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Final Rule Regarding Foreign Bank Account Filing Requirements Released

On February 23, 2011, the Financial Crimes Enforcement Network (FinCEN) of the U.S. Treasury Department ("Treasury") issued the final rule (the "Final Rule") to amend regulations regarding the Report of Foreign Bank and Financial Accounts (FBAR). The Final Rule comes one year after FinCEN issued a Notice of Proposed Rulemaking (NPRM) implementing regulations regarding the FBAR filing obligations. The Final Rule specifies the types of accounts that are reportable on the FBAR and the persons that are required to file the FBAR, and provides filing relief in the form of exceptions in certain circumstances.

The FBAR form, TDF 90-221.1, is used to report a U.S. person's financial interest in, or signature or other authority over, one or more financial accounts in foreign countries. No report is required if the aggregate value of the accounts does not exceed \$10,000 in any year. The comments FinCEN received sought broader exemptions from reporting than had been provided in the NPRM and requested clarification about the FBAR filing obligations generally. In response to these comments, the Final Rule:

- clarifies that U.S. accounts that contain holdings or assets of foreign entities doesn't render the account foreign for FBAR purposes and addresses the treatment of certain omnibus accounts maintained by a U.S. bank global custodian;
- revises the definition of signature or other authority to more clearly apply to individuals who have the authority to control the disposition of assets in the account by direct communication to the foreign financial institution;
- clarifies that officers or employees who file an FBAR because of signature or other authority over the foreign financial account of their employers are not expected to personally maintain the records of the foreign financial accounts of their employers;
- clarifies that a financial interest in a trust relates to a "present beneficial interest" in more than 50 percent of the trust's assets or receipt of more than 50 percent of the trust's current income, and thus excludes U.S. persons with a discretionary interest or a remainder interest from reporting in most situations;
- clarifies the definition of "other financial account" with respect to life insurance and annuities to reflect clearly that only those life insurance and annuity policies with a cash value are covered under this definition;
- clarifies that filers may rely on the Final Rule provisions to determine their filing obligations where filing was properly deferred under previous IRS Notices; and
- confirms that a U.S. person can rely on bona fide periodic statements prepared in the ordinary course of business to determine the value in the account required to be reported.

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Some of the key provisions regarding which persons are required to file an FBAR and which accounts are reportable include:

United States person: A U.S. person is defined as a citizen or resident of the United States or a domestic entity (including but not limited to a corporation, partnership, trust or limited liability company, regardless of whether the entity has made an election to be disregarded for federal income tax purposes) that is 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 “resident” is essentially the same as under the Internal Revenue Code (e.g., a lawful permanent resident, or an individual who meets the 183-day substantial presence test, with certain exceptions). Importantly, the Final Rule eliminates the need for foreign persons “in and doing business in” the United States to file an FBAR, which was previously required under the prior rules.

Types of reportable accounts: Generally, a reportable account is one in which a U.S. person has a formal relationship with a foreign financial institution to provide regular services, dealings or other transactions, even if the relationship is for a short period of time. A reportable account is not established by simply using a foreign financial institution to wire money or purchase a money order. The Final Rule retains as reportable accounts: (1) foreign issued insurance or annuity policies with a cash value and (2) foreign mutual funds and similar pooled funds offered to the general public with a regular net asset value determination and regular redemptions. In addition, for the present time, FinCEN continues to reserve judgment on the treatment of interests in offshore private investment vehicles, such as hedge funds and private equity funds, that do not concurrently constitute reportable financial accounts.

Financial interest: A financial interest in a bank, securities or other financial account includes an interest owned by a U.S. person who (1) is the owner of record or holder of legal title; (2) names an agent, nominee or attorney to act on his/her/its behalf; (3) beneficially owns more than 50 percent of vote or value of a corporation or a partnership; (4) is the trust grantor and has an ownership interest in the trust for U.S. federal tax purposes; or (5) has a present beneficial interest in more than 50 percent of trust assets or receives more than 50 percent of the trust’s current income.

Signature or other authority: Signature or other authority means 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 person with whom the financial account is maintained. The relevant test is whether the foreign financial institution will act upon a direct communication from that individual regarding the disposition of assets in that account. Signature or other authority does not exist if an individual merely participates in a decision to allocate assets or has the ability to instruct or supervise others with signature or other authority over a reportable account.

Special Rules for a U.S. person having a financial interest or signature or other authority in 25 or more foreign financial accounts: A U.S. person is only required to provide the number of financial accounts and certain other basic information, including the financial interest holder (if not the person reporting), on the FBAR, but will be required to provide detailed information concerning each account when so requested by the IRS.

Special Rule for Consolidated Reporting: An entity that is a U.S. person and that owns directly or indirectly more than a 50 percent interest in one or more other entities required to file an FBAR is permitted to file a consolidated report on behalf of itself and such other entities.

A more detailed International Tax Advisory on the new FBAR Final Rule is available upon request.

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