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Are You Required to File an FBAR?

FinCEN and IRS Issue Additional Guidance Important to U.S. Persons with Foreign Financial Accounts

On February 26, 2010, the Internal Revenue Service and the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury each issued guidance concerning Report of Foreign Bank and Financial Accounts (FBAR) filings on Form TD F 90-22.1. Generally, U.S. persons or entities having a financial interest in or signatory authority over financial accounts located in foreign countries with an aggregate value greater than \$10,000 are required to file an FBAR annually, on or before June 30 of the year following the applicable reporting year (e.g., June 30, 2010, for the 2009 reporting year).

FinCEN's guidance comes in the form of proposed regulations that clarify which persons will be required to file the FBAR and which foreign accounts will in fact be reportable. The proposed rules would also exempt certain persons from the filing requirement and include provisions intended to prevent those who are required to file from avoiding their reporting obligation. The IRS issued its FBAR guidance in the form of Notice 2010-23 and Announcement 2010-16. The latter temporarily suspends the FBAR filing requirement for persons who are not U.S. citizens, U.S. residents or domestic entities, while the former provides FBAR and Form 1040 filing relief for certain persons having a financial interest in or signature authority over a foreign financial account.

The IRS Guidance

IRS Notice 2010-23 modifies and supplements Notice 2009-62 (which provided a filing extension until June 30, 2010, to the below categories of filers), by providing the following:

- Persons with signature authority over but no financial interest in a foreign financial account in 2009 and prior calendar years now have until **June 30, 2011**, to report. In addition, persons who are subject to this filing extension need not report the existence of foreign accounts on their 2009 Form 1040 tax return (provided that



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such persons have no other reportable financial interest, as defined in the instructions to Form TD F 90-22.1, in a foreign financial account).

- Persons with a financial interest in or signature authority over a foreign commingled fund *that is a mutual fund* are required to file an FBAR (unless subject to another filing exception under the FBAR instructions or other guidance). The FBAR reporting rules will not, however, be enforced with respect to those persons having a financial interest in or signature authority over any other types of foreign commingled fund, such as foreign hedge funds or private equity funds, for 2009 and prior calendar years.

While Notice 2010-23 gives those persons having only signature authority with respect to a foreign financial account a one-year filing extension, it is important to note that U.S. persons having a financial interest in such foreign accounts, including foreign mutual funds, will be required to file an FBAR (and, if applicable, report the existence and location of the foreign financial accounts on their Form 1040 for the 2009 tax year) no later than June 30, 2010.

In Announcement 2010-16, the IRS suspends the FBAR filing requirement for 2009 and prior calendar years for persons who are not U.S. citizens, U.S. residents or domestic entities, even if those persons were in, and doing business in, the United States. This announcement supplements and supersedes Announcement 2009-51, which allowed persons to rely on the definition of “United States Person” found in the July 2000 version of the FBAR form for 2009 and prior calendar years to determine if they had a filing obligation rather than on the definition in the October 2008 revised version of the FBAR form.

The Proposed FinCEN Rules

The proposed FBAR filing regulations provide guidance on the following issues, among others:

- The definition of “United States Person” is proposed to include a citizen or a resident of the United States; or an entity, including a corporation, partnership, trust or limited liability company created or organized under the laws of the United States, any state, the District of Columbia, and the territories and insular possessions of the United States or Indian tribes. *The definition applies to an entity regardless of whether it has made a disregarded entity election for federal tax purpose. Therefore, the definition applies to a single member limited liability company even if its owner is a foreign person, it derives no U.S. source of income and it is not engaged in a U.S. trade or business.*
- An “account” means a formal relationship with a person to provide regular services, dealings and other financial transactions regardless of the length of time for which the service is provided. However, an account is not established by conducting transactions such as wiring money or purchasing a money order where no relationship is otherwise established.

- Foreign mutual funds (and similar funds offered to the general public) and annuities (or any other insurance policies having a cash surrender value, including variable annuities and whole life policies) that are issued outside the U.S. are proposed to come within the definition of “other financial accounts” and thereby are subject to the FBAR filing requirement. For the time being, however, private equity funds, venture capital funds and hedge funds are not included in this definition.
- A “United States Person” is considered to have a financial interest in a bank, securities or other foreign financial account for which the owner of record or holder of legal title is: (i) any entity, other than a trust, in which he owns, directly or indirectly, more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits, (ii) a trust if he is settlor and has an ownership interest in the account under the grantor trust rules of the federal income tax laws, (iii) a trust in which he has a beneficial interest in more than 50 percent of the assets or income, or (iv) a trust that was established by him and for which there is a U.S. person acting as protector subject to the U.S. person’s instructions. There is also an anti-avoidance rule that would capture any entity created by a U.S. person for the purposes of evading the FBAR reporting requirements and that is the owner of record or the holder of legal title.

It should be noted that the regulations proposed by FinCEN are not yet effective, and there is no indication therein that they may be relied upon pending issuance of a final rule.

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