreign account is required to file the FBAR if such person has "signature or other authority" over such account. Treasury has recently revised the definition of "signature or other authority" to mean 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 (whether in writing or otherwise) to the bank or other financial institution with which the financial account is maintained.

The test for determining whether an individual has signature or other authority over an account is whether the foreign financial institution would act upon a direct communication from that individual regarding the disposition of assets in that account. In the recent guidance, FinCEN provides that an individual does not have "signature or other authority" if such individual (i) participates in the decision to allocate assets or (ii) has the ability to instruct or supervise others with signature authority over a reportable account, if in either case such individual does *not* have the ability to directly communicate instructions to the bank or other financial institution with respect to the disposition of assets in the account. Although the definition of "signature or other authority" includes the authority of an individual to act "alone or in conjunction with another," the FinCEN guidance clarifies that the reference to "in conjunction with another" is intended to address situations in which a bank or other financial institution requires a direct communication from more than one individual regarding the disposition of assets in the account.

Exceptions for Officers/Employees. The new regulations provide that officers or employees of the following entities are not required to report signature or other authority over the accounts of such entities if the officers or employees do not have a financial interest in such accounts: (i) certain regulated financial institutions, including banks that are examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Administration, and financial institutions that are registered with and examined by the Securities and Exchange Commission or the Commodity Futures Trading Commission; (ii) entities that have a class of equity securities listed on a US national securities exchange; (iii) a US subsidiary entity, if its US parent entity has a class of equity securities listed on any US national securities exchange and the subsidiary is included in a consolidated FBAR report; and (iv) entities that have a class of equity securities registered, or American depository receipts in respect of equity securities registered, under the Securities Exchange Act. In addition, officers or employees who are required to file the FBAR because they hold signature or other authority over the foreign financial accounts of their employer are not required personally to maintain the records of these accounts (as is generally required by the FBAR rules).

Information Reporting. The revised FBAR form requires each US person with signature or other authority over (but no financial interest in) a reportable account to list his or her name, address, and taxpayer identification number, as well as the maximum value of the account during the calendar year reported, the type of account, and the name of the financial institution in which the account is held, in addition to reporting information about those persons with a financial interest in the account (including the account number, and the name, address and taxpayer identification number of the account owner).

25 or More Accounts. The new regulations provide that a US person having signature or other authority over, but no financial interest in, 25 or more foreign financial accounts need only provide the total number of financial accounts and certain other basic information on the report. Such person is required to provide detailed information concerning each account (the maximum value of the account during the calendar year reported, the type of account, the name of the financial institution in which the account is held, the account number, and the name, address and taxpayer identification number of the account owner) when so requested by the IRS. This is the same rule that has applied to a US person having a financial interest in 25 or more foreign financial accounts.

V. Revised Definition of "Foreign Financial Account"

Definition of "Financial Account." The new regulations clarify the types of financial accounts that are "reportable accounts" for purposes of the FBAR. A financial account for FBAR purposes includes, but is not limited to, a securities, brokerage, savings, demand, checking, deposit, time deposit (such as a certificate of deposit) or other account maintained with a financial institution. In addition, a financial account specifically includes a commodity futures or options account, an insurance policy with a cash value, an annuity policy with a cash value, and shares in a mutual fund or similar pooled fund. Under the new regulations, a "securities account" is an account maintained with a person in the business of buying, selling, holding, or trading stock or other securities. A "mutual fund or similar pooled fund" means a fund that is available to the general public with a regular net asset value determination and regular redemptions.

Definition of "Foreign." The new regulations clarify when an account is deemed "foreign" for purposes of triggering the FBAR filing requirement and how custodial accounts are treated in this context. Generally, an account is not a foreign account for FBAR purposes if the account is maintained with a financial institution that is located within the United States, even if the account may contain certain holdings or assets of foreign entities. For certain custodial arrangements, the FBAR filing requirements of a US person who may have a financial interest in the account will depend on whether the US person has direct access to assets maintained in a foreign institution. When a US bank acts as global custodian and holds a US person's assets outside the United States in an omnibus account in the bank's name, the US person would not be required to file an FBAR with respect to the assets held in this omnibus account because the US person generally cannot directly access these assets and instead must access the value in the account through the global custodian. If, however, a US person can directly access the foreign holdings maintained at the foreign institution, then the US Person would be deemed to hold a financial interest in a foreign financial account and may be subject to FBAR filing requirements.

VI. Exceptions for Certain Accounts

The revised regulations provide that US persons with a financial interest in, or signature or other authority over, certain accounts are exempt from FBAR reporting. These "exempt accounts" include:

- **Hedge Funds & Private Equity Funds:** The preamble to the regulations provides that the definition of financial account currently does *not* include hedge funds or private equity funds if such funds are not mutual funds or similar pooled funds in which the shares of the equity are offered to the general public; however, FinCEN has specifically reserved the treatment of these types of funds and may provide rules with respect to these funds in the future.
- **Pension Plans:** A participant in or beneficiary of qualified pension, profit-sharing and stock bonus plans (under section 401(a) of the Internal Revenue Code of 1986, as amended) and qualified annuity plans (under sections 403(a) and 403(b) of the Internal Revenue Code of 1986, as amended) are not required to file an FBAR with respect to a foreign financial account held by or on behalf of such plan.
- **IRAs:** Owners and beneficiaries of individual retirement accounts ("IRAs") and Roth IRAs are not required to file an FBAR with respect to a foreign financial account held by or on behalf of the IRA.
- **Correspondent/Nostro Accounts:** Correspondent or nostro accounts, which are maintained by banks and used solely for bank-to-bank settlements, are not required to be reported.
- **Accounts of Governmental Entities:** A foreign financial account of any governmental entity of the United States, including a government pension plan, is not required to be reported by any person.

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