April 30, 2010

FinCEN
P.O. Box 39
Vienna, VA 22183

Also sent electronically via Federal e-rulemaking portal: http://www.regulations.gov

RE: Comments on Notice of Proposed Rulemaking (RIN-1506-AB08) regarding Amendment to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts

Dear Sir or Madam:

The American Institute of Certified Public Accountants (AICPA) offers the attached comments in response to a Notice of Proposed Rulemaking (RIN-1506-AB08), published in the Federal Register on February 26, 2010, requesting comments regarding proposed amendments to regulations under Title 31 of the U.S. Code (the Bank Secrecy Act, or BSA) concerning reports of foreign financial accounts. These comments were developed by the Foreign Bank and Financial Account Reporting Task Force (FBAR Task Force) of the AICPA's International Taxation Technical Resource Panel, and approved by the Tax Executive Committee.

The AICPA is the national professional organization of certified public accountants comprised of approximately 360,000 members. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

The AICPA and its FBAR Task Force appreciate the work that has gone into the development of these proposed regulations by the Financial Crimes Enforcement Network (FinCEN), the Department of Treasury (Treasury), the Internal Revenue Service (IRS), and other government agencies. This is a difficult area and we understand the need for information reporting. To that end, we hope the proposed regulations and other rules can be further modified to help ensure understanding of, and compliance with, the rules, and better target the rules to the appropriate audience.

Our comments encompass various sections of the proposed regulations, Form TD F 90-22.1,

Report of Foreign Bank and Financial Accounts (the "FBAR"), the FBAR instructions and certain other items that need further written clarification in the final regulations or other guidance. More specifically, our comments address the following areas:

A. Signature Authority but No Financial Interest

We suggest further expansion and clarification of the exceptions to the filing of FBAR for others with signature authority, but no financial interest, while still providing the government with the necessary information it needs.

B. Due Date of FBAR

The FBAR due date should be changed from June 30 to October 15.

C. Mailbox Rule

The FBAR should be considered timely filed when timely mailed (or e-filed), rather than when received by Treasury in Detroit, MI, similar to the "mailbox" rule for all tax and information returns.

D. E-filing of FBAR

Filers should be permitted to electronically file the FBAR through FinCEN's BSA E-Filing System.

E. Nonresident Aliens

The definition of resident should provide relief from filing FBAR for a taxpayer who elects to be treated as a nonresident under the Internal Revenue Code or a U.S. income tax treaty.

F. Foreign Mutual Funds and Hedge Funds

The definitions of foreign mutual funds and foreign hedge funds should be further clarified, and examples provided.

G. Proposed Revisions to FBAR and Instructions

We suggest several revisions be made to both the FBAR and its draft instructions regarding the reporting of indirect interests in accounts and identification of entities included in a consolidated FBAR filing.

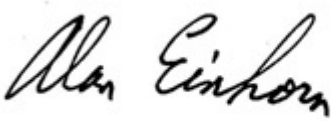
H. Hiring Incentives to Restore Employment (HIRE) Act

The Hiring Incentives to Restore Employment (HIRE) Act added new provisions under Title 26 of the U.S. Code regarding reporting of foreign bank and financial account. Common definitions, filing requirements, and other details under the regulations of both Titles 31 and 26 of the U.S. Code should be achieved wherever possible.

Each of these areas is addressed in detail in the attached comments. We continue to work on additional comments, including on FBAR definitions, filing requirements, application in the foreign trust area, expatriation, and other areas, which will be submitted in the next month or two.

We appreciate the opportunity to comment on these proposed regulations and, if desired, welcome a further discussion of any subjects raised in the comments. If you have any questions, please contact Neil A.J. Sullivan, Chair, AICPA FBAR Task Force at (914) 713-0503, or neilsullivan@att.net; Ron Dabrowski, Chair, AICPA International Taxation Technical Resource Panel at (202) 533-4274, or rdabrowski@kpmg.com; or Michelle Koroghlanian, AICPA Technical Manager, at (202) 434-9268, or mkoroghlanian@aicpa.org.

Respectfully submitted,



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Attachment

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AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Comments on Notice of Proposed Rulemaking (RIN-1506-AB08) regarding Amendment to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts

Developed by:
Foreign Bank and Financial Account Reporting Task Force
(FBAR Task Force)

Approved by:
International Taxation Technical Resource Panel
And
Tax Executive Committee

Submitted to:
Financial Crimes Enforcement Network (FinCEN)

April 30, 2010

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AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Comments on Notice of Proposed Rulemaking (RIN-1506-AB08) regarding Amendment to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts

Set forth below are our comments on the proposed regulations under Title 31 of the U.S. Code (the Bank Secrecy Act, or BSA) concerning reports of foreign financial accounts, Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts* (the "FBAR"), the FBAR instructions, and certain other items that need further clarification in the final regulations or other guidance:

A. Signature Authority but No Financial Interest
B. Due Date of FBAR
C. Mailbox Rule
D. E-filing of FBAR
E. Nonresident Aliens
F. Foreign Mutual Funds and Hedge Funds
G. Proposed Revisions to FBAR and Instructions
H. Hiring Incentives to Restore Employment (HIRE) Act

Each of these areas is addressed in detail below. We continue to work on additional comments, including on FBAR definitions, filing requirements, application in the foreign trust area, expatriation, and other areas, which will be submitted in the next month or two.

