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Form TD F 90-22.1 (FBAR) reporting

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1. Overview of FBAR regime

a. Bank Secrecy Act

The rules requiring U.S. persons to report their interest in any foreign financial account having a value of greater than $10,000 are found in the Bank Secrecy Act, 31 U.S.C. 5311 *et seq*.[1] 31 U.S.C. §5314, "Records and reports on foreign financial agency transactions," states: "The Secretary of the Treasury shall require a resident or citizen of the United States, or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. . . ." Furthermore, 31 C.F.R. §1010.350 states as follows:

> Each United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country shall report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 to be filed by such persons. The form prescribed under section 5314 is the Report of Foreign Bank and Financial Accounts (TD-F 90-22.1), or any successor form.[2]

b. FBAR as hybrid AML/tax compliance form

Although the initial purpose of Sec. 5314 was to allow the U.S. Dept. of the Treasury to better track illicit proceeds from illegal activities (i.e., money laundering), in 2003 the Financial Crimes Enforcement Network ("FinCEN") (a branch of the U.S. Treasury) delegated its FBAR enforcement duties to the IRS.[3] Furthermore, at least through the 2013 year, the FBAR form is filed with an IRS field office in Detroit, Michigan (from 2014 forward, the FBAR form must be filed electronically - see Sec. 2 below). The somewhat curious "hybrid" nature of the FBAR form as both an anti-money laundering ("AML") and tax reporting form shouldn't disguise the fact that the IRS takes FBAR compliance very seriously. Since the early 2000s, the FBAR has become a key tool for the IRS to identify high net worth U.S. taxpayers hiding unreported income in offshore bank accounts, and the penalties for noncompliance with the FBAR rules can be very severe.

c. Final FBAR regulations

On February 24, 2011, Treasury and FinCEN issued final regulations ("2011 Final Regulations") pertaining to reporting of foreign bank accounts on Form TD F 90-22.1 ("FBAR"). The 2011 Final Regulations replace proposed regulations issued by FinCEN on February 26, 2010 (75 FR 8844). The 2011 Final Regulations are effective March 28, 2011 and generally apply to reports required to be filed by June 30, 2011.

> ***Note:** Despite the historically low levels of FBAR compliance (in the early 2000s, FBAR compliance was estimated at approx. 20%), in recent years the U.S. Treasury and FinCEN have significantly stepped-up enforcement efforts and are increasingly imposing serious monetary penalties on non-FBAR filers. See Section 7 (FBAR penalties) below.

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[1] See *Currency and Foreign Transaction Reporting Act of 1970*, P.L. No. 91-508, 84 Stat. 114 (1970).

[2] On October 26, 2010, FinCEN issued a final rule ("Chapter X Final Rule" creating a new Chapter X in title 31 of the Code of Federal Regulations for anti-money laundering (AML) regulations. See 75 FR 65806 (Oct. 26, 2010) (Transfer and Reorganization of Bank Secrecy Act Regulations Final Rule). Under the Chapter X Final Rule, effective March 1, 2011, the AML regulations (including FBAR rules) previously found in 31 C.F.R. Part 103 were transferred to 31 C.F.R. Chapter X. All FBAR regulation citations in this memo are to the newly-designated Chapter X citations.

[3] 68 FR 26,468 (May 16, 2003) (codified at 31 CFR §103.56(g)).

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d. Form TD-F 90-22.1, "Report of Foreign Bank and Financial Accounts"
The form in which foreign accounts are required to be disclosed pursuant to 31 U.S.C. 5314 is Form TD-F 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR form" or "FBAR").[4] 31 U.S.C. §1010.350(a). The current version of the FBAR form was released in January, 2012 ("January 2012 FBAR").[5]

> ***Note:** In addition to the FBAR, for the 2011 calendar years forward, U.S. citizens and tax residents maintaining bank or other financial accounts outside the U.S. must also file Form 8938, "Statement of Specified Foreign Financial Assets."

2. FBAR filing requirements

a. Basic filing rule
Every U.S. person - which includes U.S. citizens, residents, domestic corporations and partnerships - that has a financial interest in, or signature authority over, any foreign financial account must file an FBAR if the aggregate value of such foreign financial account exceeds $10,000 at any time during the calendar year. FBAR Instructions, page 1.[6] The FBAR form does not attach to the filer's tax return; rather, it is a separately-filed form.

b. Manner and due date for filing

(1) 2013 calendar year and forward - mandatory electronic FBAR filing
Effective July 1, 2013, all FBAR forms must be filed electronically (the electronic version of the FBAR is FinCEN Form 114).[7] In order to e-file the FBAR, one must register in the BSA website at bsaefiling.fincen.treas.gov. Persons needing assistance in e-filing an FBAR may call the BSA E-Filing Help Desk at 866-346-9478 or send an email to BSAEfilinghelp@fincen.gov.

