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# Reporting of offshore investments - proposed regulations and the HIRE Act

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### Introduction

Offshore financial accounts and investment companies are frequently in the news these days. The Treasury Department is serious about tax enforcement on cross-border investment flows and has released proposed regulations expanding those US persons who must file annual foreign bank account reports. And Congress is serious about collecting information on offshore investments, having included provisions in the recently passed Hiring Incentives to Restore Employment (HIRE) Act requiring US individuals to file a statement disclosing foreign financial assets with their income tax return and US shareholders of passive foreign investment companies to file an annual information return.

International families and their advisers need to be aware of these filing requirements and how they may affect trust structures, because the civil penalties for failure to file can be significant and certain violations are also subject to criminal penalties.

**Background**

***Foreign bank account reporting***

US persons are required to report, on Form TD F 90-22.1, financial interests in, or signature or other authority over, bank accounts, securities accounts or other financial accounts in foreign countries. This foreign bank account report (FBAR) is required each calendar year in which the aggregate value of such accounts exceeds $10,000. The FBAR for any calendar year is to be filed on or before June 30 of the following year with the Department of the Treasury. There is no extension of time for filing the FBAR and the penalties are stiff. Civil and criminal penalties, including in certain circumstances where the failure was wilful, can amount to $500,000 and imprisonment of not more than five years. 'Wilfulness' is defined as the voluntary, intentional violation of a known legal duty and does not require proof of an evil motive. The FBAR form is available at www.irs.gov.

***Report of passive foreign investment company shareholder***

A US person that is a direct or indirect shareholder of a passive foreign investment company (PFIC) is also required to report certain events relevant to such investment. A 'PFIC' is generally defined as any foreign corporation if: (i) 75% or more of its gross income for the tax year consists of passive income; or (ii) 50% or more of its assets consist of assets that produce or are held for the production of passive income. Passive income is earned from trade or business activities in which one does not materially participate - for example, dividends, interest, royalties, rents and annuities. The PFIC shareholder is required to file Form 8621, Return by a Shareholder of a Passive Foreign Investment Company or Qualifying Electing Fund, for each tax year in which that US shareholder:

- recognizes gain on a direct or indirect disposition of PFIC stock;
- receives certain direct or indirect distributions from a PFIC; or
- is making a reportable election.

Failure to file can result in penalties and criminal prosecution. Form 8621 is available at www.irs.gov.

**FBAR form revised**

The IRS released a revised FBAR form in October 2008 with various changes, including a change to the definition of 'US person' to include not only a citizen or resident of the United States, but also a person in and doing business in the United States. The IRS received numerous questions and comments from the public concerning the changed definition.

In response, the IRS issued Announcement 2009-51 directing people to refer to the definition of 'US person' in the July 2000 version of the FBAR instructions to determine whether they had a filing obligation. Since that earlier version did not include the "in and doing business in" language, this effectively negated the filing requirement for 2008 FBARs due on June 30 2009 by persons who were not US citizens, US residents or domestic entities. The IRS then issued Announcement 2010-16, again referencing the old definition and thus eliminating the filing requirement by non-US persons for 2009 FBARs due June 30 2010.

The IRS also issued Notice 2009-62, extending the June 30 2009 filing deadline for the 2008 FBAR to June 30 2010 for: (i) persons with no financial interest in a foreign financial account, but with signature or other authority over that account; and (ii) persons with a financial interest in, or signature or other authority over, a foreign financial account in which the assets are held in a commingled fund. The IRS has since issued Announcement 2010-23 to extend to June 30 2011 the filing deadline with respect to the 2009 FBAR for persons with signature or other authority over, but no financial interest in, a foreign financial account. The announcement also says that the IRS will not interpret the term 'commingled fund' as applying to funds other than mutual funds, so that interests in foreign hedge funds, private equity funds or family investment entities are not included in the definition of 'commingled fund' and do not have to be reported with respect to FBARs for 2009 and prior calendar years. The filing deadline to report interests in foreign mutual funds held during 2009 has been extended to June 30 2011.

The Treasury Department is working on comprehensive FBAR guidance and has released proposed regulations; the period for submitting comments in this regard closed on April 27 2010.