A. Signature Authority but No Financial Interest

Recommendations

We recommend that future guidance expand the exceptions provided for U.S. persons with signature or other authority over foreign financial accounts, but no financial interest in such accounts, as follows:

- In general, future guidance should provide that U.S. persons who are officers or employees of a U.S. entity not be required to report that they have signature or other

authority over a foreign financial account of such entity if the officer or employee has no financial interest in the foreign financial account.[1]

- U.S. entities, for purposes of this exception, should be defined by the types of persons described in 31 C.F.R. § 103.11(z), but excluding individuals, and including limited liability companies. U.S. entities for this purpose should include U.S. for-profit businesses, as well as U.S. tax-exempt organizations.
- The exception should be applicable to officers or employees of U.S. subsidiaries of the U.S. entities described above when the U.S. entity chooses to file a consolidated FBAR that includes the subsidiary entity.
- The exception should be applicable to officers or employees of foreign subsidiaries of entities described above (or their U.S. subsidiaries) when the U.S. entity (or its subsidiaries in a consolidated FBAR) is required to report foreign financial accounts owned by the foreign subsidiary on its FBAR.
- In order to ensure that necessary data is still obtained, the FBAR should be revised so that filers who have a financial interest in a foreign financial account are required to report the identity of U.S. individuals with signature or other authority over such foreign financial accounts.[2]
- The exception should not be limited based on the size of the U.S. entity, though it might be reasonable to require that the applicable U.S. entity (or its subsidiary, if applicable) have an obligation to file a U.S. federal tax or information return in order for the FBAR filing exception to be applicable.
- Future guidance on expanded and clarified exceptions should apply retroactively to prior years within the BSA statute of limitations (with the exception of any lists of participants in joint or consolidated filings which are currently prohibited per the FBAR instructions).
- Regardless of whether the foregoing recommendations are adopted, the final regulations should confirm that certain written notification requirements have been eliminated in applying the exceptions described in Proposed 31 C.F.R. §103.24(f)(2)(iv) and (v).

Supporting Detail

Prior to the issuance of the October 2008 revisions to the FBAR instructions, officers and employees of certain types of entities were excepted from the requirement to file an FBAR to

[1] This exception would not relieve the officer or employee from FBAR filings related to foreign financial accounts in which the officer or employee has any other applicable FBAR filing responsibility, including a financial interest in a foreign financial account.

[2] If this recommendation is included in the final regulations, an officer or director should be allowed to be included in more than one non-individual filing with respect to FBAR obligations. See also comments below under section H for other recommendations affecting the FBAR form.

report foreign financial accounts for which they had signature or other authority, but no financial interest. One such exception applied to officers and employees of a bank subject to the supervision of certain Federal agencies.[3] The other exception applied to officers and employees of domestic corporations whose equities were listed on a U.S. national securities exchange or which had assets exceeding $10 million and 500 or more shareholders of record.[4] In the latter case, in order to qualify for the exception, the officer or employee had to have been advised in writing by the Chief Financial Officer of the corporation that the corporation had filed a current FBAR that included that account.

The October 2008 revisions to the FBAR instructions left the first exception[5] referred to above substantially unchanged, but expanded the second exception[6] to include officers or employees of domestic subsidiaries of domestic corporations meeting the aforementioned criteria, as well as officers and employees of foreign subsidiaries more-than-50-percent owned by such domestic corporations. The requirement that the officer or employee be advised in writing that the corporation had filed a current FBAR (the "written notification requirement"), including the account in question, was also apparently expanded insofar as the October 2008 instructions provided that the notice could be provided to the officer or employee, not just by the chief financial officer, but also by a "similar responsible officer of the corporation," or of the parent corporation in the case of the latter two exceptions.

Proposed 31 C.F.R. § 103.24(f)(2) makes further changes to exceptions from FBAR filing for individuals who have signature or other authority over financial accounts, but no financial interest in such accounts. For the most part, these changes expand the exceptions, and we commend the Department of Treasury (Treasury), FinCEN, and the Internal Revenue Service (IRS) for these helpful and appropriate changes. These changes include adding an exception for officers and employees of financial institutions that are registered with and examined by the Securities and Exchange Commission or Commodity Futures Trading Commission,[7] adding an exception for officers and employees of an Authorized Service Provider,[8] and removing the requirement that an officer or employee of an entity with a class of equity securities listed on any U.S. national securities exchange or a U.S. entity that has a class of equity securities registered