(2) 2012 and prior years - paper filing
For the 2012 calendar year and previous years, the FBAR form was filed by mailing it to: U.S. Department of the Treasury, P.O. Box 32621, Detroit, MI 48232-0621 (or for the 2012 year it could be e-filed). Under this paper filing procedure, the FBAR must have been filed with the Commissioner of Internal Revenue on or before June 30 of each calendar year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year. 31 C.F.R. §1010.306(c) (former §103.27(c)).

> ***Note:** Per the January 2012 FBAR Instructions, the filing must have been *received by* the IRS by June 30, rather than merely *mailed* by that date.

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[4] The FinCEN version of the FBAR form is FinCEN Form 114 (this version of the FBAR is only available in electronic format, because from July 1, 2013 onward, the FBAR must be e-filed).

[5] The January 2012 FBAR replaced the prior version of the FBAR form released in March 2011, which reflected the changes made to the FBAR reporting rules under the 2011 Final Regulations. Prior to the issuance of the March, 2011 FBAR form, there were two versions of the FBAR form - the 2000 version and the October, 2008 version. The form versions and changes made thereto over the years are relevant because the guidance to FBAR reporting has been, in whole or in part, found in the FBAR instructions, which has varied depending on the particular version applicable under the circumstances.

[6] Along with the BSA regulations themselves, the FBAR form and instructions serve as legal authority concerning the specific FBAR filing requirements.

[7] FinCEN announced on Feb. 24, 2012 that they were requiring all FinCEN reports to be filed electronically from July 1, 2012 onward (the mandatory e-filing requirement cut-off date for the FBAR was extended to July 1, 2013, however).

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c. Filers having financial interest in 25 or more foreign financial accounts
In the case of filers having a financial interest in 25 or more foreign financial accounts, such filers need only provide the number of accounts on the report, but need not provide the name of the bank(s), account numbers or balances therein. However, such information must be maintained by the filer and made available upon request. 31 C.F.R. §3010.350(g)(1).

d. Filers having signature authority in 25 or more foreign financial accounts
In the case of filers having a signature or other authority in 25 or more foreign financial accounts, such filers need only provide the number of financial accounts and certain other basic information on the report, but will be required to provide detailed information concerning each account upon request. 31 C.F.R. §3010.350(g)(2).

***Note:** Because of the aforementioned reporting exceptions for filers having a financial interest in (or signatory authority over) 25 or more foreign financial accounts, what this essentially means for large companies is that FBAR compliance fundamentally represents a *recordkeeping requirement*. See Section 8 (FBAR recordkeeping) below.

e. Consolidated FBAR filings
An entity which is a United States person and which owns, directly or indirectly, more than a 50% interest in one or more other entities required to file FBAR reports may file a consolidated FBAR on behalf of itself and such other entities. 31 C.F.R. §3010.350(g)(3).[8] Where corporate filers file a consolidated FBAR, Part V, "Information on Financial Account(s) Where Corporate Filer is Filing a Consolidated Report," must be completed.

f. Accounts held by qualified retirement plans
Participants and beneficiaries in retirement plans described by IRC Sec. 401(a), 403(a) or 403(b), as well as owners and beneficiaries of individual retirement accounts described by Sec. 408 or Roth IRAs described by Sec. 408A, are not required to file an FBAR with respect to a foreign financial account held by or on behalf of the retirement plan or IRA. 31 C.F.R. §3010.350(g)(4).

g. Accounts held by certain trusts
A beneficiary of a trust described in 31 C.F.R. §3010.350(e)(2)(iv) (i.e., a trust in which a U.S. person has a present beneficial interest in greater than 50% of the trust's assets or income) is not required to report the trust's foreign financial accounts if the trust, trustee of the trust, or agent of the trust is a United States person that files an FBAR report disclosing such accounts. 31 C.F.R. §3010.350(g)(5).

h. Tax return disclosure of foreign financial accounts
Individuals or entities having a federal tax return filing obligation and that have an FBAR filing obligation have an additional disclosure obligation with respect to foreign financial accounts on their tax returns.

(1) Disclosures for individuals
Individuals filing Form 1040, "U.S. Individual Income Tax Return," must disclose whether they had any interest in or signatory authority over a foreign financial account on Line 7a of Schedule B, "Interest and Ordinary Dividends."

(2) Disclosures for corporations
Corporations filing Form 1120, "U.S. Corporation Income Tax Return," must disclose whether it had any interest in or signatory authority over a foreign financial account on Line 6a of Schedule N, "Foreign Operations of U.S. Corporations."