**Proposed regulations on foreign bank account reporting**

On February 25 2010 the Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued proposed regulations regarding the FBAR, which are expected to become effective before the June 30 2010 filing deadline for the 2009 FBAR. These proposed regulations are designed to clarify:

- which US persons are required to file the FBAR;
- the types of foreign account that must be reported;
- what is considered a reportable financial interest; and
- when such a person has a reportable signature or other authority over the foreign account.

The IRS has released an FBAR workbook for its examiners which includes some examples (www.irs.gov/businesses/small/article/0,,id=159757,00.html).

***US persons required to file the FBAR***

The proposed regulations define a 'US person' as a citizen or resident of the United States, or 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, any state, the District of Columbia, the territories and insular possessions of the United States or the Indian tribes. This revised and expanded definition has the following results:

- A US disregarded entity, such as a Delaware single member limited liability company (LLC), must file an FBAR even if its sole member is a foreign entity and the LLC does not carry on any business in the United States. This filing requirement begins with the 2010 FBAR, due June 30 2011, as a disregarded entity is not included in the definition of 'US person' under Announcements 2009-51 and 2010-16 for 2008 and 2009 FBARs, as discussed above.
- A foreign entity for which an entity classification or 'check-the-box' election (IRS Form 8832, Entity Classification Election) has been

made is not a US person by reason of that election, whether or not it is disregarded for US tax purposes.

- Any individual who meets the substantial presence test or green card test is considered a US resident and must file the FBAR (for a discussion of these tests please see the Overview (March 2008)).
- Former US citizens and long-term residents who expatriated after June 3 2004 and before June 16 2008, and are subject to the 10-year alternative tax rules (for further details see the Overview (March 2008)), are treated as citizens or residents of the United States, in the absence of certain exceptions, for any tax year that they are physically present in the United States on more than 30 days and, thus, required to file the FBAR with respect to any foreign accounts.
- There will no longer be any requirement for a non-US person (whether an individual or a foreign company) to file the FBAR merely because the non-US person is in and doing business in the United States. Nevertheless, if that person is the owner of a US entity, the US entity may be required to report foreign financial accounts; or if the person is an individual and is considered US tax resident under the substantial presence test, that individual will be required to report foreign financial accounts. It appears that a foreign company engaged in a US trade or business causing it to be subject to US tax on effectively connected income will not be required to file the FBAR.

***Types of reportable account***

The proposed regulations focus on relations. FinCEN has chosen to define bank, securities, and other financial accounts with reference to the kinds of financial services for which a person maintains an account. Thus, the following are defined by the proposed regulations and must be reported on the FBAR:

- 'Bank account' means a savings deposit, demand deposit, cheque or any other account maintained with a person engaged in the business of banking, including time deposits such as certificates of deposit accounts that allow individuals to deposit funds with a banking institution and redeem the initial amount, along with interest earned after a prescribed period of time.

- 'Securities account' means an account maintained with a person in the business of buying, selling, holding or trading stock or other securities.
- 'Other financial accounts' mean:
  - an account with a person that is in the business of accepting deposits as a financial agency;
  - an account that is an insurance policy with a cash value or an annuity policy;
  - 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
  - an account with 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.

These definitions encompass formal relationships with foreign financial institutions to provide regular services, dealings and other financial transactions, regardless of the length of the time for which the services are provided. Thus, if the aggregate value of foreign account balances exceeds $10,000 at any time during the calendar year, even an account that is opened with a foreign financial institution for just one week with less than $10,000 will be a reportable financial account. But where no regular formal relationship exists, a reportable account does not exist simply by conducting transactions, such as wiring money or purchasing a money order.

The proposed regulations do not address accounts with private hedge funds. FinCEN notes concern regarding the use of hedge funds to evade taxes, and legislation has been proposed which would require US persons to report annually foreign hedge and private equity funds to the IRS.

***Reportable financial interests***

A foreign financial interest may be reportable regardless of how that interest is held or structured. The proposed regulations define a 'reportable financial interest' to include foreign accounts where a US person's ownership or control over the owner of record or holder of legal title to the account rises to such a level that the US person should be deemed to have a financial interest in the account. FinCEN has also included an anti-avoidance rule to require reporting in instances where US persons seek to evade the requirement to file the FBAR through the use of devices such as transfer companies.