[3] Now covered by Proposed 31 C.F.R. § 103.24(f)(2)(i) and (ii).
[4] Now covered by Proposed 31 C.F.R. § 103.24(f)(2)(v) which refers to securities registered under section 12(g) of the Securities Exchange Act.
[5] Now covered by Proposed 31 C.F.R. § 103.24(f)(2)(i) and (ii).
[6] Now covered by Proposed 31 C.F.R. § 103.24(f)(2)(iv) and (v).
[7] Proposed 31 C.F.R. § 103.24(f)(2)(ii).
[8] An "Authorized Service Provider" means an entity that is registered with and examined by the Securities and Exchange Commission and that provides services to an investment company registered under the Investment Company Act of 1940. Proposed 31 C.F.R. § 104.24(f)(2)(iii).

under section 12(g) of the Securities Exchange Act needed to receive written advice from a responsible officer of the entity as a requirement for the exception from filing the FBAR.[9] We have also noted that the exceptions described in Proposed 31 C.F.R. § 103.24(f)(2)(iv) and (v) now refer to U.S. entities, rather than corporations, which implies that the exceptions can apply to entities other than state law corporations.

Additionally, the draft instructions and proposed regulations appear generally to remove the written notification requirements referred to above in the case of any U.S. person who is excepted from filing an FBAR under Proposed 31 C.F.R. § 103.24(f)(2). This change is specifically affirmed in the preamble to the proposed regulations when explaining the exceptions described in Proposed 31 C.F.R. § 103.24(f)(2)(i), (ii) and (iii). However, the removal of the written notification requirement is not affirmed in the preamble language that corresponds to Proposed 31 C.F.R. § 103.24(f)(2)(iv) and (v). While it appears clear that the written notification requirement has been eliminated for all five of the exceptions described in the proposed regulations, we recommend that guidance in the final version of the regulations (either in the regulations, or in the preamble) make clear that the written notification requirement has been eliminated for all purposes. Moreover, our recommendation in the following discussion to expand the exceptions to officers and employees of other U.S. entities as described herein presumes that no written notification requirement would be applicable to such additional exceptions.

We support the expansion of the FBAR filing exceptions for officers or employees of certain entities as provided in Proposed 31 C.F.R. § 103.24(f)(2). We believe, however, that the Treasury, FinCEN, IRS, and FBAR filers,[10] would all benefit from additional expansion of the exceptions in future guidance to further reduce duplicative filings and streamline the administrability of the filing requirements.

Many commentators have observed that the rules governing the filing of FBARs often result in duplicate reporting of the same foreign financial accounts – often by filers who have no financial interest in the account. Duplicate reporting of the same foreign financial account occurs particularly frequently in the case of U.S. individuals who have signature or other authority, but no financial interest, in a foreign financial account of an entity by whom the individual is employed. The proposed regulations are helpful in expanding exceptions in some cases to reduce these duplicate filings, but there is an opportunity to improve compliance even more by further expanding these exceptions. As noted in the preamble to the proposed rules, FinCEN

[9] Proposed 31 C.F.R. § 103.24(f)(2)(iv) and (v).
[10] Throughout this document, the terms filer and taxpayer generally have been used interchangeably.

believes that relief is appropriate for U.S. persons having signature or other authority, but no financial interest, in the case of foreign financial accounts owned by entities that are subject to Federal oversight (*e.g.*, by the agencies described in the proposed regulations). We believe, however, that expanding the exceptions to include officers and employees of certain privately held businesses and exempt organizations[11] is also appropriate, and would not negatively impact the Treasury and FinCEN's ability to gather necessary information with respect to foreign financial accounts.

We propose that an additional exception from filing be established. Specifically, we propose that if the officer or employee has no financial interest in the foreign financial account, U.S. persons who are officers or employees of a U.S. entity not be required to file an FBAR to report that they have signature or other authority over a foreign financial account of such entity. For this purpose, U.S. entities would include U.S. for-profit businesses, as well as U.S. tax-exempt organizations.[12] This exception should also be applicable to officers and employees of U.S. subsidiaries of such entities when the U.S. "parent" entity chooses to file a consolidated FBAR that includes the U.S. "subsidiary" entity.[13]

The October 2008 version of the instructions provided that an officer or employee of a foreign subsidiary, more-than-50-percent owned by a domestic corporation, included in the consolidated FBAR filing of its U.S. parent need not file the FBAR concerning the signature or other authority over the foreign financial account if the officer or employee has no personal financial interest in the account and he has been advised in writing by the responsible officer of the parent that the parent has filed a current report which includes that account.[14] The exception under Proposed 31 C.F.R. § 103.24(f)(2)(iv) no longer appears to include this exception.

We recommend reinstating the exception for officers and employees of certain foreign subsidiaries of such U.S. entities in future guidance, provided that the U.S. entity referred to above (*i.e.*, which owns the foreign subsidiary), or any of its U.S. subsidiaries, is required to report the foreign financial accounts owned by the foreign subsidiary.

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[11] Including support organizations, private foundations, and charitable trusts.

[12] Consideration should be given to identifying an entity by reference to the types of persons described in 31 C.F.R. § 103.11(z), but excluding individuals, and including limited liability companies.