[8] The preamble to the 2011 Final Regulations confirms that foreign parents of U.S. subsidiaries may not file a consolidated FBAR report that would cover itself and its U.S. subsidiaries.

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i. Information to be reported on FBAR

With respect to any foreign financial account, the following information is required to be reported on the FBAR:

(1) the name and mailing address of the financial institution holding the account;
(2) the type of account;
(3) the account number; and
(4) the maximum value of the account during the calendar year.

3. Definitions

a. "United States person"

"United States person" includes: (1) a U.S. citizen; (2) a U.S. resident; and (3) an entity, including but not limited to, a corporation, partnership, trust, or limited liability company created, organized, or formed under the laws of the United States, the District of Columbia, and U.S. territories and possessions. 31 C.F.R. §1010.350(b). This definition generally conforms to the definition in the 2000 FBAR instructions, but with the addition of domestic LLCs and clarification that persons who are residents of U.S. territories and possessions are subject to FBAR reporting.[9] Note that, under this definition, Puerto Rican corporations are subject to FBAR reporting of their foreign accounts. With respect to the treatment of domestic disregarded entities (e.g., a single-member LLC), according to the IRS website FBAR Frequently-Asked Questions (2009),[10] single-member domestic LLCs that are disregarded for federal tax purposes are nonetheless considered "persons" for FBAR reporting purposes.

b. "United States"

For purposes of the FBAR rules, "United States" is defined with reference to the definition set forth in 31 C.F.R. §1010.100(hhh). 31 C.F.R. §1010.350(b)(2). Under 31 C.F.R. §1010.100(hhh), "United States" is defined as including the United States as well as its territories and possessions.

> **Note:** The definition of "United States" set forth in the BSA regulations, as it includes U.S. possessions, differs with that set forth in the Tax Code. See Sec. 7701(a)(9) (defining "United States," for federal tax purposes as only including the 50 states and District of Columbia). Practically speaking, the inclusion of U.S. possessions in the "United States" for FBAR reporting purposes means that - (a) U.S. possessions residents (and companies) are subject to the FBAR reporting rules, and (b) financial accounts maintained in U.S. possessions financial institutions are not subject to FBAR reporting (see the definition of "foreign country" below).

c. "United States resident"

For purposes of §1010.350(b), a resident of the United States is an individual who is a resident alien under IRC Sec. 7701(b) and the regulations thereunder (but using the definition of "United States" in 31 C.F.R. §1010.100(hhh) instead of the definition set forth in Reg. §301.7701(b)-1(c)(2)(ii)).[11] §1010.350(b)(2).

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[9] Under the 2000 FBAR Instructions, "United States person" was defined as (1) a citizen or resident of the United States; (2) a domestic partnership; (3) a domestic corporation; or (4) a domestic trust or estate. Under the Oct. 2008 FBAR Instructions, "United States person" was defined as "a citizen or resident of the United States, or a person in and doing business in the United States." Because of controversy over the latter definition, which would extend FBAR reporting obligations to foreign persons doing business in the U.S., the IRS stated that, at least with respect to the 2008 and 2009 filing years, the 2000 FBAR definition should be used. See Announcement 2009-51 (June 5, 2009) and Announcement 2010-16 (March 15, 2010).

[10] www.irs.gov/businesses/small/article/0,,id=210244,00.html

[11] Reg. §301.7701(b)-1(c)(2)(ii) defines "United States" as only including the states, and *not* its territories or possessions).

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d. "Foreign country"

Only accounts of U.S. persons located in a foreign country are subject to reporting. For this purpose, "foreign country" includes all geographical areas located outside the United States, as the term is defined under 31 C.F.R. §1010.100(hhh).[12] 31 C.F.R. §1010.350(d). Therefore, accounts of U.S. persons located in Puerto Rico (or any other U.S. territory or possession), do not have to be reported. Note also that accounts located in a foreign country held by a U.S. financial institution are subject to reporting. See January 2012 FBAR Instructions ("The geographic location of the account, not the nationality of the financial entity institution in which the account is found determines whether it is an account in a foreign country.").

4. Financial accounts subject to reporting

a. In general

There are three types of accounts subject to FBAR reporting: Bank accounts, securities accounts and other financial accounts.

(1) Bank account

The term "bank account" means a savings deposit, demand deposit, checking, or any other account maintained with a person engaged in the business of banking. 31 C.F.R. §1010.350(c)(1).

(2) Securities account

The term "securities account" means an account with a person engaged in the business of buying, selling, holding or trading stock or other securities. 31 C.F.R. §1010.350(c)(2).

