

Government Issues Final Rules on FBAR Filing Requirements

The Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of the Treasury, has issued [final regulations](#) regarding Form TD F 90-22.1, the Foreign Bank and Financial Account Report (FBAR). The final regulations largely adopt the [proposed regulations](#), which were released in February 2010 and reported in a previous [Alert](#), with some notable modifications and clarifications discussed below.

Last year's proposed regulations were accompanied by proposed revisions to the instructions for completing the FBAR. Although the final regulations indicate the FBAR instructions have been further revised, the instructions themselves are not yet available. FinCEN has indicated that the Internal Revenue Service (IRS) will soon publish these revised instructions.

Generally, the FBAR requires, with very limited exceptions, each U.S. person who has a financial interest in, or signature authority over, one or more financial accounts in a foreign country to report those accounts annually to the IRS if the aggregate value exceeds \$10,000 at any time during the calendar year. Such persons must file an FBAR by June 30 of the succeeding year, and no filing extension is available. Failure to comply with the FBAR reporting requirements can result in significant civil penalties, criminal penalties, or both.

The effective date of the final regulations is March 28, 2011. The final regulations apply to FBARs required to be filed by June 30, 2011 with respect to foreign financial accounts maintained in calendar year 2010, and to FBARs required to be filed for all subsequent calendar years. The final regulations are not retroactive but permit filers who properly deferred their filing obligations for calendar year 2009 and prior years pursuant to IRS [Notice 2010-23](#) to apply the provisions of the final regulations in determining their FBAR filing requirements for reports due June 30, 2011, with respect to foreign financial accounts maintained in calendar years beginning before 2010. (See our prior [Alert](#) regarding this Notice from March 2010.)

Notable highlights of the final regulations include:

- **Treatment of Offshore Private Equity Funds and Hedge Funds Still Reserved.** The proposed regulations reserved as to whether private investment funds organized outside the United States, such as offshore private equity funds and hedge funds, constitute foreign financial accounts subject to reporting on the FBAR. Last year's Notice provided that interests in such funds were not required to be reported on the FBAR for 2009 and prior years. Like the proposed regulations, the final regulations reserve as to whether such private investment funds constitute foreign financial accounts subject to FBAR reporting, but affirmatively require FBAR reporting for "mutual funds or similar pooled funds" which issue shares available to the general public and have regular net asset value determinations and regular redemptions. This will raise interpretive questions for some funds for 2010 and later years.
- **Definition of "Signature or Other Authority" Clarified and Circumscribed.** The final regulations contain helpful changes to the definition of "signature or other authority." FinCEN clarified that the mere ability to participate in the asset allocation decision process or to instruct or

supervise others with signature authority over a reportable account does not amount to having “signature or other authority” over an account. Under the final regulations, an individual has “signature or other authority” only if an individual has the authority (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.*” (emphasis added). Separately, FinCEN noted that the forthcoming instructions to the FBAR will be revised to clarify that only individuals may have signature or other authority over an account. Deferred filers under the Notice may apply this clarified definition to determine whether they have signature or other authority over any foreign financial accounts for 2009 and prior years.

- **Certain Custodial Arrangements Not Considered Reportable Accounts.** FinCEN clarified that, as a general matter, an account is not a foreign account subject to FBAR reporting if it is maintained with a financial institution located in the United States. Specifically, a U.S. customer of a U.S. global custodian does not need to report any custody accounts created by the custodian outside the U.S. to hold the assets of multiple customers, so long as the U.S. customer has no legal rights in those foreign accounts and can only access its holdings in those accounts through the U.S. global custodian.
- **Relief for Trust Beneficiaries Extended.** Consistent with the proposed regulations, the final regulations do not require a U.S. trust beneficiary to report the trust’s foreign financial accounts if the trust or trustee reports those accounts. In addition, the final regulations contain helpful clarifications about the filing obligations of beneficiaries of discretionary trusts with foreign financial accounts.
- **Reporting Exception for Tax-Qualified Retirement Plans’ Participants and Beneficiaries Not Extended to Plans.** As under the proposed regulations, the final regulations do not require participants and beneficiaries of tax-qualified retirement plans (i.e., plans described in Sections 401(a), 403(a) or 403(b) of the Internal Revenue Code), or owners and beneficiaries of individual retirement accounts (IRAs) and Roth IRAs, to file an FBAR with respect to foreign financial accounts held by or on behalf of the retirement plan or IRA. FinCEN rejected recommendations for a broad exemption from FBAR filing for pension or welfare benefit plans themselves.

It is important to note that FBAR filing obligations are in addition to other reporting obligations that a U.S. person may have under U.S. law, including reporting obligations imposed under the Internal Revenue Code. In particular, new tax rules adopted in March 2010 generally require individuals to report annually their interests in “specified foreign financial assets” with an aggregate value in excess of \$50,000 (see our prior [Alert](#) regarding these obligations).

If you have any questions concerning FBAR or other filing obligations, please contact your usual Ropes & Gray lawyer.

CIRCULAR 230 DISCLOSURE

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