[13] Note also that in reference to the exception provided in Proposed 31 C.F.R. § 103.24(f)(2)(iv), the preamble notes that no distinction is made between U.S. and foreign entities which are listed on a U.S. national securities exchange. We recommend that Proposed 31 C.F.R. § 103.24(f)(2)(iv) include similar language to make this clear.

[14] As referenced above, the written notification requirement appears to be eliminated in the proposed regulations.

In order to mitigate any concerns that information relative to U.S. persons having signature or other authority over, but no financial interest in, foreign financial accounts may not be made available to the Treasury and FinCEN, we recommend that the FBAR be revised in a manner such that non-individual filers, who have a financial interest in a foreign financial account be required to report any U.S. persons having signature or other authority over such foreign financial accounts. This proposal would result in the same information being reported to the Treasury and FinCEN as under the current rules. However, the system would be improved by imposing the reporting requirement on the party more likely to have comprehensive access to all the necessary information (i.e., the non-individual filer).[15] Furthermore, an individual who has signature authority over, but no financial interest in, a foreign financial account should be allowed to be included in more than one non-individual filing as described above, and should also be allowed to file his or her own FBAR for accounts over which he or she has a financial interest in a foreign financial account without jeopardizing the ability to be included in the non-individual disclosure as described above.

Additionally, in order to align this proposed exception more closely with the standard outlined in the preamble to the proposed regulations (*i.e.*, that Federal oversight of the entities be present), the exception could be made to apply only in cases where the employer is obligated to file a U.S. Federal income tax or information return for the taxable year.[16]

We do not believe that this proposed exception should be limited based on the size of the U.S. entity. Such a condition would have the effect of placing a greater compliance burden on officers or employees of small businesses and small exempt organizations, than on officers and employees of large businesses and large exempt organizations.[17]

We recommend that this proposed expansion to the exceptions for U.S. persons having signature or other authority over, but no financial interest in, certain foreign financial accounts apply on a retroactive basis to prior years within the BSA statute of limitations.[18] This would avoid

[15] In many cases, officers or employees of U.S. entities might not have access to all necessary information relative to foreign financial accounts over which they have signature or other authority, but no financial interest in, solely in the course of their service as employees.

[16] The rule should not be conditioned on whether the entity timely or accurately files its U.S. federal tax or information return. Officers or employees of such entities generally do not have knowledge of whether their employers are compliant with their tax or information return filing obligations, and similarly should not be penalized for their employers' non-compliance.

[17] Arguably, the current rules relative to excepting officers and employees only of banks, financial institutions and other large or publicly traded entities places a relatively greater compliance burden on small business and small exempt organizations, and their officers and employees.

[18] However, any revisions to the FBAR requiring filers to report a list of U.S. persons with signature or other authority over foreign financial accounts should not be applied retroactively.

confusion among filers as to their filing requirements, and also would help to prevent duplicate filings of information pertaining to the same foreign financial accounts.

B. Due Date of FBAR

Recommendation

We recommend that the June 30th due date of FBAR, which was established by 31 C.F.R. § 103.27(c) be changed from June 30 following the calendar year of the report to October 15 (unextended) following the calendar year of the report. Since the date is not established by statute, this does not require Congressional action, but could be changed by regulation by FinCEN.

Supporting Detail

There are many reasons why an October 15th due date (unextended) will lead to simplification and avoid confusion and missed or late filings.

FBAR filers very often obtain the data necessary to complete the FBAR concurrently and in connection with the preparation of their U.S. federal income tax returns. Taxpayers with the financial resources to purchase offshore investments or business interests are very likely to request an extension of time to file their income tax returns. As a result, many FBAR filers may not have access to all necessary information to complete their FBARs until after June 30. As discussed in more detail below, this is particularly true of FBAR filers who own interests in foreign financial accounts indirectly via ownership of more-than-50-percent of certain types of entities.

Taxpayers often do not have all the information (such as Schedule K-1s and footnotes thereto) that may be needed to complete the FBAR form by June 30. Many investors do not receive their Schedule K-1s until well after June 30. In fact, many are received in September. Furthermore, if a taxpayer's investment advisor purchases a foreign investment, such as a mutual fund, on behalf of the taxpayer, the taxpayer may not be aware of this except to the extent that a short entry is included on a monthly statement. People who utilize investment advisors typically have multiple accounts, and each account has a monthly statement that can have numerous pages. The investor may, therefore, have no idea of the new investment in the foreign mutual fund, and the

taxpayer's tax preparer may not be made aware of this until receipt of the Schedule K-1 for the initial year of investment, which will in many cases be well after June 30.

Even when a taxpayer does possess the relevant information to file the FBAR by June 30, there may be a number of impediments that prevent clear communication between the taxpayer and their tax return preparer to allow compliance by the deadline. Few taxpayers understand the full scope of the phrase "foreign financial account" or the concept of indirect ownership. Thus, they are unlikely to inform their tax preparer of their need to file the FBAR form or to provide all information necessary to file so as to have the report received by Treasury by June 30. Because the definition of a foreign financial account is a complex determination, especially if indirect ownership is involved, preparers are more likely to discover that there is indirect ownership of a foreign financial account when they are preparing the income tax return for the individual later in the year.

