

NEW GUIDANCE ON FOREIGN BANK ACCOUNT REPORTING (FBAR)

Federal/International Tax Alert
March 4, 2010

On February 26, 2010, the IRS issued guidance on the Report of Foreign Bank and Financial Accounts (IRS Form TD F 90-22.1), commonly known as the FBAR. In general, any U.S. person who, at any time during a calendar year, has a financial interest in, or signature or other authority over, any foreign financial account located in a foreign country with an aggregate value of more than \$10,000 must file an FBAR with the Treasury Department by June 30 of the following year.

The guidance came in the form of IRS Notice 2010-23 and IRS Announcement 2010-16. In addition to the IRS guidance, the Treasury Department's Financial Crimes Enforcement Network (FinCEN) introduced a proposed regulation (the Proposed Reg) aimed at clarifying who will be required to file the FBAR and which accounts will be reportable. This guidance provides taxpayers with some much needed clarity, especially with the individual income tax return and FBAR filing deadlines of April 15 and June 30 more drawing near. The following summary highlights some of the more significant issues addressed in the guidance.

IRS guidance

FBAR Reporting Suspended for Non-U.S. Persons

In October 2008, the FBAR instructions were revised. In doing so, the definition of a U.S. person was changed to include non-U.S. persons "in and doing business in the United States," which created uncertainty among taxpayers and tax practitioners about who must file an FBAR. As a result of the questions raised by this new definition of a U.S. person, the IRS, in Announcement 2009-51 (6/05/2009), temporarily suspended the June 30 FBAR reporting requirement for those who are not U.S. citizens, U.S. residents, or domestic entities. In IRS Announcement 2010-16 (2/26/2010), the IRS declared the continued suspension of the June 30 FBAR reporting requirement for those who are not U.S. citizens, U.S. residents, or domestic entities. Thus, for FBARs due on June 30, 2010, taxpayers 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.

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Extended Deadline for Person's with Signature Authority Only

IRS Notice 2010-23 (2/26/2010) further extends the FBAR filing deadline to June 30, 2011, for persons with signature authority over, but no financial interest in, a foreign financial account for the 2010 and prior calendar years. This is a continuation of the relief provided in Notice 2009-62, which had previously extended the filing deadline for reporting such accounts for 2008 and earlier years to June 30, 2010.

Clarification of Rules for Reporting Commingled Funds

IRS Notice 2010-23 also provides that, for FBARs for the calendar year 2009 and prior years, a financial interest in, or signature authority over, a foreign "commingled fund" other than a mutual fund (e.g., a foreign hedge fund or private equity fund) is not required to be reported on an FBAR. IRS Notice 2009-62 had set forth an extended due date of June 30, 2010, for FBARs for the 2008 year and earlier years for those with a financial interest in, or signature authority over, a foreign commingled fund. Moreover, the Proposed Reg reserves guidance on FBAR reporting of commingled funds other than mutual funds on a going-forward basis.

Tax Return Questions

If a taxpayer has no other reportable foreign financial accounts for the year in question and qualifies for any of the filing relief provided in Notice 2010-23, the IRS advised the taxpayer to 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 (e.g., Line 7a to 2009 IRS Form 1040's Schedule B).

FinCEN Guidance

Proposed Reg and Revised FBAR Instructions

FinCEN's Proposed Reg (RIN 1506-AB08) would revise the regulation implementing the Bank Secrecy Act regarding FBARs. The purpose of the Proposed Reg is to clarify who will be required to file FBARs and which accounts will be reportable, by defining several new terms, amending some already defined terms, and setting forth some explicit exemptions from the FBAR filing requirement. FinCEN attached to its Proposed Reg a draft of proposed instructions to the FBAR to reflect the changes that would take effect if the Proposed Reg is finalized. Below is a brief overview of some of the changes to FBAR reporting that would result if the Proposed Reg takes effect.

Definition of U.S. Person

The Proposed Reg would provide a revised definition of "United States person," which would include a U.S. citizen, a U.S. resident alien, or an entity, including, but not limited to, a corporation, partnership, trust, or LLC 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. This suggests that the suspension of the FBAR filing requirement for non-U.S. persons

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may become permanent. The Proposed Reg also makes clear that an entity that is disregarded for U.S. federal tax purposes would nonetheless be required to file an FBAR.

Other Definitions

The Proposed Reg separately defines the terms “bank account,” “securities account,” and “other financial account,” all of which constitute reportable accounts. The term “other financial account” is defined to include (1) an insurance policy with a cash value, (2) 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, and (4) 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. Notably, the Proposed Reg explicitly reserves for potential future guidance the treatment of an account with investment funds other than mutual funds or similar pooled funds (e.g., hedge funds).

FinCEN also revised the definition of a “financial interest” in the Proposed Reg, including adding an anti-avoidance rule aimed at U.S. persons using an entity to evade FBAR reporting.

FinCEN’s Proposed Reg contains a refined definition of “signature or other authority” over a foreign financial account, which provides specific exceptions from FBAR reporting in certain situations. The Proposed Reg also includes a new rule that a U.S. person with signature or other authority over 25 or more foreign financial accounts will only need to provide the number of financial accounts and certain other basic information on the FBAR, but will be required to provide detailed information concerning each account upon the request of the Secretary of the Treasury or the IRS.

Exclusions From FBAR Reporting

The Proposed Reg excludes from the FBAR reporting requirement participants and beneficiaries in Internal Revenue Code Section 401(a), 403(a), or 403(b) plans, as well as Individual Retirement Accounts (IRAs) and Roth IRAs, with respect to foreign financial accounts held by, or on behalf of, the retirement plan or IRA. A U.S. person having a beneficial interest in more than 50% of the assets of a trust or from which such person receives more than 50% of the income is also excluded from the FBAR filing requirement if the trust, or trustee or agent of the trust, is a U.S. person and files an FBAR disclosing the trust’s foreign financial accounts.

Verification of FBAR Filings

The draft instructions to the FBAR state that a filer can request verification that an FBAR was received by contacting the IRS by phone (at a special number) or in writing. Copies of filed FBARs would also be available. There would be nominal fees for written verification requests and copies of filed FBARs. Currently, verification is not available.

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Summary

In our extensive experience in advising taxpayers on their FBAR filing obligations, complex issues frequently arise as to whether a particular taxpayer is required to report foreign financial accounts, whether an account is a financial account, and how the account should be reported. This recent IRS and FinCEN guidance clarifies some of these issues, though many remain open. For more information regarding FBAR reporting requirements, please contact one of the members of the Hodgson Russ LLP tax group or any other Hodgson Russ LLP lawyer with whom you have consulted in the past.