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tax-exempt organizations lawflash

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Final Regulations Regarding FBAR Requirements for Exempt Organizations

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The Financial Crimes Enforcement Network (FinCEN) of the U.S. Treasury Department issued final rules (RIN 1506-AB08) on February 24, 2011 regarding the requirements for certain U.S. persons to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR) (the Final Regulations). These final rules reflect only slight modifications to the proposed rules issued February 23, 2010.[1]

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.

On February 26, 2010, the Internal Revenue Service (IRS) issued Notice 2010-23, which provided a delayed filing date for certain FBARs until June 30, 2011, for some persons with only signature authority over foreign financial accounts but no financial interest in such accounts and for persons owning certain commingled funds. The FBARs affected by the delayed filing date are for accounts for 2009 and prior calendar years.

We have covered the general changes in a separate Tax LawFlash[2]and are focusing on those special concerns of tax-exempt organizations in this LawFlash.

A. **No special treatment**. The Final Regulations provide no special treatment for tax-exempt organizations. Tax-exempt organizations are subject to the same rules as other U.S. persons holding "foreign financial accounts." Most tax-exempt organizations will come within the definition of a U.S. person requiring an FBAR filing if they hold a foreign financial account.

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), 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.** The Final Regulations currently do not require an FBAR filing with respect to interests in

1. See Notice of Proposed Rulemaking (RIN 1506-AB08), 75 Fed. Reg. 8844 (Feb. 26, 2010).

2 Available at http://www.morganlewis.com/pubs/TaxLF_FinCENIssuesFinalFBARRegulations_11march11.pdf.

certain foreign hedge funds, venture capital funds, or private equity funds if such funds are not "mutual funds or similar pooled funds." Mutual funds and similar pooled funds for this purpose are those that issue shares available to the general public that have regular net asset value determination and regular redemptions. The preamble to the Final Regulations stresses that an FBAR is required only where the shares of the entity are offered to the general public. Accordingly, interests in most hedge funds, venture capital funds, and private equity funds are not required to be reported on an FBAR because they are privately offered.

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 should 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 tax-exempt organization that have FBAR filing requirements.** A number of commenters to the proposed regulations requested that FinCEN eliminate the signature authority reporting requirement. FinCEN, however, believes that FBARs "filed by individuals with only signature authority are valuable tools in investigations . . . because the signature authority requirement also acts as an independent check on FBAR reporting." Accordingly, officers and employees of tax-exempt organizations who have "signature or other authority" over the foreign accounts of their employers are obligated to file FBARs with respect to such authority.

As noted above, the IRS guidance provided an extension until June 30, 2011 for reporting of any person with signature authority over, but no financial interest in, a foreign account for the 2010 and prior calendar years. The IRS guidance also provided that these persons were permitted to check "no" on Schedule B of their IRS Forms 1040 for 2009 and earlier for the question regarding whether they have signature authority over a foreign financial account. Such persons are now required to check "yes" on their 2010 Form 1040, Schedule B to this question.

In response to comments, the Final Regulations adjust the definition of persons who fall within the definition of signature authority. The revised test for determining whether an individual has signature or other authority over an account is whether the foreign financial institution will act upon *a direct communication* from that individual regarding the disposition of assets in that account. Therefore, persons who merely participate in the decision to allocate assets or have the ability to instruct or supervise others with signature authority over a reportable account are not included within the definition of signature authority. The preamble to the Final Regulations also clarifies that signature and other authority only applies to individuals. These two rules appear to resolve the issue of whether members of a board of trustees or directors have an obligation to file an FBAR based on any signature or other authority they may have over the account and conclude that only the employee with the ability to direct the movement of the funds in a covered account is required to file an FBAR with respect to such account.[3]

The Final Regulations also provide that employees with only signature authority over a foreign financial account but no financial interest in the account are not required to personally maintain the FBAR records

3. The entity with a financial interest in the foreign account still needs to file the FBAR. Who signs the FBAR for the entity will depend on the entity's specific facts and circumstances.

of their employer which gave rise to their obligation to file the FBAR for five years, as is required by persons with financial interests in such accounts.

F. **Exemption for employees of certain employers including employers that issue ADRs.** FinCEN accepted a comment that provides a filing exemption to the employees of a U.S. or foreign entity that issued a class of equity securities (including American Depository Receipts, or ADRs) registered under section 12(g) of the Securities Exchange Act of 1934 (i.e., those with at least $10 million in assets and 500 or more shareholders). This exemption was not, however, extended to mutual insurance companies with assets of more than $10 million and more than 500 policyholders.

G. **Valuation.** Commenters requested additional guidance on determining the value of accounts. The preamble to the Final Regulations provides that bona fide statements prepared in the ordinary course of business may be relied upon.

H. **Applicability date.** Although the Final Regulations are not retroactive, those persons who delayed their filing under IRS Notice 2010-23 are permitted to rely on the provisions in the Final Regulations for reports due June 30, 2011 for calendar years prior to the 2010 calendar year.

If you have any questions concerning issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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