

### What Are the Consequences of the New FBAR Guidance for Exempt Organizations?

March 2, 2010

The Financial Crimes Enforcement Network (FinCEN) of the U.S. Treasury Department issued a Notice of Proposed Rulemaking (RIN 1506-AB08) on February 23 regarding the requirements for certain U.S. persons to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR).

On February 26, the IRS issued Announcement 2010-16 and Notice 2010-23, which temporarily suspend, for persons that are not U.S. citizens, U.S. residents, or domestic entities the requirement to file FBARs, and provide FBAR filing relief for some persons with signature authority and that own commingled funds, respectively.

Generally, any U.S. person or entity that at any time during a calendar year had a financial interest in, or signature or other authority over, financial accounts located in a foreign country with an aggregate value in excess of \$10,000 is required to file an FBAR. The filing deadline for FBARs for each year is June 30 of the following year.

Certain persons with signature or other authority over foreign financial accounts (but no financial interest in an account) and those persons owning interests in offshore entities such as hedge funds and private equity funds were granted an extension for filing FBARs for 2008 and prior years until June 30, 2010. See Notice 2009-62, 2009-35 IRB 260 (August 7, 2009). These proposed FinCEN rules provide insight into how these filings are proposed to be treated.

The proposed FinCEN rules would clarify which persons will be required to file FBARs and which accounts will be reportable. In addition, the proposed FinCEN rules would exempt certain persons with signature or other authority over foreign financial accounts from FBAR filings.

It should be kept in mind that these rules set forth by FinCEN in RIN 1506-AB08 are proposed and need to go through the requisite comment and consideration period prior to becoming effective.

#### I. Consequences for Tax-Exempt Organizations

**A. No special treatment.** The proposed FinCEN rules and the IRS Guidance do not provide any special treatment to tax-exempt organizations. They are subject to the same rules as other U.S. persons that hold “foreign financial accounts” (see revised definition below). Most tax-exempt organizations will come within the definition of a U.S. person, as defined below.

**B. Direct holding of foreign financial accounts.** If a tax-exempt organization holds a direct interest in a foreign financial account (for example, a foreign bank account), then it will be required to file an FBAR for the foreign financial account.

**C. Direct holding of an interest in a foreign hedge fund, venture capital fund, or private equity fund.** If a tax-exempt organization holds only an interest in one of these types of foreign investment entities, the FinCEN rules do not currently impose an FBAR requirement, but reserve the right to do so in the future. The IRS guidance is consistent with this current exemption and provides a retroactive exemption for 2009 and all prior years.

**D. Holding of an interest in a foreign hedge fund, venture capital fund or private equity fund through a “blocker corporation.”** If a tax-exempt organization holds an interest in one of these types of foreign investment entities through its 100%-owned domestic or foreign blocker corporation, it should not have an FBAR filing requirement, unless the blocker corporation has a foreign financial account (for example, a foreign bank account used to make investments and receive distributions or possibly some other type of securities account). There would be no FBAR filing requirement under the FinCEN rules if the tax-exempt organization owns less than 50% of the shares (or voting power) of the blocker corporation.

**E. Officers and employees of the tax-exempt organization that has an FBAR filing requirement.** The IRS guidance provides an extension until June 30, 2011 for reporting of any person with signature authority, but no financial interest, for the 2010 and prior calendar years. This would, therefore, provide an extension to officers and employees who had signature authority where the tax-exempt organization had an FBAR filing requirement. These persons are permitted to check “no” on Schedule B of their IRS Form 1040.

**F. Government pension plans.** Proposed revised instructions to the FBAR form provide a specific exemption from the filing requirements.

## **II. General Summary of Changes in FinCEN Regulations and IRS Guidance**

### **A. Revised Definition of United States Person**

1. The revised definition of “United States person” would include 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. Entities disregarded for federal income tax purposes would also be required to file an FBAR.

### **B. Revised Definitions for Financial Accounts**

The focus of the rules is on the establishment of a financial relationship with a foreign financial agency where the agency provides regular services, dealings, and other financial transactions.

1. **Bank account** means a savings deposit, demand deposit, checking, or any other account maintained with a person engaged in the business of banking.

2. **Securities account** means an account maintained with a person in the business of buying, selling, holding, or trading stock or other securities.

3. **Other financial account** means (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 of 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) an account with a mutual fund or similar pooled fund that issues shares available to the general public that have a regular net asset value determination and regular redemptions.

### **C. Revised Definitions of Financial Interest**

1. **Financial interest** means an interest in each bank, securities, or other financial account in a foreign country for which the U.S. person is the owner of record or holds legal title regardless of whether the account is maintained for his or her own benefit or for the benefit of others. A financial interest also exists in a bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is a person acting on behalf of that U.S. person such as an attorney, agent, or nominee with respect to the account.

