IRS Announces Changes to FBAR Rules

June 21, 2011

The Internal Revenue Service announced on June 16, 2011, that individuals with signature authority over (but no financial interest in) foreign financial accounts during the 2010 calendar year must file an annual report on Treasury Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts, or "FBAR") by the regular June 30, 2011, deadline. In the past, the IRS had granted repeated deferrals for such filings while it studied the matter; for prior years, these deferrals have now been further extended to November 1, 2011.

In general, every U.S. person with a financial interest in, or signature or other authority over, any financial account outside the U.S. must file an FBAR if the aggregate value of all such accounts exceeds $10,000 at any time during the calendar year. For accounts maintained during the 2010 calendar year, the FBAR must be received by the Department of the Treasury no later than June 30, 2011.

Failure to file an FBAR in a timely manner may result in severe civil and/or criminal penalties. There is no grace period for late filing. The penalties for misfiling or non-filing range from $500 for a negligent violation to the greater of $100,000 or half of the amount in the unreported financial account at the time of the violation and up to $500,000 and/or 5 years imprisonment for certain willful and knowing violations.

The following paragraphs describe recent guidance that provides for deferrals to file certain FBARs as well as new regulations that help clarify the scope of the FBAR filing obligation. A more detailed summary of the FBAR rules generally is provided in a previous Foley Adviser.

Deferrals for Certain U.S. Persons with Signature Authority Only

Generally, there are no extensions for filing FBARs; however, the IRS previously deferred the filing deadline for persons with signature or other authority over, (but no financial interest in), foreign financial accounts held during calendar year 2009 or earlier calendar years. Properly deferred, these filings were due June 30, 2011. On June 16, 2011, the IRS released Notice 2011-54 which further extended this deadline until November 1, 2011.

This deferral does not apply to the requirement to report signature authority over (but no financial interest in) foreign financial accounts maintained during the 2010 calendar year. The deadline to report such accounts remains June 30, 2011.

Exceptions to FBAR Requirement and Related Deferrals

The new regulations (discussed below) provide that an officer or employee of any of the following types of entities (a "Specified Entity") is not required to file an FBAR to report a foreign financial account owned or maintained by the Specified Entity so long as the officer or employee has no financial interest in the account:

- 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;
- A financial institution that is registered with and examined by the Securities and Exchange Commission or Commodity Futures Trading Commission:
- An entity (an "Authorized Service Provider") that is registered with and examined by the Securities and Exchange Commission and that provides services to an investment company registered under the Investment Company Act of 1940 (this exemption applies to foreign financial accounts of the registered investment company, not foreign financial accounts of the Authorized Service Provider).
- An entity with a class of equity securities (or American depository receipts) listed on any United States national securities

exchange.

- A United States subsidiary that is included in a consolidated FBAR filed by a United States parent entity with a class of equity securities listed on a United States national securities exchange.
- An entity that has a class of equity securities registered (or American depository receipts in respect of equity securities registered) under Section 12(g) of the Securities Exchange Act.

These exceptions do not apply if the foreign financial account is owned or maintained by a controlled person of the Specified Entity, regardless of whether the employee or officer is an employee or officer of the Specified Entity, the controlled person, or another controlled person of the Specified Entity. For this purpose, a controlled person is a United States or foreign entity more than 50 percent owned (directly or indirectly) by a Specified Entity described above. For these FBARs, the filing requirement has been deferred until June 30, 2012, as announced by the IRS in Notice 2011-1. For all other individuals with an FBAR filing obligation, the deadline remains June 30, 2011.

New Regulations Clarify FBAR Terms

On February 24, 2011, Financial Crimes Enforcement Network (FinCEN) published final regulations regarding FBARs (the "Final FBAR Regulations"). These regulations became effective on March 28, 2011, and apply to FBARs with respect to foreign financial accounts maintained in calendar year 2010 (due June 30, 2011) and subsequent calendar years. The FBAR form and its accompanying instructions have been amended to reflect the changes made by the Final FBAR Regulations. Persons who are properly deferring their FBAR filing obligations may apply the provisions of the Final FBAR Regulations to foreign financial accounts maintained in calendar years beginning before 2010.

Some of the substantive clarifications and revisions included in the Final FBAR Regulations that may be of particular relevance include the following:

1. "*United States person*" is defined to mean a U.S. citizen or resident; an entity, including but not limited to a corporation, partnership, or limited liability company, created or organized in the U.S. or under the laws of the U.S.; and a trust or estate formed under the laws of the U.S. Non-U.S. persons doing business in the United States are not required to file FBARs.

2. A "*financial account*" includes a savings deposit, demand deposit, checking, securities, security derivatives, debt card, prepaid credit card and any other financial instrument account, including certain insurance products and foreign pension funds.

An equity interest in a hedge fund or private equity fund is not currently considered to be a "financial account," though the IRS is considering this question further.

3. A person has a "*financial interest*" in an account if he has legal title or is the owner of record, regardless of whether the account is maintained for his benefit. Thus, an individual with a power of attorney to control an account held on someone else's behalf must file the FBAR.

In some cases, certain direct and indirect stockholders of corporations, partners of partnerships and persons holding voting or equity interests in other entities may be required to file FBARs with respect to foreign financial accounts of these entities. In particular, these rules apply to a United States person who owns directly or indirectly more than 50 percent of (a) the voting power or the total value of the shares of a corporation, (b) the interest in profits or capital of a partnership, or (c) the voting power, total value of the equity interest or assets, or interest in profits. For example, if a U.S. corporation owns 100% of a foreign company that has foreign financial accounts, the domestic corporation must file an FBAR, as must any shareholder who owns more than 50% of the voting power or total value of the shares of the U.S. corporation.

A present beneficial interest in more than 50% of the current income or more than 50% of the assets of a trust that holds a foreign financial account triggers an FBAR filing requirement. However, a trust beneficiary does not need to file the FBAR if the trust, trustee or an agent is a United States person and files an FBAR disclosing the trust's foreign accounts. A person with a remainder interest in a trust is not within the scope of the FBAR. It is also possible that a discretionary beneficiary of a trust may not have an FBAR filing requirement with respect to the trust.

4. "*Signature authority*" is defined as the power of an individual to control the disposition of assets held in a foreign financial account by direct communication (whether in writing or otherwise) with the financial institution that maintains the financial account. An individual who merely has the power to allocate assets within an account does not have "signature authority" for the purposes of the FBAR filing

requirement.

5. A United States person that causes an entity to be created for the purpose of evading the FBAR requirement shall have a reportable financial interest.

Circular 230

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