*Accounts owned outright or as agent*

A US person has a reportable financial interest in a foreign bank, security or other financial account when: (i) the person is the owner of record or holder of legal title, regardless of for whom the account is maintained; or (ii) the owner of record or holder of legal title is a person acting on behalf of the US person such as an attorney, agent or nominee with respect to the account.

The IRS workbook provides the following example:

> "*John, a US citizen who resides in Mexico, granted his brother Paul, a US citizen, a Power of Attorney to access his Mexican bank accounts. Paul is the owner of record. John has a financial interest in the account. Paul is acting only as an attorney on behalf of John. Paul also has a financial interest in the account, since he is the owner of record. Both John and Paul must file an FBAR.*"

This example is confusing, because an agent acting under a power of attorney is generally not the owner of record or holder of legal title. Instead, Paul's obligation to file the FBAR is a result of his signature or other authority over the Mexican bank account.

*Accounts owned by an entity*

A US person has a reportable financial interest in a foreign bank, security or other financial account when the owner of record or holder of legal title:

- is a corporation in which the US person owns directly or indirectly more than 50% of the voting power or the total value of the shares;
- is a partnership in which the US person owns directly or indirectly more than 50% of the interest in profits or capital;

- is any other entity (other than a trust) in which the US person owns directly or indirectly more than 50% of the voting power, total value of the equity interest or assets, or interest in profits; or
- has caused an entity to be created for a purpose of evading the reporting requirement and that entity is the owner of record or holder of legal title.

The IRS workbook gives the example of a US person who owns 75% of a Florida corporation, which in turn owns 100% of a foreign company that has foreign financial accounts. The Florida corporation must file the FBAR because it is a US person and owns directly more than 50% of the stock of the entity that is the owner of record or holder of legal title to the foreign accounts. In addition, the US owner of the Florida corporation has to file the FBAR because he indirectly owns more than 50% of the stock of the foreign company.

*Accounts owned by a trust*
A US person has a reportable financial interest in a foreign bank, securities or other financial account for which the owner of record or holder of legal title is a trust if:

- the trust is a grantor trust for US tax purposes (for more details please see "Taxation of offshore trusts and impact of new lower tax rates"), and the US person is the grantor and therefore has an ownership interest in the account for US tax purposes;
- the trust is not a grantor trust and the US person has a beneficial interest in more than 50% of the assets or the US person receives more than 50% of the current income of the trust; or
- the US person established the trust and appointed a trust protector that is subject to such person's direct or indirect instruction.

The proposed regulations do not provide guidance on determining whether the beneficiary of a discretionary trust has a beneficial interest in more than 50% of the assets or income. The beneficial interest is to be determined under all facts and circumstances, including the terms of the trust and any accompanying documents. The IRS workbook provides no examples of a US beneficiary with a reportable financial interest. One approach mentioned by IRS representatives at conferences may be to determine a US beneficiary's beneficial interest by assuming that the trustee will exercise its maximum authority to distribute funds to the beneficiary. Thus, if the trustee has the discretion to distribute more than 50% of the assets or income to that US beneficiary, then the individual has more than a 50% beneficial interest in such assets or income. This would result in many US discretionary beneficiaries having an FBAR filing requirement.

Although trust protectors serve to safeguard trust assets from misappropriation, FinCEN is concerned that trust protectors can also act as conduits of the client's instructions to the trustees, with the trustees merely rubber stamping the protector's directions, thus permitting greater client control while maintaining the appearance of trustee independence.

***Signature or other authority***

The proposed regulations define 'signature or other authority' as 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 delivery of instructions (whether communicated in writing or otherwise) directly to the person with whom the financial account is maintained. Since the definition focuses on the delivery of instructions, a person who is a decision maker in a company does not have 'signature or other authority' for purposes of the FBAR if he or she is not authorized to communicate decisions directly to a financial institution.

As an example, the IRS workbook provides that a person who has the power to direct how an account is invested, but cannot make disbursements or deposits to the account, need not file the FBAR because the person has no power of disposition.