(3) Other financial account

The term "other financial account" means -

(i) an account with a person that is in the business of accepting deposits as a financial agency;

(ii) an account that is an insurance or annuity policy with a cash value;

(iii) an account with a person that acts as a broker or dealer for futures or options transactions in any commodity on or subject to the rules of a commodity exchange or association; or

(iv) an account with -

(A) a mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions; or

(B) other investment fund [reserved].[13]

31 C.F.R. §1010.350(c)(3).

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[12] See also IRS website FBAR Frequently-Asked Questions (2009) ("Foreign country" includes all geographical areas outside the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the territories and possessions of the United States (including Guam, American Samoa, and the U.S. Virgin Islands).

[13] With respect to so-called "foreign commingled-fund accounts," the IRS has stated that, at least for the 2009 and prior filing years, it will not interpret the term "commingled fund" as applying to funds *other than* mutual funds. Hence, U.S. persons holding an interest in foreign hedge fund or private equity fund accounts were not subject to 2009 FBAR reporting. See Notice 2010-23 (Feb. 26, 2010). With respect to the 2008 and 2009 years, the IRS provided additional time for U.S. persons to report foreign mutual fund accounts. See Notice 2009-62 (Aug. 7, 2009) and Notice 2010-23 (Feb. 26, 2010). In the Preamble to the 2011 Final Regulations, FinCEN indicated that it continues to defer the requirement for offshore investment funds *other than* mutual funds (e.g., hedge funds & private equity funds) to be subject to FBAR reporting.

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b. Excepted accounts
The following types of accounts are excepted from FBAR reporting:

(i) an account of a department or agency of the United States, an Indian Tribe, or any state or political subdivision thereof, or a wholly-owned entity, agency or instrumentality of any of the foregoing;

(ii) an account of an international financial institution of which the U.S. government is a member;

(iii) an account in a U.S. military banking facility operated by a United States financial institution designated by the U.S. government to serve U.S. government installations abroad; and

(iv) correspondent or "nostro" accounts that are maintained by banks and used solely for bank-to-bank settlements.

31 C.F.R. §1010.350(c)(4).

c. Amount subject to reporting
For reporting purposes and to determine whether the $10,000 reporting threshold has been met, the filer must use the largest amount of currency and/or non-monetary assets that appear on any quarterly or more frequent account statement issued for the applicable year. If periodic account statements are not issued, the maximum account asset value is the largest amount of currency and non-monetary assets in the account at any time during the year.

5. "Financial interest"

a. In general
A U.S. person will be considered to have a "financial interest" in a foreign account where either:

(i) such person is the owner of record or has legal title to the account (whether the account is maintained for his or her own benefit or for the benefit of others, including non-United States persons); or

(ii) the owner of record or holder of legal title of the account is a person acting as an agent, nominee, attorney, or in some other capacity on behalf of such person with respect to the account.

31 C.F.R. §1010.350(e)(1), (2)(i).

b. Deemed financial interest through foreign entities
In addition, a U.S. person will be *deemed* to have a financial interest in an account where:

(i) the owner of record or holder of legal title of a foreign financial account is a corporation in which the United States person owns, directly or indirectly, greater than 50% of the total shares, by vote or value;

(ii) the owner of record or holder of legal title of a foreign financial account is a partnership in which the United States person owns, directly or indirectly, a greater than 50% or greater profits or capital interest; or

(iii) the owner of record or holder of legal title of a foreign financial account is a trust in which the United States person has a present beneficial interest (directly or indirectly) in greater than 50% of the trust's assets or income.

31 C.F.R. §1010.350(e)(2)(ii).

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Therefore, based on §1010.350(e)(2)(ii), a U.S. shareholder of a controlled foreign corporation ("CFC")[14] or a U.S. partner of a controlled foreign partnership ("CFP"),[15] must report any foreign bank accounts in which the CFC or CFP is the owner of record or holder of legal title.

c. Anti-avoidance rule

The 2011 Final Regulations contains an anti-avoidance rule. Under this rule, any U.S. person that causes an entity, including (but not limited to) a corporation, partnership, or trust, to be created for a purpose of evading the FBAR reporting requirements will be considered to 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. 31 C.F.R. §1010.350(e)(3).

6. Signature authority accounts

a. In general

Each United States person having "signature or other authority" over, a bank, securities, or other financial account in a foreign country is subject to annual FBAR reporting. 31 C.F.R. §1010.350(a)(1). Importantly, this requirement applies, whether or not such person holds a financial interest in the account. 31 C.F.R. §1010.350(f) elaborates on the reporting requirement of U.S. persons with signature authority only (i.e., no financial interest) over foreign financial account.

