

## Government Issues Long-Awaited Guidance on FBARs

Late last week, in an effort to clarify reporting obligations under Form TD F 90-22.1, the Foreign Bank and Financial Account Report (FBAR), the U.S. Treasury Department released [proposed regulations](#), including [proposed instructions](#), for completing the FBAR. Neither the proposed regulations nor the proposed instructions are currently effective and the Government has requested comments on them by April 27, 2010. Following the release of the proposed regulations, on Friday, the Internal Revenue Service (IRS) issued [Announcement 2010-16](#) (the Announcement) and [Notice 2010-23](#) (the Notice) to provide important and immediate relief from FBAR filing for certain filers for 2009 and prior years.

Currently, the FBAR requires, with very limited exceptions, that each U.S. person (including any individual or entity) who has a financial interest in, or signature authority over, one or more financial accounts in a foreign country report those accounts annually to the IRS if the aggregate value exceeds \$10,000 at any time during the calendar year. Such persons must file an FBAR by June 30 of the succeeding year, and no filing extension is available. Failure to comply with the FBAR reporting requirements can result in significant civil and/or criminal penalties.

The newly issued proposed regulations, proposed instructions, and IRS guidance are in response to comments<sup>1</sup> submitted to Treasury following its request for comments in the IRS's [Notice 2009-62](#). Treasury solicited the comments following the significant controversy generated by IRS revisions to the FBAR form and instructions in 2008 and subsequent public statements made by IRS officials about what constitutes a reportable financial account and who is required to file FBARs. In its Notice 2009-62, the IRS also extended certain FBAR filing deadlines to June 30, 2010. (See also our prior Client Alerts on the FBAR from [June](#) and [August](#) 2009).

Notable highlights of the proposed regulations, proposed instructions, and IRS guidance include:

- **Relief from Reporting for Non-U.S. Persons.** The Announcement suspends the requirement to file FBARs for 2009 and prior years for persons who are not U.S. citizens, residents, or domestic entities. Similarly, the proposed regulations would require only U.S. citizens, residents, and domestic entities to file FBARs.
- **Short-Term Relief from Reporting Investments in Offshore Private Equity Funds and Hedge Funds; Long-Term Questions Remain.** The Notice provides that interests in private investment vehicles organized outside the United States, such as offshore private equity funds and hedge funds, are not required to be reported on the FBAR for 2009 and prior years. The Notice provides needed clarification on this question and should provide substantial relief from FBAR filing. Whether this relief will extend to future years is not clear because the proposed regulations reserve as to whether offshore private investment vehicles, such as hedge funds and private equity funds, will constitute foreign financial accounts subject to future reporting on the FBAR.
- **Extension of Filing Deadline for Filers with Signature Authority; Proposed Expansion of Signature Authority Reporting Exceptions.** The Notice provides immediate relief to persons with signature authority over, but no financial interest in, a foreign financial account by extending the

<sup>1</sup>See, e.g., the reports submitted by the New York State Bar Association on [July 17, 2009](#) and [October 30, 2009](#).

filing deadline for 2009 and prior years to June 30, 2011. The Notice also provides that the FBAR filings required at that time will be subject to the FBAR rules then in effect. The proposed regulations would clarify the definition of signature authority or other authority and generally would expand the filing exceptions for U.S. persons with signature or other authority over, but no financial interest in, certain reportable accounts to cover officers and employees of various entities, including:

- i. investment advisers or other authorized service providers registered with the Securities and Exchange Commission (SEC), with respect to foreign financial accounts of registered investment companies to which they provide services;
- ii. securities broker-dealers, futures commission merchants, and certain other financial institutions registered with the SEC or the Commodity Futures Trading Commission, with respect to foreign financial accounts owned or maintained by those entities; and
- iii. U.S. exchange-listed foreign entities with respect to those entities' foreign financial accounts.

These changes would help reduce the large number of duplicative FBAR filings that would otherwise be required to be filed, and relieve the associated compliance burdens imposed on employees of these entities, their employers, and the Government.

- **Proposed Exception for Tax-Qualified Retirement Plans' Participants and Beneficiaries.** The proposed regulations would exempt participants and beneficiaries in tax-qualified retirement plans (i.e., plans described in sections 401(a), 403(a) and 403(b) of the Internal Revenue Code) as well as owners and beneficiaries of individual retirement accounts (IRAs) or Roth IRAs from filing an FBAR with respect to a foreign financial account held by or on behalf of the retirement plan or IRA. This exception would grant substantial relief from the FBAR requirements and should result in the elimination of a wide array of otherwise burdensome requirements. Note, however, that the proposed exception is not intended to affect the filing obligations of plans or IRAs themselves.
- **Proposed Exception for Government Employee Retirement or Welfare Benefit Plans.** The proposed instructions would not require any person to report a foreign financial account of an employee retirement or welfare benefit plan of a governmental entity.
- **Absence of General Filing Exception for Tax-Exempt Organizations.** The proposed regulations would not include a general filing exception for tax-exempt organizations or their employees. However, in a limited filing exception, the proposed instructions would not require any person to report a foreign financial account of any college or university that is an agency or instrumentality of, or owned or operated by, a governmental entity.
- **Proposed Modifications to the Filing Requirements for Trusts.** The proposed regulations would provide helpful clarifications about which persons are required to report foreign financial accounts of a trust.
- **Consolidated FBAR Filing Would be Available to All Entities.** The proposed regulations would permit any entity (and not only a corporation) to file a consolidated FBAR if such entity is a U.S. person and owns directly or indirectly more than a 50% interest in another legal entity required to file an FBAR.

If you have any questions concerning FBAR filings, please contact a member of the Ropes & Gray Tax & Benefits Department.

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