

Final Foreign Bank and Financial Account Reporting Rules, Form, and Instructions

Stay informed

The Treasury Financial Crimes Enforcement Network (“FinCEN”) recently issued final rules amending the Bank Secrecy Act with respect to Foreign Bank Account Reporting requirements. In addition, a new Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts* (“FBAR”), and instructions reflecting the final rules have been posted to the Internal Revenue Service (“IRS”) website. Each U.S. person with a financial interest in, or signature or other authority over, any foreign financial account is generally required to file an FBAR, if the aggregate value of all accounts exceeds \$10,000 at any time during the calendar year. The final rules apply to calendar year 2010 FBARs, which are required **to be received** at the Treasury Department by June 30, 2011. No filing extensions are available.

The IRS also recently issued Notice 2011-31 to provide taxpayers with guidance regarding how to answer questions on foreign financial accounts on 2010 federal income tax and information returns. The notice provides that for taxpayers who filed before March 28, 2011, the effective date of the final rules, they could either rely upon (i) then existing FBAR regulations and guidance, or (ii) the final regulations and instructions. For returns filed on or after March 28, 2011, the final FBAR rules are effective and should be referenced along with the revised FBAR form and instructions when answering foreign financial account related questions on 2010 federal income tax and information returns.

It should be noted that due to various factors, including previously issued IRS guidance that is no longer effective and the newly issued final FBAR rules, individuals and entities that were not required to file FBARs in previous years may now be required to file for 2010 and subsequent years. Keep in mind that there are significant civil and criminal penalties related to the failure to file a required FBAR.

U.S. Persons

The final rules provide that only United States persons having a financial interest in or signature or other authority over a foreign financial account are required to file an FBAR. The final rules define a U.S. person as 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 Possessions of the United States or the Indian Tribes.

General Exceptions to Filing Requirements

The final rules provide exceptions for reporting certain foreign financial accounts, some of which are identical or similar to the exceptions contained in the prior reporting rules. These include exceptions for the account of an international financial institution of which the United States government is a member, accounts in a United States military banking facility, and correspondent or nostro accounts used by banks solely for bank-to-bank settlements.

The final FBAR rules provide an exception for a foreign financial account of any governmental entities of the United States. The FBAR instructions clarify that for reporting purposes a governmental entity includes a college or university that is an agency of, an instrumentality of, owned by, or operated by a government entity. The instructions further provide that this exception encompasses employee retirement or welfare benefit plans of a governmental entity.

Reportable Accounts

The final rules and instructions define the types of reportable accounts. The following items are financial accounts for FBAR reporting purposes:

- (i) a bank account which means a savings or demand deposit, checking, time deposit, or other account maintained with a person engaged in the business of banking;
- (ii) securities or brokerage accounts maintained with a person engaged in the business of buying, selling, holding or trading stock or other securities;
- (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;
- (iv) an account with a person in the business of accepting deposits as a financial agency;
- (v) an insurance or annuity policy with cash value; and
- (vi) shares in a mutual fund or similar pooled fund that is available to the general public with a regular net asset value determination and regular redemptions.

Financial Interest

The final rules clarify when U.S. persons have a financial interest in foreign financial accounts. In addition to situations where the U.S. person is the owner of record or holder of legal title to the accounts, reporting may also be required for accounts in which the U.S. person acts in some capacity on behalf of a U.S. person. For example, a U.S. broker may be the owner of record of a foreign brokerage account as the nominee of its client, a U.S. person. In such a case, both the U.S. broker and the U.S. client are required to separately report their financial interest in this foreign account. It also includes situations where the U.S. person owns directly or indirectly more than 50 percent of the total value of equity interests, voting power, or interest and profits (this can cover a number of legal structures).

The final rules make some clarifications in reporting an interest in a trust. A U.S. person has a reportable financial interest when (i) the U.S. person is the trust grantor and has an ownership interest in the trust for federal tax purposes, and (ii) when the U.S. person has a greater than 50 percent *present beneficial interest* in the assets or income of the trust. Trust beneficiaries are exempt from reporting if the trust or trustee of the trust is a U.S. person that files a report for such foreign financial accounts.

“Signature or Other Authority”

The final rules clarify the meaning of signature or other authority over a financial account and provide a test for determining whether an individual has signature or other authority over an account. The final rules state that “signature or other authority 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 direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained.” The test for determining whether a U.S. person has signature or other authority over a foreign account is whether the foreign financial institution will act upon a direct communication from the individual with respect to the disposition of assets in the account.

For 2009 and earlier FBAR filings, the IRS allowed a deferral of the FBAR filing for certain individuals with signature authority over a foreign financial account but no financial interest in a foreign financial account.¹ Individuals who took advantage of this deferral must use the final FBAR rules to determine their filing requirements due June 30, 2011 for the deferred years, as well as the 2010 calendar year.

Exceptions to the Signature Authority Filing Requirements

The final rules provide for a number of exceptions from the FBAR filing requirements for those with signature or other authority, and no financial interest in the account:

- (i) an officer or employee of an entity, whether foreign or domestic, with a class of equity securities, listed on any United States national securities exchange;
- (ii) an officer or employee of a United States subsidiary of a United States entity with a class of securities listed on United States national securities exchange if the subsidiary is included in a consolidated report filed by the United States parent;
- (iii) an officer or employee of a bank that is examined by federal authorities;
- (iv) an officer or employee of a financial institution that is registered with and examined by the Securities and Exchange Commission or Commodity Futures Trading Commission; and
- (v) an officer or employee of an Authorized Service Provider where there is an account owned or maintained by an investment company that is registered with the Securities and Exchange Commission.

¹ See IRS Notice 2010-23.

These exceptions to the signature authority filing requirements limit the employee's exception to only those financial accounts directly owned by the employer-entity. Accordingly, an employee of a U.S. parent is only excepted with regard to the parent's foreign financial accounts over which the employee has signature authority and the employee of the U.S. subsidiary is only exempt with regard to the subsidiary's foreign financial accounts over which the employee has signature authority despite the fact that the subsidiary's account was included in the parent's consolidated report. For example, an employee of a U.S. parent with signature authority over a U.S. subsidiary's foreign financial account is required to file a FBAR. In addition, a U.S. person employed by a foreign subsidiary whose foreign financial accounts are included in the consolidated report of the U.S. parent must file a FBAR for those foreign accounts of this subsidiary over which the employee has signature authority.

The final rules provide that there is no requirement for these individuals to be advised in writing by the chief financial officer or other responsible officer of either the entity's or the parent's filing for these exceptions to apply. In addition, the final rules provide relief similar to the relief available to those who have a financial interest in 25 or more foreign financial accounts by providing that a person with *only signature or other authority over 25 or more* foreign financial accounts need only complete basic information about the account owner in Part IV of the FBAR.

Consolidated Reports

The final FBAR rules allow for consolidated reporting when an entity that is a United States person owns directly or indirectly more than a 50 percent interest in one or more other U.S. entities required to report on the FBAR. A consolidated report is filed on behalf of the U. S. person and such other entities. This rule was expanded to allow for consolidated reporting by more than just a corporate parent.

As stated above, 2010 FBAR filings must be received at the Treasury Department's Detroit Center by June 30, 2011 and failure to file the FBAR may result in significant civil and criminal penalties. If you are uncertain of your filing requirements, please be sure to consult with your tax advisor.

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