> ***Note:** Due to the lack of clear guidance with respect to the signature authority FBAR filing requirement for years prior to those covered by the 2011 Final Regulations, the IRS (and FinCEN) has granted extension of time to file FBARs for signature authority-only filers. See below.

b. "Signature or other authority"

For purposes of the signature authority FBAR reporting requirement, "signature or other authority" is "the authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by *direct communication* (whether in writing or otherwise) to the person with whom the financial account is maintained." 31 C.F.R. §1010.350(f)(1) (emphasis added).

c. Direct v. indirect signature authority

According to the Preamble to the 2011 Final FBAR Regulations (75 FR 8844) (Feb. 24, 2011) ("Preamble"), FinCEN acknowledged that there may be some uncertainty as to whether a U.S. person that "has the ability to instruct or supervise others with signature authority over a reportable account" was subject to FBAR reporting themselves. In the Preamble, FinCEN stated that the primary reason they included the word "direct" in 31 C.F.R. 1010.350(f)(1) was to eliminate such uncertainties with respect to persons with supervisory authority over persons with signature authority over reportable accounts. According to the Preamble, "the test for determining whether an individual has signature or other authority over an account is whether the foreign financial institution will act upon a direct communication from that individual regarding the disposition of assets in that account." Therefore, corporate directors who do not have direct authority over the disposition of funds within an account, but who *do* have supervisory authority over lower-level managers with such authority, should *not* be subject to the FBAR reporting requirements.

d. Officers listed on certificate of incumbency but not on bank signature card

Based on the "direct"/"indirect" authority distinction, it is reasonable to conclude that officers of a U.S. company listed on a certificate of incumbency as having *general* supervisory authority over the company's bank accounts, but not specific authority to control the disposition of funds in a particular financial account, will not

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[14] A "controlled foreign corporation" is any foreign corporation, greater than 50% of the stock (by vote or value) of which is owned, directly, indirectly or constructively, by "U.S. shareholders" (i.e., U.S. persons holding a 10% or greater interest in the corporation's voting stock) on any day during the taxable year of such corporation. Sec. 957(a); Reg. §1.957-1(a).

[15] A "controlled foreign partnership" is generally a foreign partnership greater than 50% of the interests of which are owned by 10% U.S. partners. See Sec. 6038(a)(5). Such U.S. partners are obligated to file an annual information return on Form 8865 with respect to their interest in the partnership.

be subject to FBAR reporting where such officers are not listed on the bank signature card held on file by the bank (such bank signature card delegating authority to act on behalf of the company with respect to that account). In the aforementioned case, only the person(s) listed on the bank signature card should be considered to have "signature or other authority" over the account for FBAR purposes.

e. Signature authority exceptions

(1) In general

The 2011 Final Regulations provides the following exceptions to the signature authority-only reporting requirement (see also the Jan. 2012 FBAR Instructions):

(i) Officers/employees of federally-regulated banks: An officer or employee of a bank that is examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the FDIC, the OTS, or the NCUA need not report that he has signature or other authority over a foreign financial account owned or maintained by the bank if the officer or employee has no financial interest in the account.

(ii) Officers/employees of SEC-registered financial institutions: An officer or employee of a financial institution that is registered with and examined by the SEC or CFTC need not report that he has signature or other authority over a foreign financial account owned or maintained by such financial institution if the officer or employee has no financial interest in the account.

(iii) Officers/employees of Authorized Service Providers: An officer or employee of an Authorized Service Provider (i.e., an entity registered with and examined by the SEC and that provides services to an investment company registered under the Investment Company Act of 1940) need not report that he has signature or other authority over a foreign financial account owned or maintained by an investment company that is registered with the SEC if the office or employee has no financial interest in the account.

(iv) Officers/employees of nationally-listed companies: An officer or employee of an entity with a class of equity securities (or ADRs) listed on any U.S. national securities exchange need not report that he has signature or other authority over a foreign financial account of such entity if the officer or employee has no financial interest in the account, and an officer or employee of a U.S. subsidiary of a U.S. entity with a class of equity securities listed on a U.S. national securities exchange need not file a report concerning signature or other authority over a foreign financial account of the subsidiary if he has no financial interest in the account and the U.S. subsidiary is included in a consolidated report of the parent filed under 31 C.F.R. §3010.350.

(v) Officers/employees of Sec. 12(g) registered foreign companies: An officer or employee of an entity that has a class of equity securities (or ADRs in respect of equity securities) registered under Sec. 12(g) of the Securities Exchange Act[16] need not report that he has signature or other authority over the foreign financial accounts of such entity if he has no financial interest in the accounts.

