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Resetting the FBAR: Foreign Financial Account Reporting Regulations are Finalized With Significant, But Not Always Helpful, Clarifications

The Department of Treasury's Financial Crimes Enforcement Network (FinCEN) division recently issued final rules regarding the reporting of foreign bank and financial accounts (commonly known as FBAR filings). The final [FBAR regulations](#) largely adopt proposed regulations issued in early 2010, but with some significant clarifications. The key points are:

- Only individuals that control a financial account by **direct** instructions to a financial institution have "signature or other authority."
- Only life insurance and annuity policies with cash value are treated as "financial accounts," but in those cases reporting is required even if the policy or contract is not in payout status.
- Whether hedge funds and private equity funds are "financial accounts" is determined under the general rules – only interests in funds that issue shares available to the general public are covered.
- Companies that make a section 953(d) election are **not** treated as domestic companies for FBAR purposes and, thus, accounts of such companies and policies issued by such companies are subject to FBAR reporting.
- The reporting exception relating to signatory authority over accounts of financial institutions registered with the Securities and Exchange Commission (SEC) or the Commodity Futures Trading Commission (CFTC) does not extend to investment advisors, and the exception for SEC registered investment advisors applies only to those investment advisors who provide services for clients registered under the Investment Company Act.
- U.S. employees of U.S. subsidiaries of foreign corporations who have signature authority over financial accounts do not qualify for the expanded consolidated FBAR rule, notwithstanding language in the proposed regulations that suggested they may so qualify.
- Filers eligible to defer pre-2010 FBARs may apply the final regulations to those FBARs that are due on June 30, 2011.

Background

The FBAR regulations generally require U.S. persons having a financial interest in, or signature or other authority over, a financial account in a foreign country that exceeds \$10,000 to report that interest to the IRS. The FBAR report is made on Form TD-F 90-22.1, and is required to be filed on or before June 30 each year for accounts maintained in the previous calendar year.

On February 26, 2010, FinCEN published proposed changes to the FBAR regulations intended to clarify the scope of the FBAR rules, the types of reportable accounts and the exemptions for certain persons and accounts from the reporting requirement. The final FBAR regulations respond to comments on the proposed regulations, including when an account is reportable under FBAR and the scope of persons covered by the requirement.

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Signature or Other Authority

Under the final regulations, the definition of “signature or other authority” has been revised to make clear that only individuals with authority to control the disposition of funds by direct communication with the financial institution are considered to have signature or other authority over the account. Commentators had expressed concern that under the proposed regulations persons who simply participate in the decision to allocate assets, or who have the ability to supervise or instruct others with signature authority, would be considered to have “signature or other authority” over an account. Under the final regulations, it is clear that only persons with direct signature authority are covered.

Scope of Accounts – Insurance, Annuities, Mutual Funds, and Section 953(d) Companies

The proposed regulations include within the definition of financial accounts “an account that is an insurance policy with a cash value or an annuity policy” and “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.” The final regulations clarify that only life insurance or annuity policies with a cash value are required to be reported. However, FinCEN declined to limit the reporting requirement to cases where there is the payment of an income stream on such accounts. The final regulations also clarify that the obligation to report is with the policy holder, not the beneficiary.

With regard to reporting requirements for mutual funds, commentators expressed concern under the proposed regulations that the requirement potentially covered hedge funds and private equity funds that make periodic distributions. In response, FinCEN reiterated that reporting is required only if the fund issues shares available to the general public. The instructions also have been revised to make clear the requirement that the shares be available to the general public.

In response to comments, the final regulations also clarify that accounts of a foreign insurance company that makes a section 953(d) election are subject to the FBAR requirement.

The FBAR Filing Exceptions

Under the proposed regulations, relief would be granted from the obligation to report signature or other authority over accounts to officers and employees of certain specifically identified types of entities, where the officer or employee does not have a direct financial interest in the account.

The final regulations clarify that the exception for accounts of financial institutions registered with the SEC or the CFTC does not extend to investment advisors. Similarly, in the case of SEC registered entities providing services to companies registered under the Investment Company Act, the exception applies only to the reporting of accounts of those clients which are registered under the Investment Company Act. Finally, FinCEN rejected a comment requesting an exception for officers and employees of a mutual insurance company having more than \$10 million in assets and at least 500 policy holders on the basis that these companies are not subject to the same SEC regulation as other companies identified for exceptions.

The following types of entities with signature or other authority over financial accounts are excepted from the FBAR filing:

1. Banks that are examined by the Office of the Comptroller of Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Administration;
2. Financial institutions registered with and examined by the SEC or the CFTC;
3. Entities that are registered with and examined by the SEC that provide services to an investment company registered under the Investment Company Act of 1940;
4. Entities with a class of equity securities registered (or American depository receipts with respect to equity securities registered) under section 12(g) of the Securities Exchange Act of 1934; and
5. Entities with a class of equity securities listed (or American depository receipts listed) on any United States national securities exchange, and U.S. subsidiaries of United States entities with a class of listed securities if the U.S. subsidiary is identified on a consolidated FBAR filed by the parent (the consolidated FBAR exception).

Consolidated FBAR Exception

Under the proposed regulations, there was some question whether the consolidated FBAR exception for affiliated groups extended to a person with signature authority over the foreign account of a U.S. subsidiary of a foreign entity with a class of equity securities listed on a national securities exchange. The final regulations purport to "clarify" that this exception is only for U.S. subsidiaries of U.S. corporations. In so doing, FinCEN noted that foreign entities with a class of securities listed on a United States exchange are not required to make FBAR filings and, therefore, subsidiaries of such entities cannot be identified on the consolidated FBAR of such entity as required under the regulations. The final regulations modify the consolidated FBAR exception language to make this clear.

Commentators had urged that the exception for U.S. subsidiaries of exchange listed companies include U.S. subsidiaries of foreign parents. Some commentators even suggested that the foreign parent be able to voluntarily file the consolidated FBAR. Nevertheless, FinCEN declined to accept these comments, reasoning that the foreign parent has no obligation to file the FBAR, and the subsidiary is not required to file the same reports with the SEC that a U.S. company is required to file.

FinCEN's explanation for declining to accept the comments is lacking. If the foreign parent voluntarily files, then there is no need for a filing requirement. Moreover, foreign entities with U.S. listed securities are required to file reports with the SEC that are similar to those of their U.S. counterparts; and a U.S. subsidiary of a foreign parent that issues public debt may well be required to make the same filings with the SEC as a U.S. listed company. The rationale for treating similarly regulated companies differently is not apparent.

FinCEN is careful in the preamble to the final regulations to note that the exception for U.S. subsidiaries in the proposed regulations extended only to those identified in a consolidated FBAR filing. Since only a U.S. corporation may make a consolidated FBAR filing, FinCEN is able to characterize the changes made to the exception as clarifying. If this change were considered to be substantive rather than clarifying, there may be a question of whether FinCEN complied with the notice and comment requirements under the Administrative Procedures Act.

Deferred Filing Obligations

Notice 2009-62 and Notice 2010-23 deferred the pre-2010 FBAR filing obligations of persons with signature authority over, but no financial interest in, a foreign financial account until June 30, 2011. Although the final rule is not retroactively applied, filers with properly deferred filing obligations under Notices 2010-23 and 2009-62 may apply the provisions of the final rule in determining their pre-2010 FBAR filing obligations.



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