For example, an individual may own a controlled foreign corporation (CFC) that has a foreign bank account; however, the individual generally files the Form 1040 after June 30 because Schedule K-1s are not yet received or the inability to obtain the CFC information for the individual's Form 5471 by June 30. The tax practitioner might not even be aware of the CFC or be in a position to inform the client of the need to file an FBAR form until well after June 30.

As another example, a U.S. parent company that owns more than 50-percent of the stock of a foreign corporation that has a reportable foreign bank account has to file its own FBAR, even though the foreign bank account is not directly held by the U.S. parent company. That is because the U.S. parent "controls" the more-than-50-percent owned foreign subsidiary under the definition of "control" in the 2008 revision of the FBAR instructions. When practitioners are preparing Forms 1120, the information is frequently not provided by the foreign subsidiary by June 30 if the U.S. parent company's tax return is on extension. If the U.S. parent company set up a new foreign subsidiary during the year, the practitioner may not learn of it until well after June 30, such as when the information regarding the new subsidiary is provided to the practitioner after that date.

No other tax form is due on June 30, so many taxpayers are not aware of, or accustomed to, the need to provide their tax preparers with information by the current June 30 due date. In addition, taxpayers are not accustomed to having a filing requirement for which there is no extension. It also takes a lot of time for many taxpayers to gather the information required to prepare the FBAR form. For the above reasons, and in light of the potentially significant penalties involved, the FBAR form due date should be on or after October 15, to conform to the extended due date

of federal income tax returns for the vast majority of individuals. This would also ensure that the FBAR form due date is after the extended filing deadline for calendar year-end entities, so most taxpayers will have reviewed their prior calendar-year filing requirements and disclosures to ensure that complete and accurate FBAR forms are filed, rather than having to file late or amended FBAR forms due to Schedule K-1s received after June 30.

The rules regarding the reporting of foreign banks and financial accounts are confusing for many taxpayers to understand, especially for many of the individuals impacted by these rules. These rules are contained in Title 31 of the U.S. Code. Most individuals deal strictly with Title 26 of the U.S. Code. When individuals are dealing with the IRS with respect to the FBAR, they assume that they are following the rules that they commonly know under Title 26 of the U.S. Code. Having unique due dates and mailing rules for the FBAR complicates compliance efforts.[19] Many taxpayers are still learning that an FBAR filing requirement exists, let alone the details of the requirement to file an FBAR. Having rules that fall outside the typical comfort zone for income taxes that they have dealt with all their lives, and that have only recently been publicized to more of the general public, leads to unintended missed or late FBARs in many situations.

C. Mailbox Rule

Recommendation

In an AICPA comment letter submitted November 16, 2009, in response to IRS Notice 2009-62, we recommended that the FBAR form be considered timely filed when timely mailed (or e-filed), rather than when timely "received," similar to the "mailbox" rule for filing all tax and information returns. We reiterate that request now.

Supporting Detail

26 C.F.R. § 301.7502-1 clearly states that tax returns "…or other document required to be filed within a prescribed date under authority of any provision of the internal revenue laws…" are timely filed if mailed by the due date.

[19] See also comments below under section C regarding the mailbox rule.

The mailbox rule applies to all other areas where taxpayers (individuals and businesses) are filing forms and documentation with the IRS. Applying a different standard to the FBAR leads to confusion and missed deadlines.

We recommend proof of timely filing include: (1) hand-delivery of the FBAR form with receipt of a date stamp at an IRS district office, U.S. embassies and consulates; (2) use of U.S. Postal Service (USPS) certified receipts; (3) use of private delivery services as designated by IRS Notice 2004-83 for purposes of 26 U.S.C. § 7502; or (4) other proof of mailing alternatives.

We recognize and appreciate that the draft instructions to the FBAR have been modified to include a street address to enable a taxpayer (including a nonresident of the U.S.) to use an overnight delivery service to deliver the FBAR to the IRS.

D. E-filing of FBAR

Recommendation

FinCEN, IRS and Treasury should allow and encourage taxpayers to electronically file (e-file) the FBAR.

Supporting Detail

E-filing is not currently available for the FBAR. E-filing increases ease of compliance with the annual reporting requirements and reduces processing costs. To maintain usefulness as a law enforcement tool, and to not be subject to Title 26 of the U.S. Code confidentiality restrictions, we recommend that FBAR be submitted through FinCEN's BSA E-Filing System, http://www.fincen.gov/forms/bsa_forms/.

This is very important to facilitate timely filing by persons with reporting responsibilities throughout the world. It will also provide an easier mode of filing for many individuals who are overseas and do not have easy access to U.S. mail services or embassies.

Taxpayers should be kept apprised of when FinCEN and the IRS anticipate that e-filing will be permitted for the FBAR form.