31 C.F.R. §1010.350(f)(2)(i)--(v); Jan. 2012 FBAR Instructions.

(2) Signature authority - officers/employees of multinationals

Based on the above, the changes reflected in the 2011 Final Regulations (as compared to the Oct., 2008 FBAR Instructions) with respect to signature authority-only reporting are as follows:

(a) Officers/employees of foreign subs of U.S. publicly-traded companies

Officers or employees of foreign subsidiaries of a U.S. publicly-traded company are *not* covered by any exception to signature authority reporting; and

[16] Section 12(g) of the Securities and Exchange Act of 1934 requires registration by foreign private issuers of certain equity securities when such securities become "widely held," i.e., when the issuer has $10 million in assets or more, and more than 500 record holders of the securities, at least 300 of which are U.S. residents.

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(b) Officers/employees of affiliates of ADR-listed foreign companies

The publicly-traded exception extends to officers or employees of *foreign companies* whose shares (or ADRs) are listed on a U.S. national securities exchange, but only with respect to accounts held by that entity (and not its U.S. or foreign subsidiaries).

> **Note:** As mentioned above, officers or employees of a foreign-owned U.S. company may *not* avail itself of the publicly-traded company exception to the signature authority FBAR filing requirement on the basis that its foreign parent's stock (or ADRs) are listed on a U.S. exchange. According to the Preamble to the 2011 Final Regulations, FinCEN decided against extending the publicly-traded company exception to U.S. affiliates or subsidiaries of foreign publicly-traded entities.

f. Former CFO certification exception

As a result of the 2011 Final Regulations, the rules pertaining to signature authority-only reporting changed in 2010 in two important aspects: (i) the "CFO certification" exception rule has been completely eliminated; and (ii) the exception for officers or employees of U.S. publicly-traded corporations no longer extends to foreign corporations controlled by the U.S. parent (it only extends to the parent and its U.S. subsidiaries, whether such subsidiaries are controlled or not). The following is a summary of the former "CFO certification" exception, and the new rule that replaces it.

(1) In general

With respect to the signature authority reporting requirement, the old (pre-2011) FBAR regulations provided no guidance at all. Therefore, prior to 2011, the sole authority with respect to the signature authority requirement was the FBAR instructions applicable for the relevant year. The FBAR form was revised in July 2000, and then later in October, 2008. The July, 2000 FBAR Instructions provided that, in the case of a foreign account held by a publicly-traded (i.e., U.S.-listed) or widely-held (i.e., having 500 or more shareholders) domestic corporation, an officer or employee of that corporation having signature authority over (but no financial interest in) the account was not required to file an FBAR, so long as such person had been advised in writing by the chief financial officer ("CFO") of the corporation that the company itself had filed an FBAR report which included that account. The 2000 FBAR instructions did *not,* however, extend the "CFO certification" exception to foreign accounts held by U.S. or foreign subsidiaries of a U.S. parent.

(2) FinCEN guidance on CFO certification exception

In 1988, FinCEN apparently issued a (non-public) ruling ("1988 FinCEN Ruling") in which it concluded that the CFO certification exception extended to >50% owned U.S. and foreign subsidiaries of a publicly-traded U.S. parent. In 2005, the IRS apparently confirmed (albeit informally) to a national accounting firm that the CFO exception extended to U.S. & foreign subsidiaries of a publicly-traded domestic parent. Apparently some U.S. publicly-traded companies have been relying on the 1988 FinCEN Ruling to exempt all of their employees with signature authority from FBAR filing, at least with respect to >50%-owned U.S. & foreign subsidiaries. But because the July 2000 FBAR instructions did not expressly extend the CFO certification exception to a U.S. parent's subsidiaries, it is questionable whether this position was appropriate with respect to the years prior to 2008 (i.e., the years in which the July, 2000 FBAR form was controlling authority), because the 1988 FinCEN Ruling may have only applied to the person requesting it.

(3) October, 2008 FBAR Instructions

In October, 2008, a revised FBAR form was issued, in which the CFO certification exception covered U.S. publicly-traded parent corporations, domestic subsidiaries of a U.S. publicly-traded parent corporation, and foreign subsidiaries that were controlled (i.e., >50% owned) by the U.S. publicly-traded parent.

