ALERTS

Treasury Clarifies FBAR Regulations for Private Investment Funds

April 1, 2011

On March 28, 2011, the Final Regulations, issued by the Financial Crimes Enforcement Network of the U.S. Department of the Treasury ("Treasury") relating to the filing of Reports of Foreign Bank and Financial Accounts ("FBAR") became effective. Notably, the Final Regulations do not require ownership interests in, or signing or other authority over, private investment funds, such as hedge funds and private equity funds, to be reported on FBARs, although Treasury will continue to study the issue.

The Final Regulations apply to FBARs required to be filed by June 30, 2011 with respect to foreign financial accounts maintained in the calendar year 2010, and for all subsequent years. United States persons who deferred FBAR filings for prior reporting years in accordance with guidance issued by Treasury,[1] may apply the provisions of the Final Regulations in determining their FBAR filing requirements for any deferred reports due June 30, 2011.

A revised FBAR form (Form TD-F-90-22.1) and General Instructions, which should be used for the June 30, 2011 filing deadline, were also recently released.

Background Information Relating to FBARs

Any United States person, who has a financial interest in, or signature or other authority over, any foreign financial accounts, including bank, securities, or other types of financial accounts in a foreign country, must report that relationship each calendar year by filing an FBAR with

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Treasury on or before June 30 of the succeeding year, if the aggregate value of these financial accounts exceeds $10,000 at any time during the calendar year.

Final FBAR Regulations

1. United States Person

The Final Regulations define a "United States person" as a "citizen or resident of the United States, or an entity, including but not limited to a corporation, partnership, trust, or limited liability company, created, organized, or 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." The Preamble to the Final Regulations (the "Preamble") clarifies that a U.S. grantor trust and a U.S. entity which is disregarded for tax purposes (such as a single member LLC) are United States persons which are required to file FBARs.

2. Status of Investment Funds

The Final Regulations define a "financial account" as including "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." Therefore, offshore hedge funds and private equity funds which are not offered to the public will not constitute financial accounts reportable on FBARs. Owners of offshore private investment fund interests, and individuals with signature authority with respect to such interests, are not required to report these interests on FBARs. However, FBAR reporting is still required for any foreign financial accounts maintained by a private investment fund — *e.g.,* a domestic fund's interest in a foreign bank or brokerage account, and a U.S. investment adviser's signature authority over an offshore fund's foreign financial account are subject to FBAR reporting.

Treasury stated that it will continue to consider the appropriate treatment of private funds for FBAR purposes. In addition, under new tax legislation an interest in an offshore private fund *will be treated as a foreign financial account* subject to new tax return reporting requirements for individuals.

3. Signature or Other Authority

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The Final Regulations define "signature or other authority" as "the 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 direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained." Where an entity (*e.g.,* an investment management company, or a general partner entity) is given authority over a foreign financial account, the entity need not file an FBAR reflecting its signature authority. Only the individuals — the real people — who can exercise that authority are required to report the signature authority.

In the Preamble, Treasury noted that "the test for determining whether an individual has signature or other authority over an account is whether the foreign financial institution will act upon a direct communication from that individual regarding the disposition of assets in that account." Treasury explained that the phrase "in conjunction with another" is "intended to address situations in which a foreign financial institution requires a direct communication from more than one individual regarding the disposition of assets in the account."

Although Treasury provided in the Final Regulations exemptions to the FBAR reporting requirements for officers or employees with signature authority over foreign financial accounts maintained by certain entities, Treasury made it clear that these exemptions generally do not apply to officers or employees of investment advisers of private investment funds because they are not included in the definition of "financial institutions" under the Bank Secrecy Act.[2]

4. Special Rules to Simplify FBAR Filings

The Final Regulations state that a United States person having a financial interest in 25 or more foreign financial accounts, or signature or other authority over 25 or more foreign financial accounts, need only provide the number of financial accounts and certain other basic information on the FBAR form. Detailed information concerning each account must be provided upon request.

The Final Regulations also provide that an entity that is a United States person and owns directly or indirectly more than a 50 percent interest in an entity required to report under this section will be permitted to file a consolidated report on behalf of itself and such other entities.

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Treasury also indicated its plans to allow electronic filing of FBAR forms at some point in the future.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] As a result of changes that were made to the FBAR Form instructions in October 2008, FBAR filing deadlines were extended for certain filers. *See* IRS Notice 2009-62 and IRS Notice 2010-23.

[2] 31 C.F.R. § 103.11(n) (2010).

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