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US Treasury Department publishes final rule for foreign bank account reports

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Introduction

US persons with financial interests in, or signature (or other authority) over, foreign bank accounts, securities accounts and other financial accounts are required to report such interests on Form TD F 90-22.1. For any calendar year in which the aggregate value of such accounts exceeds $10,000, this foreign bank account report (FBAR) is due on or before June 30 of the following year.

The US Treasury Department issued a revised FBAR 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 public submitted numerous questions and comments concerning both the scope of the persons who are required to file the FBAR and the filing requirements.

On February 25 2010 the Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued proposed regulations regarding FBARs meant to address these concerns (for further details please see

"Reporting of offshore investments - proposed regulations and the HIRE Act"). Again, individuals, entities and representatives of various groups and industries submitted comment letters.

Final rule published

On February 24 2011 FinCEN issued a comprehensive final rule amending the Bank Secrecy Act regulations regarding FBARs. The final rule applies to FBARs due by June 30 2011 with respect to accounts maintained in 2010 and for those filed in subsequent years.

According to FinCEN, the final rule addresses the various comments and clarifies:

- who must file FBARs;
- the types of account which must be reported; and
- exemptions from filing that apply for certain persons with signature (or other authority) over foreign financial accounts.

The final rule is available at www.fincen.gov/statutes_regs/frn/.

Changes of note

Under the final rule, the test to determine 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.

The inclusion of trusts has been retained under the definition of 'US person' in the same manner as corporations and limited liability companies - that is, a trust that has been created, organised or formed under the laws of the United States. FinCEN received comments asking that trusts not have a separate filing obligation, in light of the fact that a US trustee would also have an obligation to file an FBAR with respect to the trust. FinCEN acknowledged that in the case of trusts, a US trustee must file the FBAR for the trust, but declined to remove trusts from the definition of 'US person'.

In the case of trusts, FinCEN has stated that it does not intend for a beneficiary of a discretionary trust to have a financial interest in a foreign account simply because of his or her status as a discretionary beneficiary; nor does it intend to include a remainder interest. FinCEN notes that it has addressed this in the final rule by changing the term 'beneficial interest' to 'present beneficial interest' in the definition of 'financial interest'. However, uncertainty remains as to how 'present beneficial interest' is determined in various situations.

The final rule does not include the provision found in the proposed regulations where the appointment of a trust protector, who is subject to the US person's instruction, causes the US person to have a financial interest in the accounts of that trust, but FinCEN remains concerned about the potential for abuse when a trust protector is appointed.

Comment

Advisers must carefully review the final rule and consider whether their clients are subject to the FBAR reporting obligation and, if so, assess the scope of the required disclosures. Penalties for non-compliance are high. As FinCEN notes in its explanation, the purpose of the FBAR is broader than tax administration. By requiring US persons to identify foreign financial accounts, the FBAR creates a financial trail that assists law enforcement and other agencies to identify accounts outside of the United States.

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