E. Nonresident Aliens

Recommendation

The definition of resident in the final regulations under the BSA should provide relief from filing the FBAR for a taxpayer who elects to be treated as a nonresident of the U.S. for tax purposes under the Internal Revenue Code (IRC) or the "Residence" article of a U.S. income tax treaty for a tax year. This language should provide that the taxpayer may rely upon the treaty election for current and prior tax years within the BSA statute of limitations. We include some examples below to highlight issues in this area. If the final regulations cannot accommodate the recommendation above, we request that further guidance be provided to address the concerns raised below.

Supporting Detail and Examples

The definition of a U.S. resident in Proposed 31 C.F.R. § 103.24 should consider the extent to which these rules are impacted by malleable residency situations, i.e., U.S. residency that can be changed either under U.S. domestic law or treaty provisions.

The two most common situations can be broadly categorized as "residency elections" under the IRC provisions and residency determined under the "Residence"[20] article (also referred to as "tie breaker" rules) of a comprehensive bilateral tax treaty.

U.S. Domestic Rules under 26 U.S.C.

Residency Elections Effective for an Entire Taxable Year

Non-U.S. persons married to U.S. citizens are eligible to make certain residency elections. Title 26 of the U.S. Code permits the filing of certain elections granting U.S. tax residency status to non-U.S. persons pursuant to 26 U.S.C. §§ 6013(g) and 6013(h).

[20] For example, Article IV of the Canada U.S. Tax Convention (1980) as amended by Protocols.

a. 26 U.S.C. § 6013(g) permits a nonresident alien of the U.S. to elect to be treated as a U.S. resident.

Example 1

A U.S. citizen residing in Canada is married to a Canadian resident/citizen. The U.S. citizen and spouse jointly elect to treat the non-U.S. spouse as a U.S. resident in order to file a joint Form 1040.

Issue: Does the nonresident alien (NRA) spouse have an FBAR filing requirement for accounts in his / her name only and / or joint accounts?

Recommendation: The NRA should have an FBAR filing requirement. Accounts in the name of the NRA should be subject to FBAR reporting. Accounts held jointly should be subject to reporting by both the U.S. spouse and the NRA.

Issue: How is the dollar value of joint accounts determined?

Recommendation: The full dollar value should be included for each spouse, consistent with treatment of U.S. citizen spouses with a joint account.

b. 26 U.S.C. § 6013(h) permits a joint return to be filed for the year in which a nonresident alien(s) becomes a U.S. resident. For married couples, if both spouses are resident aliens at the end of the year, but either or both of them were a nonresident alien at the beginning of the year, they may elect to be resident aliens for the entire year.

Example 2

Mr. and Mrs. X move to the U.S. on August 1, 2010. They are eligible to elect under 26 U.S.C. § 6013(h) to be treated as U.S. residents for the entire year even though they were not physically present in the U.S. for the entire year.

Issue: Does the FBAR filing cover the nonresident period from January 1, 2010 to July 31, 2010?

Recommendation: For ease of administration, the FBAR filing should be effective for the entire reporting tax period (retroactive to January 1, 2010).

Residency Elections Effective for a Portion of a Taxable Year

Residency starting dates can be changed in the year a person moves to the U.S.

c. Under 26 U.S.C. § 7701(b)(4), a non-immigrant alien who is classified as a nonresident alien under the substantial presence test for the entire year during which he / she moved to the U.S. may nevertheless be able to elect resident alien status, provided he / she satisfies certain tests.

Example 3

Mr. X moves to the U.S. permanently on October 3rd of 2010. Under the day count test, Mr. X does not qualify as a resident alien of the U.S. for 2010, thereby precluding him from claiming certain tax deductions otherwise available to a U.S. resident on Schedule A. Mr. X qualifies for, and elects under 26 U.S.C. § 7701(b)(4) to be treated as, a U.S. resident for the qualifying portion (October 3rd to December 31st) of the 2010 year.

Issue: Does the election subject Mr. X to FBAR reporting? If so, is the relevant period the entire 2010 year or only the U.S. residency portion (October 3rd to December 31st)?

Recommendation: The election should not subject him to FBAR reporting in that first year.

The residency termination date rules operate in part as a "mirror" of the residency starting date rules, so the FBAR issues raised above also must be considered within the context of departing persons.

Treaty Tax Residents / Nonresidents

Two of the most relevant categories of aliens affected by the tie-breaker rules found in U.S.' income tax treaties are non-immigrant aliens with a U.S. presence and green card holders living abroad.

Non-immigrant aliens working or living temporarily in the United States who are classified as resident aliens under the 3-year look-back formula of 26 U.S.C. § 7701(b), but who remain income tax residents of their home country, can elect to be treated as a nonresident of the U.S. if such an individual can show that the tie-breaker rules classify them as a resident of the foreign treaty country rather than of the U.S.

Example 4

Mr. X secured permanent employment in the U.S. in 2010 and is considered a resident alien of the U.S. for that year under the substantial presence day count test. He rents an apartment in the U.S.; however, his spouse and children remain in Canada. He still maintains a permanent home in Canada. Mr. X files his 2010 U.S. tax return as a treaty nonresident of the U.S. since his primary ties remain in Canada pursuant to paragraph 2 of Article IV of the Canada U.S. Tax Treaty. His 2010 U.S. tax filing is comprised of a Form 1040NR income tax return with a Form 8833 Treaty Statement.