(4) 2011 Final Regulations

As previously mentioned, in February, 2011, final FBAR regulations were issued, and in March, 2011, a revised FBAR form and instructions were issued that reflect the final regulations (and in January, 2012, a further-revised FBAR form was released). In the 2011 Final Regulations (and March, 2011 FBAR Instructions), the publicly-traded U.S. corporation exception extended to domestic but *not* foreign subsidiaries of the U.S. parent (and the CFO certification requirement was eliminated). Therefore, in contrast to the position some U.S.

companies may have taken previously, starting in 2010 and forward, officers or employees of *any* foreign corporation, whether U.S.-controlled or not, are subject to FBAR filing - no exception applies.

g. Administrative relief accorded to signature authority-only FBAR filers

(1) In general
Due to the somewhat confusing (and in some cases, even contradictory) guidance with respect to calendar years not covered by the 2011 Final Regulations, the IRS and FinCEN have granted administrative relief in the form of filing extensions for U.S. persons having signature authority over (but no financial interest in) a foreign financial account.

(2) Notice 2011-54 (July 18, 2011)
In Notice 2011-54, IRB 2011-29 (July 18, 2011) (signature authority only filers have until November 1, 2011 to file FBAR form with respect to 2009 or previous years).

(3) Notice 2010-23 (Feb. 26, 2010)
In Notice 2010-23, 2010-11 IRB 441 (Feb. 26, 2010), the IRS provided a 1-year FBAR filing extension granted to signature authority-only filers with respect to 2009 FBAR filing - such filers have until June 30, 2011 to file form.

(4) Notice 2009-62 (Aug. 7, 2009)
In Notice 2009-62, 2009-35 IRB 260 (Aug. 7, 2009), the IRS provided a 2-year FBAR filing extension granted to signature authority only filers with respect to 2008 and prior year FBAR filings - such filers have until June 30, 2010 to file the form.

(5) FinCEN administrative relief
Regarding signature authority-only filers, FinCEN has also provided administrative relief. In FinCEN Notice 2012-2 (Dec. 26, 2012), FinCEN stated that signature authority-only FBAR filers qualifying for administrative relief under Notice 2011-1, Notice 2011-2 or Notice 2012-1 (see footnote) have until June 30, 2014 to file their FBARs with respect to previous calendar years covered by those notices.[17]

[17] See also FinCEN Notice 2011-1 (May 31, 2011) (rev. June 2, 2011) (FBAR filing due date extended to June 30, 2012 for signature authority-only filers whose FBAR obligations may be effected by the signature authority-only filing exceptions set forth in §1010.350(f)(2)(i)--(v)); FinCEN Notice 2011-2 (FBAR filing due date extended to June 30, 2012 for signature authority-only filers who are certain employees or officers of SEC-registered investment advisors); FinCEN Notice 2012-1 (FBAR filing due date extended to June 30, 2013 for signature authority-only filers who qualified for administrative relief under Notice 2011-1 or Notice 2011-2).

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7. FBAR penalties

a. In general
As noted in the introduction, there has been a historically low level of FBAR compliance; in the early 2000s, the U.S. Treasury estimated that only 20% of persons required to report an offshore bank account on an FBAR actually did so. In recent years, the U.S. Treasury/IRS and FinCEN have significantly stepped-up enforcement efforts against recalcitrant FBAR filers. Furthermore, the current penalties for failing to file an FBAR when required, or failing to include all required information on an FBAR, can be very severe, particularly in the case of a "willful" violation. Where a taxpayer is found to have willfully disregarded the FBAR filing requirement, the Dept. of the Treasury may generally subject the taxpayer to a civil penalty up to a maximum of $100,000 (or 50% of the unreported account's balance, if greater).[18] Civil penalties for failure to comply with the FBAR rules are set forth in 31 U.S.C. 5321(a)(5), "Foreign financial agency transaction violation." Sec. 5321(a)(5) distinguishes between "nonwillful" and "willful" failures to comply.

b. Civil penalties - nonwillful failure to comply
The civil penalty for a non-willful violation of 31 U.S.C. §5314 is an amount not to exceed $10,000 for each violation. However, this penalty may be waived if the underlying violation was due to "reasonable cause," and the amount of the transaction or the balance in the account at the time of the transaction was properly reported. 31 U.S.C. 5321(a)(5)(B).

c. Civil penalties - willful failure to comply
The civil penalty for a "willful" violation of §5314, much higher than for a "nonwillful" violation is an amount not to exceed the greater of: (i) 50% of the balance in the account, or (ii) $100,000, for each violation. 31 U.S.C. 5321(a)(5)(C). The statute of limitations applicable to §5314 is six years.

d. Criminal penalties
Persons who willfully fail to comply with the FBAR filing requirements may be subject to criminal penalties, which could include a monetary fine not to exceed $250,000, or imprisonment for not more than five years. However, in the case of a willful violation of the FBAR reporting rules, if done in connection with the violation of another U.S. law or as part of a pattern of illegal activity involving more than $100,000 in any 12-month period, may be penalized by a monetary fine not to exceed $500,000, up to 10 years imprisonment, or both. 31 U.S.C. 5322.

