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FINCEN FINALIZES FBAR REPORTING REGULATIONS

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FinCEN has issued final regulations addressing various FBAR reporting issues. These rules are effective as of March 28, 2011 for reported due by June 30, 2011 for 2010 years and thereafter.

The new regulations do not address all reporting issues, but they do provide a fair amount of clarification. Per my initial reading of the regulations and the issued comments and explanations, some key points include:

--The use of IRC residency test for U.S. residents subject to reporting has been adopted.

--Clarification has been provided that the U.S. status of entities for reporting purposes is determined by where they are formed.

--Signature authority over an account that triggers reporting now includes ability to control disposition of assets by non-written communication, not just written communications.

--Officers or employees who file an FBAR because of authority over accounts of their employers are not expected to personally maintain records of the accounts.

--Omnibus accounts with U.S. financial institutions that hold assets thrugh a global custodian are generally not reported, so long as the u.s. person cannot directly access the foreign holdings maintained at the foreign institution.

--Domestic trusts with foreign accounts must file FBARs - the test is not the §7701(a)(3) definition of a domestic trust, but whether the trust has ben created, organized or formed under the laws of the U.S.

--Domestic corporations do not include Section 897(i) electing corporations, per the focus on jurisdiction of formation and not tax elections to be treated as domestic entities.

--There is no mention of foreign persons doing business in the U.S. as persons that must file, notwithstanding prior proposals on that score.

--"Bank accounts" include certificate of deposit and other time deposits.

--Life insurance and annuities are "accounts" but only if they have a cash value. Presumably these rules should not capture term policies, but that is not 100% clear, unless it is established that unearned premium is not cash value.

--Clarifies that determining whether a trust is a grantor trust for purposes of reporting by a U.S. grantor occurs under Internal Revenue Code rules.

--Fully discretionary trust beneficiaries do not have a "present income interest" that will subject them to reporting. Nor do remainder beneficiaries by reason of that status alone.

--The former trust protector provision that could have given rise to reporting has been removed, but it may still have application under the anti-abuse rule when appropriate.

--Anti-avoidance rules have been added. A United States person that causes an entity, including but not limited to a corporation, partnership, or trust, to be created for a purpose of evading this section shall have a financial interest in any bank, securities, or other financial account in a foreign country for which the entity is the owner of record or holder of legal title.

--Relief for beneficiaries is granted when the trust already reports.

--If someone has more than 24 accounts to report, they need only provide certain basic information.

--Consolidated reports allowed if domestic entity own more than 50% of another reporting entity.

Of course, the 2009 HIRE Act will also require similar reporting Code §6038D reporting of foreign financial assets. Why Congress could not direct FinCEN and the IRS to come up with one filing and one set of rules for foreign financial asset reporting borders on the ridiculous – taxpayers now will have to struggle with two sets of complex and overlapping reporting requirements.

Amendments to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts, Federal Register, Vol. 76, No. 37, p. 10234

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