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Volume 33 | Issue 12 | March 19, 2010

IRS and Treasury Release FBAR Guidance

On February 26, the Treasury's Financial Crimes Enforcement Network (FinCEN) issued proposed regulations on the requirements for certain U.S. persons to file a Report of Foreign Bank and Financial Accounts (FBAR). The IRS concurrently issued Announcement 2010-16 and Notice 2010-23, temporarily suspending the FBAR filing requirement for persons who are not U.S. citizens, U.S. residents or domestic entities and providing filing relief for certain persons with signature authority over, but no financial interest in, a foreign financial account and persons with interests in certain foreign commingled funds.

Background

Generally, U.S. citizens, residents or domestic entities with financial interests in, or signature or other authority over, offshore financial accounts valued at more than \$10,000 at any time during a calendar year must file an FBAR ([Form TD F 90-22.1](#)) for those accounts. The filing deadline is June 30 of each calendar year for accounts maintained during the previous year.

The IRS previously granted filing relief for 2008 and prior years for certain persons with signature or other authority over foreign financial accounts (with no financial interest) and persons with a financial interest in a foreign commingled fund (e.g., hedge funds and private equity funds). For those persons, Notice 2009-62 delayed the FBAR filing deadline for one year, or until June 30, 2010. (See our August 24, 2009 [For Your Information](#).) Taxpayers ineligible for that relief were given a lesser extension until September 23, 2009 to file delinquent FBARs without penalty.

On February 26, the IRS issued Notice 2010-23 and Announcement 2010-16, providing further relief from filing requirements. On the same day, FinCEN, which shares FBAR jurisdiction with the IRS, issued proposed regulations along with new draft instructions for the FBAR form.

Proposed FinCEN Regulations

The [proposed regulations](#) and accompanying revised instructions are intended to clarify FBAR filing requirements with respect to foreign financial accounts, focusing on which persons will be required to file FBARs and which accounts will be reportable. Among the important clarifications they provide are those relating to the definitions of U.S. person, financial interest, and reportable accounts.

U.S. Person. The proposed regulations provide guidance on how “United States persons” should report foreign financial accounts in which they have an interest or for which they have signature authority. FinCEN proposes to define United States person as a U.S. citizen, U.S. resident (as defined in the Internal Revenue Code) or an entity including, but not limited to a corporation, partnership, trust or limited liability company created, organized or formed under federal or state law, the laws of the District of Columbia, U.S. Territories and Insular Possessions or the Indian Tribes. Under the revised definition, “green card” holders residing abroad would be required to report their foreign financial accounts.

Significantly, the proposed regulations would effectively eliminate the FBAR filing requirement for governmental pension, retirement and welfare funds and their employees, qualified retirement plan participants, owners and beneficiaries of traditional or Roth IRAs, public universities, individuals employed by registered investment advisors advising registered mutual funds, and certain tax-exempt investors. However, relief from the filing requirement would generally not be provided to exempt organizations, private universities, trustees or other fiduciaries of qualified retirement plans or to employees of publicly traded corporations with signature authority over, but no financial interest in, foreign accounts owned by the corporation’s pension plan.

Situations Giving Rise to a Financial Interest. The regulations confirm that a U.S. person has a financial interest in every bank, securities, or other financial account in a foreign country for which he or she is the owner or holds legal title whether or not the account is maintained for his or her own benefit or for that of others. If the account is maintained in the name of more than one person, each person is deemed to have a financial interest. A U.S. person also has a financial interest in each account for which the owner or holder of legal title is a person acting on behalf of the U.S. person such as an attorney or agent. A financial interest will also be deemed to exist in situations in which 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% of the voting power or the total value of the shares, a partnership in which the U.S. person owns directly or indirectly more than 50% of the interest in profits or capital, or other entity (other than a trust) in which the U.S. person owns directly or indirectly more than 50% of the voting power, equity or interest in profits
- grantor trust
- trust in which the U.S. person has a beneficial interest in more than 50% of the assets or from which the person receives more than 50% of the current income
- trust established by a U.S. person with a trust protector arrangement
- an entity created to evade the reporting requirements.