Issue: Does Mr. X have an FBAR filing requirement in respect of foreign accounts?

Recommendation: Mr. X should not have an FBAR filing requirement while a treaty nonresident.

It has become increasingly popular for aliens holding a U.S. green card to move abroad to live or work in a foreign country. Under the green card test of 26 U.S.C. § 7701(b), those aliens continue to be classified as resident aliens for U.S. tax purposes. Typically, they are classified as income tax residents of the country where they live and, if they can show that the treaty tie-breaker rules also classify them as resident in the country where they live, the U.S. tax regulations[21] classify them as nonresident aliens for U.S. tax purposes.

[21] See 26 C.F.R. § 301.7701(b)-7(a)(1) and coordination with U.S. income tax treaties.

Example 5

Mrs. X, a green card holder and long-term resident of the U.S., moved back to Canada with her children in 2010, after the passing of her U.S. citizen spouse. Mrs. X purchased a home in Canada and lives and works in Canada. Mrs. X is a resident of Canada for Canadian tax purposes under the domestic day-count rules and also the treaty tie breaker rules. She receives substantial allocations annually from her husband's U.S. estate, which she deposits in a Canadian bank account and then contributes to her self-directed Canadian pension plan (RRSP) and children's Canadian education plans (RESP).

Issue: Does an FBAR filing requirement exist for the foreign accounts in the name of Mrs. X? Does such a filing requirement exist for the foreign accounts of the minor children, generally under the age of 18, born in the U.S. but without social security numbers (SSNs)?

Recommendation: No FBAR filing requirement should exist for the foreign accounts in the name of Mrs. X or for the foreign accounts of the minor children born in the U.S. but without SSNs.[22]

In addition to the above examples, there are various other provisions that are impacted by similar issues regarding whether an FBAR reporting requirement exists, and if so, when does the obligation to report cease. These are summarized below.

1. Former long-term residents of the U.S. (Expatriated Persons)
2. Foreign corporations holding a U.S. real property interest that elect to be treated as a U.S. corporation for U.S. income tax purposes under 26 U.S.C. § 897(i).

The definition in Proposed 31 C.F.R. § 103.24 is repeated in reporting requirements of 31 U.S.C. § 5314 of the BSA, which authorizes the Secretary to require persons subject to the jurisdiction of the U. S. to file reports for transactions with a foreign financial agency. Clarification also is needed with respect to the tax treaty elections in sections 31 U.S.C. §§ 5312, 5314 and 5315.

[22] Despite 26 C.F.R. § 301.7701(b)-7(a)(3).

F. Foreign Mutual Funds and Hedge Funds

Recommendations

The final regulations or other guidance should further define, with more clarity and certainty, terminology and illustrate by examples the application to hedge funds, mutual funds, or similar investments, which would be subject to reporting.

Supporting Detail

The proposed regulations do not provide a clear definition of "mutual fund" or "similar pooled fund."

The proposed regulations, in part, define an "other financial account" to mean an account with 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.

First, the term "regular net asset value determination" should be better explained. Clearly, the term would encompass publicly traded funds. We note, however, that there are some funds that are not publicly traded that post net asset values. We suggest that the definition of "other financial accounts" be limited to publicly traded funds. If non-publicly traded funds are included, we suggest further clarification of the circumstances when the "regular net asset value determination" will be satisfied.

Second, clarification is needed regarding how one discerns whether a life insurance policy is foreign. Once a life insurance policy is determined to be foreign, what reporting needs to be made on the FBAR? Is it the foreign policy itself, investments within the policy, such as a portfolio of foreign mutual funds, or are both the policy and its investments to be disclosed on the FBAR? We recommend that only the foreign life insurance policy be required to be reported.

We suggest further clarification of the definitions of "mutual fund", "pooled income fund", and examples of investments that would be included in these terms should be included in the final regulations.

G. Proposed Revisions to FBAR and Instructions

Recommendations

Some recommendations regarding the FBAR were provided in conjunction with our recommendations regarding situations involving signature or other authority but no financial interest.[23] We further recommend several changes to the FBAR and its instructions, as follows:

- Modify the FBAR to more easily accommodate the reporting of indirect interests in accounts, with additional instructions to clarify the reporting.
- Clarify how entities included in a consolidated FBAR should be identified in the report.

Supporting Detail

Reporting of Indirect Interests in Accounts

The revised FBAR provides a section for owners of a foreign financial account that have a financial interest in and signature authority over the account (Part II) and a section for filers who have signature or other authority but no financial interest in a foreign account (Part IV). Part IV provides a place for information about the organization that is the owner of the account (Lines 34, 35 & 43). However, when the filer has both a financial interest in an account and signature or other authority over an account owned by an organization, there is no clear place for a filer to report the name, taxpayer identification number and the filer's title.