The proposed regulations include a few exceptions to the FBAR filing requirement which generally apply to officers and employees of US financial institutions that have a federal functional regulator, and certain US entities that are publicly traded on a US national securities exchange or that are otherwise required to register their equity securities with the Securities and Exchange Commission. FinCEN believes such relief is appropriate, given the federal oversight of such entities. However, these exceptions apply only where the officer or employee has no financial interest in the reportable account. The US entity itself is, of course, still required to report its financial interest in foreign reportable accounts.

***Rules to simplify FBAR filings***

The proposed regulations include rules designed to simply FBAR filings in certain cases:

- A US person with financial interest in or signature or other authority over 25 or more foreign financial accounts need only report the number of financial accounts and certain other basic information on the FBAR, but will be required to provide detailed information concerning each account if so requested.
- A US group of entities can file a consolidated report as long as the group is headed by a parent entity that directly or indirectly owns 50% or more of the other members of the group. Under this rule, a US trustee of a trust that owns 100% of a disregarded Delaware single-member LLC can file the FBAR to report foreign accounts held by it and the LLC, and the LLC itself will not be required to also file the FBAR.
- Participants and beneficiaries in retirement plans, as well as owners and beneficiaries of individual retirement accounts, will not be required to file an FBAR with respect to a foreign financial account held by or on behalf of the retirement plan or individual retirement account. The plan administrator or trustee will have the FBAR filing requirement.
- FinCEN anticipates that for US persons employed in a foreign country and who have signature or other authority over foreign financial accounts owned or maintained by their foreign employers, the instructions to the FBAR form will prescribe reduced reporting obligations for such persons.

**Implications for settlors, trusts, trustees and beneficiaries**

***US settlor***

As discussed above, a settlor of a trust (whether foreign or domestic) who is a US person and who is considered the owner of the trust assets under the grantor trust rules must file the FBAR and report any foreign financial accounts held in the trust. A US settlor will always be considered the owner of a foreign trust for any tax year in which the trust has a US beneficiary.

The US settlor of a non-grantor trust with foreign financial accounts must also make the FBAR filing, even though that settlor is not considered the owner of the trust assets under the grantor trust rules, if the US settlor has appointed a trust protector that is subject to such person's direct or indirect instruction. The October 2008 TD F 90-22.1 instructions provide that a 'trust protector' is a person who is responsible for monitoring the activities of a trustee, with the authority to influence the decisions of the trustee or to replace or recommend the replacement of the trustee.

It appears that the protector need not have signature or other authority over the trust's foreign account in order to trigger the US settlor's FBAR filing, and that the filing is not required where the protector has been appointed by someone other than the settlor or is not subject to the settlor's direct or indirect instruction. When drafting new non-grantor trust settlements, it may be possible to avoid a US settlor's FBAR filing requirement. With respect to existing non-grantor trust situations where the US settlor does not wish to make the FBAR filing, advisers might consider whether:

- the current protector should resign;
- the US settlor can relinquish any power under the trust document to appoint and/or instruct a protector; and
- the provisions of the trust provide for an appropriate successor protector.

Care must be taken in any situation involving a non-grantor trust with a US settlor and provision for a protector, as it is possible to envision a scenario where the IRS might contend that a protector was appointed at the direction of the US settlor and that the US settlor indirectly instructed that protector. The trust itself, if it was a domestic trust, would of course still have the FBAR filing requirement.

***US trust***

Until 2008, the FBAR instructions defined a 'US person' subject to the FBAR reporting obligations to mean:

- a citizen or resident of the United States;
- a domestic partnership;
- a domestic corporation; or
- a domestic estate or trust.

Then, as mentioned above, in the October 2008 revision of TD F 90-22.1 the definition of the term 'US person' was expanded. The revised form refers taxpayers to 31 CFR 103.11(z) for a complete definition of 'person', which includes a trust. This definition is found in the Bank Secrecy Act, not the Internal Revenue Code.

