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Treasury Issues New FBAR Guidance

The United States Treasury has issued proposed regulations providing new guidance for filing Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts*, also known as the “FBAR.” In addition, the Internal Revenue Service (“IRS”) issued Announcement 2010-16 and Notice 2010-23, which allow the continued reliance on the definition of “United States person” found in the 2000 FBAR instructions and partially extend last year’s moratorium on FBAR filings for commingled funds and for United States persons with signatory authority over foreign financial accounts.

[Announcement 2010-16](#)

In October 2008, the IRS issued new instructions along with a new form TD F 90-22.1. The 2008 instructions broadened the filing obligations to include a person in and doing business in the United States. No guidance was issued with regard to the definition of “in and doing business in the United States.”

Because of opposition to the broadened filing obligation, the IRS issued Announcement 2009-51 directing potential filers to use the old definition from the 2000 FBAR instructions to evaluate their filing obligation for 2008 FBAR filings due on June 30, 2009. Announcement 2010-16 extends that guidance for one additional year.

[Notice 2010-23](#)

The 2008 filing instructions also created controversy regarding the terms “signatory authority” and “commingled fund.” Practitioners were concerned that a commingled fund might include hedge funds, private equity funds, CDOs and other pooled investment vehicles. In addition, practitioners expressed concern over the scope of signatory authority that required filing.

As a result, the IRS issued Notice 2009-62 to extend the filing deadline for the 2008 calendar year, and all prior years, 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 signatory authority over, a foreign financial account in which the assets are held in a commingled fund.

Notice 2010-23 extends until June 30, 2011, the filing deadline for persons with signature authority over, but no financial interest in, a foreign financial account. The extension applies to filings for the 2009 calendar year and prior calendar years.

The moratorium on commingled funds has been only partially extended by Notice 2010-23. According to Notice 2010-23, persons with a financial interest

in, or signature authority over, a foreign mutual fund are required to file an FBAR on or before June 30, 2010, unless another filing exception applies. It is unclear whether the general filing extension to June 30, 2011 provided in Notice 2010-23 for persons with signature authority over, but no financial interest in, a foreign financial account is such a filing exception with respect to foreign mutual funds. The Notice states that the term “commingled fund” will not include funds other than mutual funds for calendar year 2009 and prior years.

Finally, Notice 2010-23 clarifies that a taxpayer with no FBAR filing obligation should check the “no” box in response to FBAR-related questions found on their federal tax return forms for 2009 and earlier years that ask about the existence of a financial interest in, or signatory authority over, a foreign financial account.

The Proposed Regulations

Treasury has issued proposed changes to the FBAR filing regulations. The proposed regulation changes were published along with new proposed instructions to Form TD F 90-22.1.

Under the proposed changes to the FBAR regulations, “a United States person” is defined as (1) a citizen of the United States, (2) a resident individual of the United States or (3) an entity 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. Notably, this definition excludes foreign entities that may be “in or doing business in the United States.” The preamble to the proposed regulations also clarifies that a disregarded entity for federal income tax purposes can still be a United States person for purposes of FBAR filing requirements.

The proposed changes also modify the definition of financial account to include only (1) bank accounts, (2) securities accounts and (3) other financial accounts. The definition of “other financial account” includes only a mutual fund or “similar pooled fund” that issues shares available to the general public that have a regular net asset value determination and regular redemptions. Thus, that definition would exclude pooled investment funds unless they issue shares available to the general public that have regular net asset value determinations and regular redemptions. The scope of that exclusion is unclear at this time given the uncertain meaning of terms such as “available to the general public.” The term commingled fund is not used in the proposed regulations or instructions.

Signature or other authority under the proposed changes to the regulations means 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. The proposed instructions do not expressly address “other authority” or require that an FBAR be filed based on such authority. That aspect of the proposed instructions appears to be consistent with the definition of “signature authority” in the proposed changes to the regulations and represents a significant narrowing of the filing obligation.

The proposed changes to the regulations contain an express exception from the authorized signatory filing requirement for an officer or employee of an “Authorized Service Provider” that is registered with the SEC with respect to foreign financial accounts owned or maintained by an investment company that is registered with the SEC. That exception is intended to exempt employees of a management company who manage the operations of a mutual fund.

The proposed changes to the regulations do not provide a proposed effective date. Presumably, they will become effective when issued in final form. The preamble to the proposed regulations requests comments within 60 days.

The tax lawyers at Hunton & Williams LLP have extensive experience with FBAR filing requirements. If you would like to discuss these issues further, please contact any of the lawyers listed on this alert.

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