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IRS And FinCEN Revise FBAR Filing Requirements

The Internal Revenue Service (IRS) issued Notice 2010-23 and Announcement 2010-16 (collectively, the “IRS Guidance”) regarding Form TD F 90-22.1, Report of Foreign Bank And Financial Accounts (the FBAR) on February 26, 2010. Notice 2010-23 provides administrative relief to taxpayers who would otherwise be required to file the FBAR by June 30, 2010. Announcement 2010-16 suspends the FBAR filing requirement for persons who are not U.S. citizens, U.S. residents, or domestic entities. The Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of the Treasury, contemporaneously issued proposed regulations regarding FBAR filing requirements (the “Proposed Regulations”). This alert discusses the IRS Guidance and the Proposed Regulations.

Background

Currently, an FBAR form must be filed by a “United States person” who has any “financial interest” in, or “signature or other authority” over, any “foreign financial account” with an aggregate value exceeding \$10,000 at any time during the calendar year. In October 2008, the IRS revised the FBAR and accompanying instructions, which created uncertainty regarding who is required to file an FBAR. The instructions provide that a foreign financial account includes any accounts in which the assets are held in a fund, and the account holder holds an equity interest in the fund (including mutual funds). There has been uncertainty as to whether investors that hold equity interests in offshore hedge funds and private equity funds must file FBARs. There has also been uncertainty as to whether officers and employees of such investors must file FBARs. In Notice 2009-62, the IRS extended the filing deadline to June 30, 2010 with respect to FBARs due for 2008 and earlier calendar years for those persons who were previously unaware of their FBAR filing requirements and were either (1) persons with signature or other authority, but no financial interest in, a foreign financial account or (2) persons with financial interests in, or signature authority over, a foreign commingled fund. The IRS granted this extension in order for the IRS and FinCEN to have time to develop FBAR guidance.

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IRS Guidance

The IRS Guidance applies with respect to FBARs for calendar years 2009 and earlier.

Commingled Funds

Notice 2010-23 provides that unless another FBAR exception applies, persons with a financial interest in, or signature authority over, a foreign commingled fund that is a mutual fund are required to file an FBAR. The IRS stated that it will not define a “commingled fund” to include a foreign hedge fund, private equity fund, or any other fund that is not a mutual fund for calendar years prior to 2010. Therefore, persons with a financial interest in, or signature authority over, foreign hedge funds, private equity funds, or any other fund that is not a mutual fund are relieved of the FBAR filing requirement for calendar years prior to 2010.

Signature Authority

Notice 2010-23 extends the filing deadline to June 30, 2011 for persons with signature authority over, but no financial interest in, a foreign financial account for which an FBAR would otherwise have been due on June 30, 2010. Therefore, persons that had signature authority over, but no financial interest in, a foreign financial account for the 2010 and prior calendar years may file an FBAR on or before June 30, 2011.

United States Person

Announcement 2010-16 provides that for purposes of filing FBARs for calendar years prior to 2010, the term “United States 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. Additionally, the announcement suspended the requirement to file an FBAR due on June 30, 2010 for persons that are not United States citizens, United States residents, or domestic entities.

The Proposed Regulations

The Proposed Regulations are in proposed form and have yet to be finalized. FinCEN is currently accepting written comments on the Proposed Regulations until April 27, 2010. The Proposed Regulations would:

- (1) clarify who is required to file the FBAR;
- (2) clarify what types of accounts are reportable accounts subject to the FBAR filing obligation;
- (3) exempt certain persons with signature or other authority from filing the FBAR;
- (4) include provisions intended to prevent United States persons that are required to file the FBAR from avoiding their reporting requirement.



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United States Persons

The Proposed Regulations define a United States person as (1) a citizen of the United States, (2) a resident of the United States as determined under section 7701(b) of the Internal Revenue Code and the regulations thereunder using the definition of “United States” provided in 31 CFR 103.11(nn) and (3) 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 regardless of whether an election has been made to disregard the entity for U.S. federal income tax purposes.

In contrast to the IRS’s October 2008 amendments to the FBAR instructions, FinCEN’s definition of “United States person” does not include a person “in and doing business in the United States.” Therefore, a non-United States person doing business in the United States would not be subject to an FBAR filing obligation. Such definition would effectively exempt any non-United States person that is an investor in an offshore fund from an FBAR filing requirement.

Reportable Accounts

The Proposed Regulations define reportable accounts as including bank, securities, and other financial accounts. A “bank account” is defined as “a savings deposit, demand deposit, checking, or any other account maintained with a person engaged in the business of banking” and includes “certificates of deposit.” A “securities account” is defined as “an account maintained with a person in the business of buying, selling, holding, or trading stock or other securities.” Additionally, the term “other financial account” includes only “(1) an account with a person that is in the business of accepting deposits as a financial agency; (2) an account that is an insurance policy with a cash value or an annuity policy; (3) 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 (4) an account with a mutual fund or similar pooled fund which issues shares available to the general public that have a regular net value determination and regular redemptions.”