The proposed regulations now define 'US person' to include:

> "[*a]n 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, any State, the District of Columbia, the Territories and Insular Possessions of the United States, or the Indian Tribes.*"

This definition is not easy to apply in the situation of trusts. A trust with a Delaware trust company acting as trustee under a trust agreement that provides that the trust is to be governed by Delaware law is clearly a trust created, organized or formed under the laws of a US state. But what about a trust settled in Bermuda where the Bermuda trustee resigns, a Delaware trust company is appointed as successor trustee and, pursuant to the terms of the trust agreement, the trustee changes the governing law to Delaware? Arguably, the trust was not created, organized or formed under the laws of Delaware, in the sense that it was not first settled there. Such a trust may even have a non-US investment adviser, so that it would remain foreign for US income tax purposes (for a full discussion on when a trust is considered foreign please see "Taxation of offshore trusts and impact of new lower tax rates"). It is unclear whether the trust is a US person for purposes of the FBAR rules. Nonetheless, its US trustee may be required to file the FBAR.

***US trustee***

Regardless of whether the trust itself is considered to be a US domestic trust for income tax purposes or created, organized or formed under the laws of a US state, a US citizen or resident individual or US corporation or LLC serving as trustee will be required to file the FBAR to report foreign accounts held in the trust with respect to which that trustee has a financial interest in or over which it has signature or other authority. Trustees generally have legal title to accounts in which trust funds are invested. They also generally have signature authority over those accounts. The Uniform Trust Code enacted by states such as Delaware (for further details see "State law allows settlors to tailor trust investment objectives") may allow for the Delaware trustee to be excluded from exercising powers under the trust instrument to deposit or invest trust moneys in foreign accounts, which powers may be exercised by a foreign fiduciary such as an investment adviser in situations where the trust is to be foreign for US income tax purposes. A US trustee will also be treated as having a reportable financial interest where legal title to an account is held by a corporation or partnership and the trust owns directly or indirectly more than 50% of the corporation or partnership.

***US beneficiary***

As mentioned above, with respect to non-grantor trusts, the proposed regulations shed no light on the FBAR filing requirements of a US beneficiary of a discretionary trust that holds trust assets in a foreign financial account. Whether that beneficiary has a beneficial interest in more than 50% of the assets or income of the trust is determined under all facts and circumstances, including the terms of the trust and any accompanying documents. Certain situations are relatively clear:

- The US beneficiary, in fact, receives distributions of more than 50% of the trust income.
- The US beneficiary is the only discretionary beneficiary or is one of, say, two children of the settlor who are discretionary beneficiaries (one US and one non-US), but the trust instrument or the settlor's letter of wishes indicates that the needs of the US child are to be given priority as the non-US child is very well off financially.
- The trust, trustee of the trust or agent of the trust is a US person and is filing the FBAR. The proposed regulations specifically provide that

the US beneficiary is relieved from filing.

Foreign trusts with non-US settlors and US beneficiaries are frequently classified as non-grantor trusts for US income tax purposes, either because their non-US grantors have not retained the right to revoke the trust or because the trust is not solely for the benefit of the non-US grantor and his or her spouse. A US beneficiary who receives a distribution from such a trust, in addition to reporting the receipt of the distribution on Form 3520 (for further details please see "Reporting deadlines draw near"), will want to consider filing the FBAR. For the US beneficiary who has not received a distribution and who may not even be aware of the trust or its assets, there is no reassuring answer. Advisers to international families should consider discussing with the trustees of foreign family trusts with a discretionary class of beneficiaries that includes US persons the possibility of holding trust assets only in US financial accounts or taking steps, such as distribution to non-US beneficiaries, that will counter the argument that the US beneficiary has a beneficial interest in more than 50% of the assets or income of the trust.

Although the proposed regulations specifically relieve a US beneficiary of a non-grantor trust from the FBAR filing where the trust, trustee or agent of the trust files, the proposed regulations give no guidance with respect to a possible duplicate reporting requirement where a grantor trust with a US grantor also has US beneficiaries with a beneficial interest in more than 50% of the trust assets or income.

**Expanded reporting under the HIRE Act**

***Individuals***

President Obama signed the HIRE Act into law on March 18 2010. Beginning with tax year 2011, the HIRE Act requires individual taxpayers to disclose any interest in a "specified foreign financial asset" for any year in which the aggregate value of such assets is greater than $50,000. This disclosure is separate from and in addition to the FBAR. New Section 6038D of the Internal Revenue Code, added by the HIRE Act, requires the taxpayer to "attach to such person's return of tax imposed by subtitle A" the required disclosure. It is not clear whether the disclosure is required in the situation where the owner of a specified foreign financial asset is not required to file an income tax return.

