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FinCEN Issues Extension for Certain FBAR Filers

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The Financial Crimes Enforcement Network (FinCEN) of the U.S. Treasury Department issued Notice 2011-1 (the Notice) on May 31, providing a filing extension until June 30, 2012 for certain U.S. persons with signature authority over, but no financial interest in, foreign financial accounts of their employers and entities related to their employers, who are required to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR).

Background

Generally, any U.S. person or entity that at any time during a calendar year has 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. The filing deadline for FBARs for each year is June 30 of the following year. Accordingly, FBARs for 2010 are due June 30, 2011.

FinCEN issued final rules (RIN 1506-AB08) on February 24, 2011 regarding FBAR filing requirements (the Final Regulations). These rules reflected only minor changes to the proposed rules issued February 23, 2010 (the Proposed Regulations).

On February 26, 2010, the 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 in Notice 2010-23 are with respect to accounts for 2009 and prior calendar years.

The Final Regulations provided filing relief in the form of exemptions for officers or employees with signature or other authority over certain foreign financial accounts, but no financial interest in the reportable account. The exemptions, in general, covered officers and employees of the following entities (Excepted Entities):

(i) An officer or employee of a bank that is examined by certain federal regulators does not report that he or she has signature or other authority over a foreign financial account owned or maintained by the bank.

(ii) An officer or employee of a financial institution that is registered with and examined by the SEC or CFTC need not report that he or she has signature or other authority over a foreign financial account owned or maintained by such financial institution.

(iii) An officer or employee of an Authorized Service Provider (ASP) registered with the SEC need not report that he or she has signature or other authority over a foreign financial account owned or maintained by an investment company that is registered with the SEC.

(iv) An officer or employee of an entity that is publicly traded on a U.S. national securities exchange need not report that he or she has signature or other authority over a foreign financial account of such entity, and an officer or employee of a United States subsidiary of a United States entity with a class of equity securities listed on a 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 account is included in an FBAR consolidated report of the parent entity.

(v) An officer or employee of an entity that has a class of equity securities registered under section 12(g) of the Securities Exchange Act need not report that he or she has signature or other authority over the foreign financial accounts of such entity.

The Problems with the Final Regulations

FinCEN received a number of comments on these exemptions, mainly as a result of a change made to the draft FBAR instructions that were attached to the Proposed Regulations and the final FBAR instructions that were attached to the Final Regulations. Specifically, the draft instructions attached to the Proposed Regulations provide as follows:

> (4) An officer or employee of an entity whose class of equity securities is listed on any United States national securities exchange need not report signature authority over a foreign financial account **in which the entity has a financial interest**. An officer or employee of a United States subsidiary of such entity need not report signature authority over a foreign financial account of the subsidiary. (Emphasis added).

Under the rules describing whether a U.S. person has a financial interest in a foreign financial account, such person does have such interest where the owner of record or holder of legal title is a corporation in which the U.S. person owns directly or indirectly (i) more than 50% of the total value of the shares of stock or (ii) more than 50% of the voting power of all the shares of stock. Therefore, all wholly owned subsidiaries of a publicly traded corporation, whether foreign or domestic, would be included as a result of the direct or indirect ownership of such subsidiaries. Unfortunately, the instructions to the most recently revised FBAR form dated March 2011 (released March 21, 2011) require that the officer and employee be employed **with the entity in which the account was titled** and do not extend the exemption to U.S. and foreign subsidiaries of the parent company.

Our understanding from discussions with clients is that it is commonplace for an officer or employee of the parent corporation to have signature authority over its foreign subsidiaries' bank and other accounts as a reasonable and prudent business practice to maintain checks over the disbursements made from these accounts. In addition, if the revised limited officer and employee exemptions set forth in the Final Regulations were maintained, many such persons would have FBAR filing requirements covering a large number of accounts—filing requirements of which they were unaware prior to March 21, 2010.

Extension Provided in the Notice

The Notice provides an extension to file FBARs for the following employees and officers of the Excepted Entities:

(1) An employee or officer of an Excepted Entity who has signature or other authority over and no financial interest in a foreign financial account of a controlled person of the entity

(2) An employee or officer of a controlled person of an Excepted Entity who has signature or other authority over and no financial interest in a foreign financial account of the entity or another controlled person of the entity

For purposes of the Notice, a "controlled person" is a U.S. or foreign entity more than 50% owned (directly or indirectly) by an Excepted Entity.

The effect of the Notice is to provide an extension in the situation, for example, where an officer of a U.S. publicly traded corporation had signature authority over the bank accounts of a foreign subsidiary of the publicly traded parent meeting the ownership requirements. This will be welcome news to a number of officers and employees of publicly traded companies and their subsidiaries.

The Notice, however, needs clarification in a number of areas. For example, it is unclear whether the Notice provides any relief to officers and employees of subsidiaries that are owned by ASPs. This is a common ownership structure created for valid business purposes and one which one might have thought would have been covered by the related-party delayed filing date provided in the Notice. But, because the accounts for which the ASP exemption is provided are accounts of 1940 registered funds and not accounts of the ASPs, such officers and employees of subsidiaries owned by ASPs are still not covered by the ASP exemption. The inclusion of the ASP exemption as being covered by the extension provided for in the Notice is therefore misleading and bound to result in confusion.

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