Reportable Accounts. The proposed regulations clarify that pension plans must file FBARs with respect to plan-related foreign financial accounts with important exceptions for governmental plans, plan participants and beneficiaries, and IRA owners and beneficiaries with respect to foreign financial accounts held by or on behalf of

the plan or IRA. Reportable accounts would include bank accounts, securities accounts, and “other financial accounts, such as –

- annuities or other insurance policies with a cash surrender value issued outside the U.S.
- foreign mutual funds and similar pooled funds offered to the general public.

Although the IRS previously stated that foreign hedge funds and private equity funds would be reportable accounts, FinCEN has now reserved judgment on their treatment pending further study. As FinCEN notes, pending legislative proposals, if passed, would require U.S. individuals to report annually to the IRS with respect to foreign hedge funds and private equity funds.

Significantly, the proposed regulations do not state when they would be effective and do not address whether they may be relied on in preparing FBARs for 2009 or earlier years.

Announcement 2010-16

[Announcement 2010-16](#) provides temporary relief for persons who are not U.S. citizens, U.S. residents, or domestic entities, by suspending the FBAR filing requirement for 2009 and earlier calendar years otherwise due on June 30, 2010. Given the limited nature of this relief, U.S. citizens, residents and domestic entities must still meet applicable filing requirements for 2009 and prior years. The IRS also made it clear that potential filers can rely on the definition of “United States person” in the July 2000 version of the FBAR instructions (i.e., a U.S. citizen or resident, domestic partnership, domestic corporation, or domestic estate or trust) to determine whether they have a filing requirement for 2009 and earlier calendar years. All other requirements of the 2008 version of the FBAR form and instructions, as modified by Notice 2010-23, remain in effect until changed by subsequent Treasury or IRS guidance.

BUCK COMMENT. *Because the FBAR form instructions issued in October 2008 included a broader definition of United States person (i.e., “a person in and doing business in the United States”), certain foreign entities and individuals would otherwise have been required to file FBARs by June 30, 2010.*

Notice 2010-23

IRS [Notice 2010-23](#) grants the following administrative relief to certain persons who may have a filing obligation for 2009 or prior years –

- postpones FBAR filing requirements for certain persons from June 30, 2010 until June 30, 2011
- exempts from FBAR reporting for 2009 and earlier years persons with investments in private investment vehicles such as foreign hedge funds or private equity funds

- eliminates the requirement for persons subject to the extended filing deadline to report the existence of foreign accounts on their 2009 Form 1040.

Delayed Filing Requirement. The notice extends until June 30, 2011 the deadline for persons with signature or other authority over (but no financial interest in) a foreign financial account to file an FBAR for the 2009 calendar year or prior years. Importantly, they will not have to report relationships with those accounts on their 2009 personal income tax return.

Nonenforcement Policy for 2009 and Prior Years. The IRS has expressly exempted offshore private equity and hedge funds from the term “commingled fund” for all calendar years prior to 2010, and thus excepted interests in such funds from FBAR reporting at this time. However, investments in foreign mutual funds are not exempt from the reporting requirement. Unless another filing exception applies, persons with a financial interest in any such fund must file a 2009 FBAR on or before June 30, 2010 and report the fund’s existence and location on their 2009 Form 1040.

Reporting on Tax Returns. The notice also provides that, for a year in which the taxpayer has no other reportable foreign financial accounts, the taxpayer who qualifies for relief under Notice 2010-23 should answer “no” to FBAR-related questions on the federal tax forms for 2009 or earlier years that ask whether the taxpayer has a financial interest in, or signature authority over, a foreign financial account.

Conclusion

The IRS has now provided welcome relief for many U.S. persons that may otherwise have had to file FBARs. Many investment fiduciaries of employee benefit plans may enjoy relief from any FBAR filing until June 30, 2011. Because the extension does not apply to all plan-related filings, some plans, plan sponsors and service providers may still be required to file by June 30, 2010.

Buck’s consultants would be pleased to discuss with you the proposed regulations and FBAR filing requirements in light of the recent guidance.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.