

Client Alert.

February 25, 2011

FinCEN Issues Final FBAR Rules

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The Financial Crimes Enforcement Network (“FinCEN”) on February 24, 2011 issued final rules (the “Rules”) that amend the regulations under the Bank Secrecy Act (the “BSA”) regarding Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (commonly referred to as “FBAR”). The amended regulations (1) clarify when an account is foreign and therefore reportable as a foreign financial account and (2) provide a definition for terms such as “signature or other authority.” As discussed in a previous Client Alert, [“FinCEN and IRS Provide Timely FBAR Guidance Regarding Key Definitions,”](#) issued on March 5, 2010, the Rules adopt, with slight modifications, the Notice of Proposed Rulemaking (“NPR”) issued in February 2010.

FinCEN has indicated that the Internal Revenue Service (“IRS”) will soon publish instructions for completing the FBAR form.

BACKGROUND

The BSA, codified in Titles 12 and 31 of the U.S.C., authorizes the Secretary of the Treasury to issue regulations requiring persons to keep records and file reports of foreign financial accounts. That authority has been delegated to FinCEN, an agency within the Department of Treasury.

On February 23, 2010, FinCEN issued the NPR regarding certain key definitions to the instructions of the FBAR. In particular, the NPR proposed to: define the scope of individuals required to file the FBAR; delineate the types of reportable accounts; and exempt certain persons and accounts from the reporting requirements. The IRS followed up shortly after in February 2010 with a Notice and Announcement that provided important administrative relief and guidance in time for the income tax return filing deadlines and Announcement 2010-16 and Notice 2010-23 providing significant relief for taxpayers, under certain circumstances.

THE RULES

The Rules address the scope of the persons that are required to file reports of foreign financial accounts. The Rules further specify the types of accounts that are reportable, and provides filing relief in the form of exemptions for certain persons with signature or other authority over foreign financial accounts. Finally, the rule adopts provisions intended to prevent persons subject to the rule from avoiding their reporting requirement.

The Rules generally require each person subject to the jurisdiction of the United States having a financial interest in or signature or other authority over a bank, securities, or other financial account in a foreign country to “report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists, and . . . provide such information as shall be specified in a reporting form prescribed by the Secretary to be filed by such persons.” The lack of clarity regarding the scope of this provision issue drew significant criticism after FinCEN released the NPR last February. The Rules provide a definition of persons with “signature or other authority” that limits such persons to those who have the authority to control the disposition of assets in a financial account by “direct communication” to the person with whom the account is maintained. However, the Rules did not contain any changes to address the concern raised

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that that the filing requirement for individuals with only signature authority could lead to duplicative reporting. In addition, the Rules clarified that officers or employees who file an FBAR because of signature or other authority over an employer's financial account will not be expected to maintain records of the employer's account.

The Rules also clarify that certain types of accounts are not foreign for purposes of the FBAR filing requirements. FinCEN explained that in general, an account is not foreign if it is maintained with a financial institution in the United States. Using a U.S. bank as a global custodian for international assets also does not trigger the filing requirements, as long as the custodial services customer cannot directly access their foreign assets maintained in a foreign institution.

Notably, the Rules continue to reserve on whether accounts in hedge funds and private equity funds would be considered reportable accounts under the FBAR rules, similar to the 2010 guidance. The Rules also did not include changes in response to requests for broader exemptions to the filing requirements, such as in cases where other countries have robust money-laundering rules or for pension and welfare benefit plans.

The new final rules apply to FBARs for foreign financial accounts maintained in calendar year 2010, which are required to be filed by June 30, 2011, and for all reports required to be filed for subsequent calendar years.

The full text of the Rules is available at: <http://edocket.access.gpo.gov/2011/pdf/2011-4048.pdf>

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