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Navigating the FBAR Maze

The requirement to annually report foreign financial accounts on Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts* (the "FBAR"), has become an area of increased IRS scrutiny in recent years. Despite the publication of final FBAR regulations in 2011, many U.S. corporations remain confused regarding the FBAR filing requirements, including how the rules affect corporate officers and employees who have signature or other authority over these accounts. This article alerts taxpayers to the upcoming filing deadline for calendar year 2012 FBAR reports, with special focus on the requirements for officers and employees having signature or other authority over foreign financial accounts.

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The requirement to report foreign financial accounts has become an area of increased IRS scrutiny in recent years, as evidenced by the renewed focus on the FBAR. Generally, FBAR reporting applies to each "United States person" (U.S. person) who has a financial interest in, or signature or other authority over, foreign financial accounts that have an aggregate value exceeding $10,000 at any time during the *calendar* year. A U.S. person is defined as (1) a citizen or resident of the United States or (2) a domestic entity (including a corporation, partnership, trust, or limited liability company, regardless of whether the entity has made an election to be disregarded for federal income tax purposes).

Despite the publication of final FBAR regulations in 2011[1] by the Financial Crimes Enforcement Network ("FinCEN," a bureau of the U.S. Department of the Treasury), many U.S. corporations remain confused regarding the FBAR filing requirements, including how the rules affect their officers and employees who have signature or other authority over these accounts. The concerns raised by corporate America on the reporting requirements of its officers and employees led FinCEN to grant a filing extension to certain of these individuals, as described more fully below (in the section on *The Reporting Exception for Employees and Officers*).

[1] RIN 1506-AB08, 76 Fed. Reg. 10245 (Feb. 24, 2011).

Further complicating matters for *individuals* with FBAR filing obligations is the new (and separate) requirement to file Form 8938, *Statement of Specified Foreign Financial Assets*.[2] Although beyond the scope of this article, note that foreign financial accounts over which an individual has signature authority (and which are reportable on the FBAR) are *not* required to be reported on Form 8938, but the scope of foreign assets in which an individual has a reportable interest for purposes of Form 8938 is broader in comparison to the FBAR rules (e.g., interests in a foreign pension plan or foreign deferred compensation plan may be reportable on Form 8938).

Accelerated FBAR Filing Deadline in 2013

FBAR filers should plan to have their 2012 FBARs received by Treasury by Friday, June 28, 2013.

The deadline for filing FBARs for calendar year 2012 is fast approaching. In general, FBARs must be *received* by the U.S. Treasury Department by June 30. Because June 30, 2013, falls on a Sunday, *FBAR filers should plan to have their 2012 FBARs received by Treasury by Friday, June 28, 2013.* Unlike income tax filings, the FBAR due date is *not* extended to the next business day when the deadline falls on a weekend. In addition, unlike income tax filings, there is no "mailbox rule" with respect to FBARs, so the deadline is measured by the date received, not the date sent. The FBAR should be delivered to the address shown in the instructions to the FBAR (Rev. January 2012). A street address is provided in the FBAR instructions if an express delivery service is used. Although paper filings still are acceptable for timely filed 2012 FBARs, filings made after June 30, 2013, are required to be done electronically (using the BSA E-Filing System).

U.S. Persons Have a "Financial Interest" in Accounts of Their Greater-Than-50-Percent-Owned Subsidiaries and Other Entities

In addition to having a financial interest in a foreign financial account when a U.S. person is a named owner of record or a named holder of legal title,

Unless otherwise indicated, references to "section" or "sections" in this article are to the Internal Revenue Code of 1986 (the "Code"), as most recently amended, or to the U.S. Treasury Department regulations (the "regulations"), as most recently adopted or amended.