A 'specified foreign financial asset' 'includes:

- depositary or custodial accounts at foreign financial institutions;
- to the extent not held in an account at a financial institution, stocks or securities issued by foreign persons, and any other financial instrument or contract held for investment that is issued by or has a counterparty that is not a US person; and
- any interest in a foreign entity.

A 'foreign entity' is defined in new Section 1473 of the code (also added by the HIRE Act) as any entity which is not a US person. Since the requirement for the disclosure statement will be found in the new Section 6038D of the code, the use of the term 'US person' will be as defined in Section 7701(a)(39) of the code - that is:

- a citizen or resident of the United States;
- a domestic partnership, corporation or estate; or
- a trust that meets the court test and the control test (for more details please see "Taxation of offshore trusts and impact of new lower tax rates").

Thus, a trust that is foreign for US income tax purposes will be a 'foreign entity' for purposes of the new disclosure statement.

The information required by the disclosure statement is similar, but not identical, to that required to be disclosed on an FBAR. The information to be disclosed includes:

- in the case of any account, the name and address of the financial institution in which the account is maintained and the number of the account;
- in the case of any stock or security, the name and address of the issuer and such information as is necessary to identify the class or issue of which the stock or security is part;
- in the case of any instrument, contract or interest, such information as is necessary to identify the instrument, contract or interest and the

names and addresses of all issuers and counterparties with respect to the instrument, contract or interest; and

- the maximum value of the asset during the tax year.

The disclosure requirements are far reaching and it remains to be seen just how broadly the IRS will apply the 'any interest' language of the new code section to a foreign trust. The IRS is to issue regulations or other guidance necessary to carry out the new code provisions and may provide exceptions including for assets where this disclosure is duplicative of other disclosures (with respect to foreign trusts, the Form 3520 and 3520-A filings come to mind). It also remains to be seen how the new disclosure statement will affect US entities, as the IRS is to issue regulations or other guidance that will apply the disclosure statement requirement to domestic entities formed or used for purposes of holding, directly or indirectly, specified foreign financial assets, in the same manner as if the entity were an individual.

Failure to file the required disclosure will result in a penalty of $10,000, with an additional $10,000 penalty for each 30 days of failure to disclose (or fraction of such 30-day period) if the failure to disclose continues for more than 90 days after the IRS has issued notification of the failure to disclose, up to a $50,000 maximum penalty. No penalty is imposed where an individual can establish that the failure was due to reasonable cause and not wilful neglect. A foreign law prohibition against disclosure of the required information does not constitute reasonable cause.

***PFIC shareholders***

The HIRE Act adds new Section 1298(f) to the Internal Revenue Code requiring US persons who are shareholders of a PFIC to file an annual report containing such information as the IRS may require. This new law is effective as of March 18 2010. The IRS has released Notice 2010-34 stating that it is developing further guidance regarding this new reporting obligation. The notice clarifies that in the meantime, PFIC shareholders that were required to file Form 8621 prior to the enactment of Section 1298(f) must continue to file Form 8621 as provided in the instructions (eg, upon disposition of stock, receipt of a distribution or the making of certain elections). PFIC shareholders that were not otherwise required to file Form

8621 annually prior to March 18 2010 will not be required to file the new annual report for taxable years beginning before March 18 2010. Since the taxable year for individuals and trusts generally begins on January 1, it appears that the new PFIC reporting requirement will not be relevant until 2011.

**Comment**

US persons with signature or other authority over foreign bank accounts and those with interests in foreign financial assets and passive foreign investment companies will need guidance from the IRS well in advance of FBAR and income tax return filing due dates. Emily McMahon, Treasury deputy assistant secretary for tax policy, has said that the priority will be to implement new law provisions quickly. She noted that guidance will be released in pieces and in a variety of different forms so that taxpayers get information on the new rules as quickly as possible. This guidance is sorely needed and international families and their advisers will need to monitor carefully its release and effect.

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