

E-ALERT | Employee Benefits, Financial Institutions & Tax

March 29, 2011

FBAR FINAL REGULATIONS EXPAND REPORTING REQUIREMENTS

The Financial Crimes Enforcement Network (“FinCEN”) recently issued final regulations on the obligation of US persons to file foreign bank account reports (“FBARs”). The regulations went into effect on March 28, 2011, and the Internal Revenue Service (the “IRS”) simultaneously issued a revised version of the FBAR Form (Form TD F 90-22.1) along with revised Instructions.

The final regulations narrow the scope of certain filing exceptions found in the prior rules, and the final regulations are effective for this filing season—income tax returns filed on or before April 18, 2011 and FBARs due on June 30, 2011. It is therefore important to review the key changes made by the final regulations. They include the following:

- A US citizen or resident who is an officer or employee of a *foreign subsidiary* of a US publicly traded company will be required to file an FBAR if he or she has signature authority over a foreign account of the foreign subsidiary. This requirement applies even if the account is reported in the consolidated FBAR filed by the US parent company. Until it was preempted by the final regulations, the prior version of the form Instructions generally excused this filing if the account was reported in the consolidated FBAR. FinCEN rejected public comments seeking a continuation of this exception.
- A US citizen or resident who is an officer or employee of a US publicly traded company must file an FBAR if he or she has signature authority over a foreign account of a *US affiliate* of the company for which the individual is not an officer or employee. For example, if an officer or employee of a US publicly traded parent company has signature authority over a foreign bank account of a wholly owned US subsidiary of the parent, the employee generally must file an FBAR reporting the account, unless he or she also is an officer or employee of the subsidiary.
- The same rule applies in reverse. A US citizen or resident who is an officer or employee of the subsidiary must file an FBAR if he or she has signature authority over a foreign account of the publicly traded *parent company* for which the individual is not an officer or employee. These filing requirements again apply even though the accounts are reported in the consolidated FBAR of the parent company. Under the prior Instructions, it was unclear whether these types of filings were required, but FinCEN clarified in the final regulations that they are.
- FinCEN rejected comments to exempt US trustees from filing FBARs to report accounts held (and reported) by US trusts. FinCEN also rejected comments seeking a general filing exemption for tax-exempt pension plans and welfare benefit plans. FinCEN further rejected public comments asking for the exception for officers and employees of US publicly traded companies to be extended to officers and employees of foreign publicly traded companies.

The final regulations do include a few helpful clarifications:

- When US customers have an account with a US bank acting as a global custodian, they do not have to file an FBAR if the custodian holds the customers' assets in a foreign omnibus account.
- A US person has signature authority only if the financial institution holding the account will act upon a direct communication from that individual regarding the disposition of assets in that account.
- Ownership interests in hedge funds and private equity funds other than specific types of mutual funds remain exempt from reporting under the final regulations until this issue is revisited by FinCEN. Reporting still is required for interests in foreign mutual funds or other pooled funds that (1) issue shares available to the general public, (2) have a regular net asset value determination, and (3) have regular redemptions.
- FinCEN accepted public comments seeking clarification or deletion of the trust protector provision in the proposed regulations and previous FBAR Instructions. Under the trust protector provision, a U.S. person had a financial interest in, and therefore an FBAR filing obligation for, any trust established by the U.S. person if the U.S. person had appointed a "trust protector" to monitor the activities of the trustee, with the authority to influence the decisions of the trustee or replace the trustee. FinCEN deleted the trust protector provision because of its potential over-inclusiveness but noted that the anti-abuse provision in the final regulations could capture any attempts to use trusts to obfuscate ownership interests in foreign accounts.

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