[2] This reporting requirement under section 6038D, which first took effect for calendar year 2011, is filed with the individual's annual federal income tax return (e.g., Form 1040).

a U.S. person is also treated as having a financial interest through indirect ownership, such as when the owner of record or holder of legal title is:

- A corporation in which the U.S. person owns directly or indirectly more than 50 percent of the voting power or total value of the shares;
- A partnership in which the U.S. person owns directly or indirectly more than 50 percent of the profits interest or capital; or
- Any other entity in which the U.S. person owns directly or indirectly more than 50 percent of voting power, total value of the equity interest or assets, or interest in profits.[3]

Thus, for example, if a U.S. corporation owns a 51 percent profits interest in a foreign partnership and that partnership has a foreign bank account at any time during the 2012 calendar year, the U.S. corporation is considered to have a financial interest in the partnership's account and should include the foreign account on the corporation's FBAR (assuming the aggregate value of all foreign financial accounts of the U.S. corporation exceeded $10,000 at any time during the calendar year).

A U.S. entity that owns directly or indirectly a greater than 50 percent interest in another U.S. entity (such as a corporation or partnership) is permitted to file a consolidated FBAR on behalf of itself and the other entity.

Filing a Consolidated FBAR

A U.S. entity that owns directly or indirectly a greater–than-50-percent interest in another U.S. entity (such as a corporation or partnership) is permitted to file a consolidated FBAR on behalf of itself and the other entity.[4] However, in order for the lower-tier U.S. entity's filing obligation to be satisfied through its parent's consolidated FBAR filing, the lower-tier U.S. entity should be identified in Part V of the consolidated FBAR as the owner of at least one foreign financial account. This may require listing a single account more than once in Part V to ensure that each entity joining in the consolidated FBAR is covered by the consolidated filing.[5] If a financial account is listed more than once in the same FBAR filing, an explanatory note (at the bottom of the page) should be included regarding such repeat listings (e.g., "This financial account is being listed more than

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3 31 C.F.R. § 1010.350(e)(2)(ii).
4 31 C.F.R. § 1010.350(g)(3).
5 This could occur because each of several lower-tier U.S. subsidiaries may be treated as having a financial interest in the same foreign financial account under the "more-than-50 percent ownership" rules.

once to ensure that each U.S. entity participating in the consolidated FBAR filing is identified in Part V of the report.")

The Reporting Exception for Employees and Officers

Certain U.S. persons may be required to file an FBAR even if they do not have a financial interest in a foreign financial account. FBAR reporting is required by a U.S. person who is an individual and who (alone or in conjunction with another) has signature or other authority over bank, securities, or other financial accounts in a foreign country. The preamble to the final regulations clarifies that an officer or employee who merely has supervisory control over a foreign financial account (i.e., can instruct others within the company to transfer or withdraw funds, but cannot directly transfer or withdraw funds) is *not* required to report such an account on an FBAR because reporting is limited to those individuals who have control over the account *through direct communication to the person with whom the financial account is maintained*.[6] Also clarified is the fact that only an individual (and not an entity) can have signature or other authority over an account (so a corporation is not required to complete Part IV of its FBAR).

Exceptions to the filing requirement for individuals with signature authority may apply to the officers and employees of six categories of entities . . .

Exceptions to the filing requirement for individuals with signature authority may apply to the officers and employees of six categories of entities subject to specific types of federal regulation, provided the officers or employees have no financial interest in the reportable account and the foreign financial account is directly owned by the U.S. entity in which they serve as an officer or employee.[7] Officers and employees of the following so-called "regulated entities" may qualify for the reporting exception:

- 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 ("SEC") or Commodity Futures Trading Commission

[6] 31 C.F.R. § 1010.350(f)(1).
[7] 31 C.F.R. §1010.350(f)(2)(i)-(v).

- An "Authorized Service Provider"[8] that provides services to investment companies (U.S. mutual funds) registered with the SEC
- An entity with a class of equity securities listed (or American depository receipts listed) on any U.S. national securities exchange
- A U.S. subsidiary of a U.S. entity with a class of equity securities listed on a U.S. national securities exchange, provided the subsidiary is included in a consolidated FBAR report filed by the parent
- 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 (i.e., corporations with more than $10 million in assets and more than 500 shareholders of record)

Although the listing above appears to exempt from FBAR filing requirements U.S. individuals who are officers and employees of a broad range of regulated entities, the above-described reporting exception is limited in scope and is *not* available to the following individuals:

- Officers and employees of foreign subsidiaries of U.S. corporations who have signature authority over the foreign financial accounts of such foreign subsidiaries, notwithstanding that the U.S. parent company is obligated to report such foreign financial accounts in its own FBAR.
- Officers and employees of U.S. subsidiaries of foreign corporations who have signature authority over foreign financial accounts, as the foreign parent is not required to file an FBAR and the U.S. subsidiary's stock is not publicly traded. This rule applies even if the foreign corporation voluntarily files an FBAR report.
- Officers and employees of a U.S. parent corporation who have signature authority over a foreign financial account of a U.S. subsidiary with regard to the subsidiary's account. Similarly, officers and employees of a U.S. subsidiary that have signature authority over a foreign financial account of its U.S. parent do not qualify for the exception from reporting on the FBAR with regard

[8] An "Authorized Service Provider" is defined as an entity that is registered with and examined by the SEC, and that provides services to an investment company registered under the Investment Company Act of 1940.

to the U.S. parent company's account. These exclusions from the reporting exception apply regardless of whether the two U.S. companies file a consolidated FBAR report.

As a result of questions raised regarding the limited scope of the reporting exception, in FinCEN Notices 2011-1 and 2011-2, certain officers and employees of these regulated entities who fell outside the reporting exception were given an extension of time to report those accounts on their FBARs. As the issues surrounding the reporting exception remain unanswered, the extension granted by FinCEN (which originally provided an extension date of June 30, 2012) was furthered extended to June 30, 2013 (by FinCEN Notice 2012-1) and *extended again to June 30, 2014*, by FinCEN Notice 2012-2 for those U.S. individuals who otherwise qualify under FinCEN Notices 2011-1 or 2011-2 (which, in general, covered the officers and employees described in the prior three bullet points).

The extension, however, does not apply to foreign financial accounts in which officers or employees have a financial interest or to personal accounts over which they have signature or other authority. Thus, an FBAR filing may be required to report calendar year 2012 accounts by June 30, 2013 (actually June 28, 2013, as discussed above). In these situations, an amended FBAR would need to be filed later to report any corporate accounts not originally reported pursuant to the extension under FinCEN Notice 2012-2.

Penalties

U.S. persons required to file an FBAR–whether a U.S. corporation reporting its financial interest in foreign financial accounts or individuals reporting their authority over such accounts–should not forget that civil penalties can be imposed for non-willful reporting failures. Such penalties can generally range from $500 to $10,000 *per account*, depending on the severity of the failure.[9]

Harsher penalties can be imposed for willful reporting failures. If willfulness is found, the penalty is the greater of $100,000 or 50 percent of the amount in the account at the time of the violation.[10] For purposes of this penalty, the violation is considered to have occurred on the due date for filing the FBAR. Thus, the IRS would use the amount (the balance) in

[9] 31 U.S.C. §5321(a)(5)(B).
[10] 31 U.S.C. §5321(a)(5)(C).

the foreign financial account at the close of June 30th in calculating the penalty. The IRS's *Internal Revenue Manual* provides that "[t]he test for willfulness is whether there was a voluntary, intentional violation of a known legal duty."[11] Recently, courts have applied their own standards for willfulness. For example, the Fourth Circuit Court of Appeals equated reckless conduct with willfulness for purposes of the FBAR civil penalty[12] and a federal district court found that willfulness can be established by an individual's reckless disregard of a statutory duty.[13]

Conclusion

In light of the severe penalties at issue, U.S. entities may want to consider a further review of the FBAR rules to determine who is required to file and the manner in which to file. Given the fast-approaching June 28, 2013, deadline for those not eligible for the extension granted by FinCEN in Notice 2012-2, considerations about FBAR filings for calendar year 2012 should be addressed in a timely manner.

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[11] I.R.M. § 4.26.16.4.5.3 (07-01-2008).
[12] United States v. Williams, 489 Fed. Appx. 655 (4th Cir. 2012).
[13] United States v. McBride, 110 AFTR 2d 2012-6600 (D. Utah 2012).