e. Burden of proof issues for civil FBAR penalties
As noted above, the civil penalty for a "willful" FBAR violation can be very harsh. There has been various litigation in recent years involving the civil "willfulness" FBAR penalty. The question that courts have considered is whether a taxpayer claiming not to have known about the FBAR filing requirement may be subject to the higher civil "willfulness" penalty. Generally, courts have answered that question affirmatively, stating that taxpayers may not "close their eyes" to their filing obligations. See *United States v. McBride* (2:09-cv-378 DN) (U.S.D.C. Utah) (Nov. 8, 2012) (concluding that taxpayer had constructive knowledge of the FBAR filing requirement); *United States v. Williams* (No. 10-2230) (unpublished opinion) (4th Cir. 2012) (concluding that "willfulness" for FBAR violations may be inferred "from a conscious effort to avoid learning about reporting requirements"). But see *James v. United States* (8:11-cv-271-T-30AEP) (U.S.D.C. FL) (Aug. 14, 2012) (Court denied government's motion for summary judgment, concluding that Taxpayer could be found to have "reasonable cause" for failing to file Form 3520 requiring reporting of offshore trusts where he reasonably relied on the advice of a tax preparer).

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[18] The civil penalties for failure to timely file an FBAR were dramatically increased in 2004 under the 2004 JOBS Act. Prior to the JOBS Act, the government could generally only impose civil FBAR penalties where it could prove the taxpayer acted willfully; in short, the government had to show that the taxpayer both knew about his FBAR filing obligation and deliberately disregarded this obligation. Furthermore, under pre-JOBS Act law, the maximum civil FBAR penalty was the greater of $25,000 or the amount of the transaction (but in the latter case, not to exceed $100,000). Following the JOBS Act, the government no longer held the burden of proof to show "willfulness," the government could impose FBAR penalties for either "nonwillful" or "willful" penalties, and the civil penalty for "willful" FBAR violations was fine not to exceed the greater of $100,000 or 50% of the account balance.

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f. No civil penalties where no non-reported income

Notwithstanding the greatly expanded FBAR enforcement environment that has developed in recent years, the IRS has publicly stated that no civil FBAR penalties will be imposed where there is no underreporting of income relating to the unreported offshore account. See Offshore Voluntary Disclosure Program FAQ (last updated August 26, 2013) ("OVDP FAQ"), Question 17.

> ***Note:** In the case where a taxpayer failed to file an FBAR, but reported and paid tax on all his income, the IRS instructs such persons to file "delinquent" (i.e., late) FBARs for the relevant years (but again, no penalties should be imposed in this case). See OVDP FAQ, Question 17.

g. Quiet disclosure to avoid penalties

Some recalcitrant FBAR filers neglecting to file the FBAR in prior years in which such filing was required, and in which there was unreported income attributable to the unreported offshore account, have sought to avoid FBAR penalties by making "quiet" disclosures; generally meaning that they simply file an amended tax return (e.g., Form 1040) for the relevant year, which reflects the previously unreported income, as well as a delinquent FBAR. The strategy in the above case is to stay outside of the IRS' 2009 and 2012 offshore amnesty programs, which generally impose civil (but no criminal) penalties on recalcitrant FBAR filers having unreported income attributable to the account. Although this strategy may work, the U.S. Treasury has noted that they are monitoring amended returns for indications that the previously unreported income was attributable to an unreported offshore account. See OVDP FAQ, Question 18.[19]

8. Recordkeeping requirements

a. In general

Recordkeeping is a very important part of FBAR compliance. 31 C.F.R. §3010.420 (formerly 31 C.F.R. §103.32) requires taxpayers who have an interest in (or signature authority over) any foreign financial account to keep detailed records concerning such interest (or signature authority). §3010.420 provides as follows:

> Records of accounts required by §1010.350 to be reported to the Commissioner of Internal Revenue shall be retained by each person having a financial interest in or signature or other authority over any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of 5 years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of 5 years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent Federal income tax return or failing to file a Federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

b. Truncated recordkeeping for officers or employees

Officers or employees who have signature authority only over accounts of their employer, and who are working overseas, are not required to personally maintain records of those accounts pursuant to 31 C.F.R. §3010.420. See Preamble to 2011 Final Regulations.

[19] See also Government Accountability Office, *Offshore Tax Evasion: IRS Has Collected Billions of Dollars, but May Be Missing Continued Evasion* (GAO-13-318) (April 26, 2013) (identifiying over 10,000 taxpayers who filed amended or late tax returns and FBARs for years covered by the 2009 OVDP).

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