2. **Clarification of 50% look-through rule.** A U.S. person is deemed to have a financial interest in a bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is:

- A corporation in which the U.S. person owns directly or indirectly more than 50% of the voting power or the total value of the share, a partnership in which the U.S. person owns directly or indirectly more than 50% of the interests in the profits or capital or any other entity (other than a trust) in which the U.S. person owns directly or indirectly more than 50% of the voting power, total value of the equity interest or assets, or interest in profits.
- A grantor trust
- A trust where the U.S. person either has 50% of the beneficial interest in the assets or receives more than 50% of the current income
- A certain type of trust protector arrangement
- Under broad anti-abuse rules, an entity that is formed for the purpose of evading the FBAR filing requirements

### **D. Revised Exceptions to Signature or Other Authority**

Generally, signature authority or other authority over a bank, securities, or other financial accounts in a foreign country 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 delivery of instructions (whether communicated in writing or otherwise) directly to the person with whom the financial account is maintained. The apparent intention is to provide an exception to officers and employees of financial institutions that have a “federal functional regulator” and certain entities that are publicly traded on a U.S. exchange or that are otherwise required to register their equity with the SEC.

- The exclusions expand on the existing exclusion of bank employees (which now do not need to receive any notice that the bank has filed an FBAR).

- The exclusions now cover officers or employees of securities broker-dealers or futures commission merchants that are registered with the U.S. Securities and Exchange Commission (SEC) and the U.S. Commodity Futures Trading Commission (CFTC), and no notification is required that an FBAR has been filed by their employers.
- The exclusion is extended to officers or employees of investment advisers to entities that are examined by or registered with the SEC.
- The exclusion is extended to officers and employees of an entity that is publicly traded on a U.S. exchange, whether the entity is domestic or foreign.
- The exclusion is extended to officers and employees of corporations that have more than \$10 million in assets or more than 500 shareholders and are required to register with the SEC under Section 12(g) of the Securities Exchange Act (also deleting previous requirement of notice to employee).

#### **E. Rules regarding simplification of FBAR Filings**

1. **Direct holding of 25 or more foreign financial accounts.** A U.S. person having a financial interest in 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the report, but is required to provide further detail upon request.

2. **Signature authority over 25 or more foreign financial accounts.** A person having 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 on request.

3. **Consolidated reports.** An entity that is a U.S. 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.

4. **Participants and beneficiaries in certain retirement plans.** No FBAR is required for participants and beneficiaries in 401(a), 403(a), or 403(b) plans, as well as regular or Roth IRAs.

5. **Certain trust beneficiaries.** If the trustee of the trust or agent of the trust is a U.S. person and files an FBAR and certain other information, then the beneficiaries of certain trusts are not required to file.

#### **F. Announcement 2010-16**

On February 26, the IRS issued Announcement 2010-16, which provides that the requirement to file an FBAR due on June 30, 2010, is suspended for persons who are not U.S. citizens, U.S. residents, or domestic entities. Affected 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.

## G. Notice 2010-23

On February 26, the IRS issued Notice 2010-23, which provides administrative relief to certain persons who may be required to file an FBAR for calendar year 2009 and earlier calendar years. As noted above, the IRS in Notice 2009-62 extended the filing deadline for (i) persons with no financial interest in a foreign financial account but with signature or other authority over that account (hereinafter referred to as “signature authority”) and (ii) persons with a financial interest in, or signature authority over, a foreign financial account in which the assets are held in a commingled fund (hereinafter referred to as “foreign commingled funds”).

Notice 2010-23 provides administrative relief in the following areas:

- **Signature Authority.** 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, now have until June 30, 2011 to report those foreign financial accounts. The deadline of June 30, 2011, applies to FBARs reporting foreign financial accounts for which the person has signature authority, but no financial interest, for the 2010 and prior calendar years.
- **Certain Foreign Commingled Funds.** Persons with a financial interest in, or signature authority over, a foreign commingled fund that is a foreign mutual fund are required to file an FBAR unless another filing exception, as provided in the FBAR instructions or other relevant guidance, applies. The IRS will not interpret the term “commingled fund” as applying to funds other than foreign mutual funds with respect to FBARs for calendar year 2009 and prior years. Thus, the IRS has determined that it will not apply its enforcement authority adversely in the case of persons with a financial interest in, or signature authority over, any other foreign commingled fund with respect to that account for calendar year 2009 and earlier calendar years. A financial interest in, or signature authority over, a foreign hedge fund or private equity fund is included in the administrative relief provided in the preceding sentence. *This section basically provides an FBAR filing extension for U.S. advisers (and their employees) of foreign hedge funds, venture funds and private equity funds.*
- **FBAR-Related Questions on Federal Tax Forms.** Notice 2010-23 provides that any taxpayer that has no other reportable foreign financial accounts for the year in question, and who qualifies for the filing relief provided in the Notice should check the “no” box in response to FBAR-related questions found on federal tax forms for 2009 and earlier years that ask about the existence of a financial interest in, or signature authority over, a foreign financial account.

If you have any questions or would like more information on any of the issues discussed in this Tax LawFlash, please contact any of the following Morgan Lewis attorneys:

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