Consider the example of a U.S. person who owns an interest in a foreign corporation or foreign partnership or is a U.S. grantor of a foreign trust where the foreign entity or foreign trust owns directly, or indirectly, a financial interest in one or more foreign financial accounts. If the U.S. person is treated as having a financial interest in a foreign financial account owned by the foreign entity (e.g., because the U.S. person has a greater than 50-percent ownership interest in the foreign entity), the U.S. person would presumably report such an account on Part II of the FBAR.

As currently drafted, since there is no place on Part II to report the actual direct owner of the financial interest in the foreign financial account, the FBAR does not distinguish between which accounts are owned directly by the U.S. person filing the FBAR, or by a foreign entity in which

[23] See comments above under section A.

the U.S. person owns an interest. This leads to a great deal of confusion for U.S. persons completing the FBAR. Clarification is needed. At a minimum, the FBAR instructions should be revised to confirm that interests in foreign financial accounts owned indirectly (e.g., through controlling interests in foreign entities held by the filer) are actually intended to be reported in Part II of the FBAR, and, if not, where on the FBAR such information should be included. It also would be helpful to revise the FBAR itself to differentiate between financial interests in foreign financial accounts held by the filer directly, versus those held indirectly through ownership interests in one or more foreign or domestic entities or trusts.

Consolidated Filings

Under Proposed 31 C.F.R. § 103.24(g)(3), an entity that is a U.S. person, and which owns directly or indirectly more than a 50-percent interest in one or more other entities that are required to report under Proposed 31 C.F.R. § 103.24, will be permitted to file a consolidated report on behalf of itself and such other entities. This rule reflects a helpful expansion of the rules for consolidated FBAR reports from the previously existing guidance in the 2008 version of the FBAR instructions, and is a very welcome change. Under the 2008 FBAR and instructions, the rules appear to require that only *corporate* entities may file consolidated FBARs, provided the requisite ownership requirements are satisfied. By changing the reference regarding the filer from "corporation" to "entity," Proposed 31 C.F.R. § 103.24(g)(3) appears to allow for other types of entities, such as partnerships and LLCs, to file consolidated FBARs. This is a helpful expansion of filers that are permitted to file a consolidated FBAR.

With respect to U.S. persons filing a consolidated report under Part V of the FBAR, however, important clarification is needed as to how the entities included in the consolidated report should be reflected on the form. Part V of the FBAR includes two areas where the name of an entity is reported. Lines 34 through 42 request information relative to the direct owner of the foreign financial account being reported (*e.g.*, presumably even if the foreign financial account is not owned by a U.S. person otherwise required to file an FBAR). Lines 1 through 6 appear to request information relative to the filer of the FBAR. Thus, in a case where a consolidated report is being filed by a chain of multiple entities, it is not clear where on the FBAR to identify the entities "in between" the ultimate filing entity and the direct owner of the foreign financial account being reported. The uncertainty that previously existed on this point may now be heightened by the fact that the proposed new instructions state that no supplemental attachments should be included with the report. Therefore, the instructions and the form should be revised to clarify how entities included in a consolidated FBAR should be identified on the form.

H. Hiring Incentives to Restore Employment (HIRE) Act

Recommendations

To the greatest extent possible, there should be common definitions, filing requirements and other details between the final regulations issued by FinCEN and other relevant guidance and regulations that are anticipated to be issued by the IRS, especially as it relates to recent legislative action.

Supporting Detail

We anticipate submitting additional comments on FBAR under Title 31 of the U.S. Code, as well as under Title 26 of the U.S. Code regarding the new provisions in the Hiring Incentives to Restore Employment (HIRE) Act, (H.R. 2847, P.L. 111-147), which was signed into law on March 18, 2010. Of particular concern is the fact that taxpayers will have a new, additional filing requirement for similar information regarding foreign bank and financial accounts under newly enacted 26 U.S.C. § 6038D, in addition to the existing requirement under 31 U.S.C. § 5314.

We strongly recommend that FinCEN work closely with the IRS as the IRS works on guidance under 26 U.S.C. § 6038D to ensure that definitions, filing requirements, and other details are as close to identical as can be achieved pursuant to the reporting requirements under both Titles 26 and 31 and the regulations thereunder. Any differences will result in confusion, incorrect filings or unintended noncompliance by taxpayers. One such item of note is the $10,000 filing requirement threshold under 31 C.F.R. § 103.27(c), which has never been indexed for inflation or changed since these rules were enacted in 1970, while 26 U.S.C. § 6038D will have a $50,000 filing requirement under the HIRE Act.

FinCEN, IRS and Treasury should develop a separate name for the report for the 26 U.S.C. § 6038D reporting, perhaps Foreign Asset Account Report (FAAR), to avoid confusion with the FBAR and help people to understand that these are two different and separate filings.

We also encourage FinCEN and the IRS to work on further education for the public to enhance understanding of reporting requirements under 31 U.S.C. for FBAR purposes and 26 U.S.C. for HIRE Act purposes. This may take the form of additional education programs for the internet, for print media, for radio and for television to assist the public and tax practitioners in understanding these rules and requirements for both FBAR and FAAR.