The Proposed Regulations reserve on the treatment of private equity fund, venture capital fund, and hedge funds as foreign financial accounts. The preamble to the Proposed Regulations provides that FinCEN is aware of pending legislative proposals that would apply additional regulation and oversight over these funds, and therefore the Proposed Regulations reserve on whether funds will constitute reportable accounts. It appears likely that this reference is to the so-called “FAT CAT” proposed legislation, which would generally impose an FBAR-like filing requirement on investors who hold interests worth an aggregate \$50,000 in offshore funds. It therefore remains to be seen whether fund investors will be subject to an FBAR filing requirement if Congress does not enact the FAT CAT proposed legislation.



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Financial Interests

A United States person has a financial interest in each bank, securities, or other financial account in a foreign country if such person:

- (1) is an owner of record or holds legal title regardless of whether the account is maintained for his own benefit or for the benefit of others;
- (2) owns directly or indirectly more than 50% of the interest in a corporation, partnership, or any other entity (other than a trust) that is the owner of record or holder of legal title for such foreign financial account;
- (3) is the settlor of a trust that is the owner of record or holder of legal title for such foreign financial account, if such person has an ownership interest in the account for U.S. federal income tax purposes;
- (4) has a beneficial interest in more than 50% of the assets of or receives more than 50% of the current income from a trust that is the owner of record or holder of legal title for such foreign financial account;
- (5) has established a trust for which such person has appointed a trust protector and such trust is the owner of record or holder of legal title for such foreign financial account; or
- (6) causes an entity to be created for a purpose of evading the reporting requirement and such entity is the owner of record or holder of legal title for such foreign financial account.

Additionally, FinCEN states that the definition of financial interest includes instances where a United States person's ownership or control over the owner of record or holder of legal title rises to such a level that the person should be deemed to have a financial interest in the account. This would give FinCEN broad discretion to ensure that the financial interests of United States persons are reported on the FBAR.

Signature or Other Authority

The Proposed Regulations define "signature or other authority" as authority of an individual to control the disposition of money, funds, or other assets held in a financial account. The authority must be exercised by communication of instructions directly to the person with whom the financial account is maintained. Authority can exist even if it must be exercised in conjunction with another person.

FinCEN also proposed the following exceptions for United States persons with signature or other authority over, but no financial interest in a reportable account:

- (1) an officer or employee of a bank that is examined by certain federal banking agencies need not report that he has signature or other authority over a foreign financial account owned or maintained by the bank;
- (2) an officer or employee of a financial institution, such as a securities broker-dealer or futures commission merchant, that is registered with and examined by the Securities and Exchange Commission (SEC) or Commodity Futures Trading Commission need not report that he has



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signature or other authority over a foreign financial account owned or maintained by such financial institution;

- (3) an officer or employee of 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 need not report that he has signature or other authority over a foreign financial account owned or maintained by the investment company that is registered with the SEC;
- (4) an officer or employee of a domestic or foreign entity with a class of equity securities listed on any United States national securities exchange need not report that he has signature or other authority over a foreign financial account of such entity;
- (5) an officer or employee of a United States subsidiary of a domestic or foreign entity with a class of equity securities listed on any United States national securities exchange need not file a report concerning signature or other authority over a foreign financial account of the subsidiary if the United States subsidiary is named in the consolidated FBAR report of the parent; or
- (6) an officer or employee of a United States corporation that has a class of equity securities registered under section 12(g) of the Securities Exchange Act need not report that he has signature or other authority over the foreign financial account of such corporation.

Absent from this list of exceptions are officers and employees of tax-exempt pension plans. Therefore, under the Proposed Regulations such persons would be obligated to file FBARs with respect to foreign financial accounts held by their employers if such persons possess signature authority over such accounts.

Special Rules

The Proposed Regulations also include the following special rules to simplify FBAR filings:

- (1) a United States person having a financial interest in, or signature or other authority over, 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate;
- (2) an entity that is a United States person and owns directly or indirectly more than 50% interest in an entity required to file an FBAR will be permitted to file a consolidated report on behalf of itself and such other entity;
- (3) participants and beneficiaries in retirement plans under IRC §§ 401(a), 403(a) or 403(b) as well as owners and beneficiaries of individual retirement accounts under IRC § 408 or Roth IRAs under IRC § 408A will not be required to file an FBAR with respect to a foreign financial account held by or on behalf of the retirement plan or IRA; and
- (4) a beneficiary of a trust that has a beneficial interest in more than 50% of the assets of such trust or receives more than 50% of the income of such trust is not required to report the trust's foreign financial accounts if the trust, trustee of the trust, or agent of the trust is a United States person that files an FBAR disclosing the trust's foreign financial accounts.



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Additionally, FinCEN expects that the instructions to the FBAR will prescribe a modified form of reporting for 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.

Notice 2010-23, Announcement 2010-16 and the Proposed Regulations can be found at these links:

- Notice 2010-23: www.irs.gov/pub/irs-drop/n-10-23.pdf
- Announcement 2010-16: www.irs.gov/pub/irs-drop/a-10-16.pdf
- FinCEN Proposed Regulations: http://www.fincen.gov/news_room/nr/html/20100226.html

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