

E-ALERT | Tax

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RECENT TREASURY GUIDANCE ON FOREIGN BANK ACCOUNT REPORTS

On February 26, 2010, the Financial Crimes Enforcement Network (FinCEN) proposed new Treasury regulations detailing how U.S. individuals and entities should report foreign financial accounts in which they have an interest, or for which they have signature authority.¹ Existing regulations simply require U.S. individuals and entities to file a foreign bank account report (FBAR) for such accounts according to the instructions to the FBAR form, TD F 90-22.1.

The proposed regulations and accompanying guidance² clarify some of the ambiguities in the current form instructions, reduce certain duplicative filings by expanding the number of filing exceptions, delay for an additional year the filing requirement for individuals with signature authority only, and—not least in importance—begin to provide a legal basis for interpreting the scope of the FBAR requirement, which to date has been covered only in nonbinding instructions to a form.

To speed the release of the proposed regulations, however, FinCEN did not address several important questions and concerns raised by practitioners and commentators. Many of the unaddressed issues relate to duplicative FBAR filings by individuals with signature authority over accounts already reported by their employer or another entity. FinCEN may address some of these issues in final regulations or in other guidance taken up later this year. Comments on the proposed regulations are due on or before April 27, 2010.

Along with the release of the proposed regulations, the IRS announced that it would postpone, from June 30, 2010, until June 30, 2011, the due date for persons to report that they had signature authority over, but no financial interest in, a foreign financial account during 2009 or prior years. If a person had no other reportable accounts for those years, they can check the “no” box in response to FBAR-related questions on their individual Form 1040 for 2009 and prior years, according to the IRS. The IRS also announced the continued suspension of the FBAR filing requirement for persons who are not U.S. citizens, U.S. residents, or U.S. entities.

The following are some of the noteworthy changes in the proposed regulations, as compared to the existing form instructions and other informal guidance currently in effect:

- **Pooled Investment Vehicles.** The proposed regulations would narrow and clarify the scope of financial accounts that must be reported. Interests in privately held pooled investment vehicles, such as private equity funds, venture capital funds, and hedge funds, generally would not be treated as financial accounts. Although they are not specifically mentioned in the guidance, collective trusts and group trusts presumably would be eligible for this exception as well. No reporting of interests in such investment vehicles would be required for now, pending further study by FinCEN. In guidance accompanying the proposed regulations, moreover, the IRS announced that it would not attempt to enforce the filing requirement for 2009 and prior years

¹ See Notice of Proposed Rulemaking, *Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts*, 75 Fed. Reg. 8844–54 (February 26, 2010).

² Notice 2010-23, 2010-11 I.R.B. (Feb. 26, 2010); Announcement 2010-16, 2010-11 I.R.B. (Feb. 26, 2010).

with respect to interests in pooled investment vehicles other than mutual funds. The proposed regulations and accompanying guidance would require reporting of shares in foreign mutual funds and other pooled investment vehicles that issue shares to the general public, have a regular net asset value determination, and have regular redemptions. U.S. individuals and entities also would be required to report insurance policies with a cash surrender value and annuity policies if in either case the policy is purchased outside the United States from a foreign issuer.

- **Definition of “U.S. Resident.”** The definition of a “U.S. resident” required to file an FBAR is unclear under the current form instructions. The proposed regulations would define a “U.S. resident” by reference to the federal income tax definition of that term, except that the boundaries of the United States would be determined using the Bank Secrecy Act definition. This revision would clarify that “green card” holders residing abroad are required to report their foreign financial accounts.
- **Financial Services Employees.** The proposed regulations would expand and clarify the filing exceptions for employees of banks, securities dealers, and other financial service providers. It would cover employees of a bank that is examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Administration. The exception also would cover employees of “Authorized Service Providers” registered with, and examined by, the Securities and Exchange Commission. These exceptions would apply only to employees with signature authority over, but no financial interest in, the foreign account.
- **Employees of Publicly Traded Corporations.** The filing exception for employees with signature authority over, but no financial interest in, accounts of publicly traded corporations would be expanded in some respects but—unexpectedly—narrowed in others. The revised exception would excuse officers and employees from reporting their signature authority over accounts of both U.S. corporations and, for the first time, foreign corporations, if the corporation’s stock is traded on a U.S. national securities exchange. In a change from the existing form instructions, such individuals would be excused from filing regardless of whether they receive a letter notifying them that the corporation has filed the required FBAR. However, the proposed regulations would provide no relief to officers and employees of a foreign corporation or its U.S. subsidiaries if the foreign corporation is only publicly traded on a foreign securities exchange. In addition, the proposed regulations apparently would eliminate the exception in the current instructions that excuses officers and employees of a foreign subsidiary of a publicly traded U.S. corporation from filing an FBAR to report their signature authority over accounts owned by the foreign subsidiary.
- **Plan Trustees and Other Fiduciaries.** The proposed regulations would excuse the beneficiaries of qualified retirement plans and individual retirement accounts (IRAs) from filing an FBAR for foreign financial accounts held by the qualified plan or IRA. However, the proposed regulations would not excuse the trustees and other fiduciaries of qualified retirement plans from filing duplicative FBARs to report their signature authority over foreign financial accounts of the plan, even if the plan already reports those accounts to the IRS and the Department of Labor. The proposed regulations would provide no relief to employees of publicly traded corporations with signature authority over, but no financial interest in, foreign accounts owned by the corporation’s pension plan.
- **Signature Authority and Direct Communication.** The proposed regulations would revise the definition of “signature or other authority” to mean 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 delivery of instructions (whether communicated in writing or otherwise) *directly* to the person with whom the financial account is maintained” (emphasis added). The addition of the qualifier “directly” implies that a U.S. person need not report authority over an

account maintained through an intermediary who is not acting as an agent or nominee (e.g., an investment manager). This implication is not clear, however.

- *Changes in the Form Instructions.* FinCEN issued a revised set of draft instructions to accompany the proposed regulations. The revised instructions elaborate on certain aspects of the proposed regulations. For example, they would excuse State-owned colleges and universities, as well as government pension plans (and their trustees), from filing FBARs. The instructions also would allow filers to request confirmation that Treasury has received their FBAR. They would allow filers to deliver FBARs to their local IRS office for forwarding to Detroit for processing but would continue to hold the filer responsible if the June 30 filing deadline is missed. The revised instructions would allow filers to report the value of an account based on a “reasonable approximation” of its maximum value, and they would allow periodic statements to be used only if those statements “fairly reflect” that maximum account value. They would use an “official” exchange rate for converting foreign-currency account values, rather than giving filers flexibility to use other published exchange rates.

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