

CANADIAN TAX *Highlights*

New FBAR Guidance

On February 26, 2010, the IRS issued guidance on its “Report of Foreign Bank and Financial Accounts” (FBAR, IRS form TD F 90-22.1; see Announcement 2010-16 and Notice 2010-23). Treasury’s Financial Crimes Enforcement Network (FinCEN) also proposed regulations (RIN 1506-AB08) to clarify who is required to file an FBAR and which accounts are reportable. (A new reporting requirement is discussed in “US Targets Foreign Investment,” which follows this article.)

Generally, any US person who at any time during a calendar year has a financial interest in, or signature or other authority over, any financial accounts in a foreign country whose aggregate value exceeds \$10,000 must file an FBAR with Treasury by June 30 of the following year. In October 2008, the IRS revised the FBAR and its instructions, broadening the “US person” definition to include non-US persons “in and doing business in the United States.” The resulting uncertainty about who must file an FBAR led to the temporary suspension of FBAR reporting for persons other than US citizens, US residents, and domestic entities (IRS Announcement 2009-51, continued for 2010 by Announcement 2010-16). Thus, to determine whether an FBAR is due on June 30, 2010—for 2009 and earlier years—a Canadian may rely on the “US person” definition in the July 2000 FBAR instructions.

New IRS Notice 2010-23 further extends to June 30, 2011 the FBAR filing deadline for any person with signature authority over—but no financial interest in—a foreign financial account during 2010 and prior calendar years. (IRS Notice 2009-62 had previously extended the FBAR filing deadline for those filers to June 30, 2010, for 2008 and earlier calendar years’ filings.) The new notice also provides that no FBAR is required for a financial interest in, or signature authority over, a foreign “commingled fund” other than a mutual fund (such as a foreign hedge fund or private equity fund) for 2009 and prior years. (IRS Notice 2009-62 had previously extended the FBAR filing deadline therefor to June 30, 2010 for 2008 and prior years.)

FinCEN’s proposed regulation reserves guidance on future FBAR reporting of non-mutual fund commingled funds. FinCEN’s proposed regulation revises the regulation implementing the Bank Secrecy Act regarding FBARs to clarify who must file an FBAR and which accounts are reportable. Several new terms are defined, some definitions are amended, and some filing exemptions are made explicit. Attached to the proposed regulation is a draft of the consequentially proposed FBAR instructions. Before becoming effective, the proposed regulation must go through a comment period; comments are due on April 27, 2010.

The proposed regulation revises the “US person” definition to include a US citizen, a US resident alien, and an entity including a corporation, partnership, trust, and LLC 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 revision suggests that the suspension of the FBAR filing requirement for non-US persons may become permanent and also clarifies that an entity disregarded for US federal tax purposes (such as a singlemember LLC) must nonetheless file an FBAR.

The proposed regulation defines separately “bank account,” “securities account,” and “other financial account,” all of which are reportable accounts. “Other financial account” includes (1) an insurance policy with a cash value; (2) an annuity policy; (3) an account with a broker or dealer for futures or options in any commodity on, or subject to the rules of, a commodity exchange or association; and (4) an account with a mutual fund or similar pooled fund that issues shares available to the general public and that has regular net asset value determinations and regular redemptions. The treatment of an account with investment funds other than mutual funds or similar pooled funds (such as hedge funds) is explicitly reserved for possible future guidance. The “financial interest” definition is revised to include, inter alia, an anti-avoidance rule aimed at a US person who uses an entity to evade FBAR reporting.

The definition of “signature or other authority” over a foreign financial account is also refined, and FBAR reporting exceptions are made for certain persons whose signature or other authority merely resides in their capacity as an employee or officer. A US person with signature or other authority over 25 or more foreign financial accounts need now report only the number of accounts and some other basic information, but must provide details for each account if requested by the Treasury or the IRS.

The proposed regulation excludes from the FBAR reporting requirement participants and beneficiaries in certain deferred compensation plans, and IRAs or Roth IRAs, for foreign financial accounts held by them or on their behalf. A US person that has more than a 50 percent beneficial interest in trust assets, or that receives more than 50 percent of the income from a trust, need not report if the trust, or its trustee or agent, is a US person that files an FBAR disclosing the trust’s foreign financial accounts.

The draft FBAR instructions state that a filer can now request receipt verification by phone (at a special number) or in writing (for a nominal fee) and can also request copies of filed FBARs (for a nominal fee).

The IRS and FinCEN continue to focus on offshore issues, including FBAR reporting. The recent guidance provides some much-needed clarity, especially given the approaching deadlines for filing individual income tax returns and FBARs, but many issues remain open for future guidance.

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