News From
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REMINDER -- FBAR JUNE 30 DEADLINE FAST APPROACHING

New Foreign Bank Account Report (FBAR) Regulations

United States persons with foreign bank and financial accounts have long been required to annually disclose information to the U.S. Treasury Department. This information is reported on Treasury Form 90-22.1, Report of Foreign Bank and Financial Accounts, commonly referred to as "FBAR." The FBAR is required to be filed not only for outright ownership of an account, but also for accounts owned by entities in which the U.S. person owns a more than 50% interest and for various trust accounts. Penalties for failure to report the required information can be severe, ranging from $10,000 to the greater of $100,000 or 50% of the balance of the account. Criminal penalties may also apply.

The FBAR and accompanying instructions were revised in the fall of 2008 to require more detail regarding reportable foreign accounts and expand the definition of United States persons required to file the FBAR. This revision sparked much attention in the professional and business press late in the spring of 2009, just before the June 30 filing deadline. In response to public comments on the revision, the IRS suspended the filing requirements for certain persons and certain types of accounts until June 30, 2010, pending the issuance of new regulations.

Proposed regulations were issued February 26, 2010. The new regulations provide some clarity, but questions remain. Because these regulations were issued in proposed form, they are subject to revision before being finalized. Guidance from the IRS was issued simultaneously with the proposed regulations, postponing the filing of 2009 FBARs for some U.S. persons until June 30, 2011.

The general FBAR reporting requirement remained the same in the wake of the proposed regulations and IRS guidance: a United States person having a financial interest in, or signature authority over, a bank, securities, or other financial account in a foreign country is required to file the FBAR.

WHAT'S NEW UNDER THE REGULATIONS?

Definition of United States Person

Instructions for the 2008 FBAR expanded the definition of a United States person to include persons in and doing business in the U.S. Under the proposed regulations, however, the definition of a U.S.

person is narrowed to mean a U.S. citizen, a U.S. resident, an entity formed in the U.S., or a trust or estate formed under the laws of the U.S.[i] Pending finalization of the regulations, the requirement to file an FBAR due June 30, 2010 is suspended for persons who do not meet the definition in the proposed regulations.

Types of Reportable Accounts

Reportable accounts include the obvious, such as bank and brokerage accounts. The regulations make it clear that FBAR reporting is also required for other types of financial accounts, including:

1. Insurance policies (with cash value) and annuity contracts where such policies or contracts were purchased outside the U.S. from a non-U.S. issuer; and
2. Mutual funds and similar pooled funds.

Treasury is also considering whether reporting is required for interests in other types of foreign pooled investments such as private equity funds, venture capital funds, and hedge funds, but has not yet drafted regulations to this effect. IRS provided guidance for 2009 FBARs stating that reporting is not required for interests in foreign hedge funds or foreign private equity funds.

The regulations clarify that owners of IRAs and participants of retirement plans are not required to report foreign financial accounts owned by such plans.

Signature Authority

A U.S. person who has signature or other authority over a foreign account is required to file an FBAR reporting the foreign account, even though that person may have no financial interest in the account. The proposed regulations offer many exceptions to this requirement, generally excluding officers and employees of institutions, such as banks and securities firms, that are subject to the supervision of a federal regulatory agency such as the Securities and Exchange Commission. Interim guidance permits non-owners of accounts holding only signatory authority (but no financial interest) to delay reporting those accounts until June 30, 2011.

QUESTIONS REMAIN

While the proposed regulations address many of the issues related to FBAR filing requirements, questions remain. For example, a trust beneficiary having a beneficial interest in more than 50% of the assets or receiving more than 50% of the current income of the trust is required to report foreign accounts owned by the trust. The regulations do not address the case of a discretionary trust with multiple beneficiaries, any of whom could potentially meet this 50% threshold. Further complicating the issue is the potential that beneficiaries might not be aware of their interests in a trust or might not have access to the trust's financial information required to properly complete the form. The same concern exists with indirect ownership of business entities such as corporations and partnerships.

Until these and other questions are answered, we must be satisfied with the additional guidance provided for FBARs that are due June 30, 2010. In light of the increased complexity of financial instruments over the years, and the severity of penalties for failure to comply, this is certainly welcome.

ADDITIONAL REPORTING REQUIRED FOR 2011

Additional legislation expanding foreign asset reporting by U.S. persons was signed into law just a few weeks after the proposed FBAR regulations were issued. Provisions in the Hiring Incentives to Restore Employment Act ("HIRE Act") will require U.S. individuals who own any interest in a "specified foreign financial asset" to disclose certain information with their income tax return if the aggregate value of such assets exceeds $50,000. Assets required to be reported include accounts at foreign financial institutions, stock or securities issued by a non-U.S. person or company and not held in an account at a financial

institution, and interests in foreign entities (including disregarded entities). This new law clearly overlaps with the FBAR filing requirements, but is much broader in scope. The HIRE Act's provisions are generally effective for years beginning after the March 2010 date of enactment. We will be addressing this new reporting requirement and related developments included in the HIRE Act in a separate communication.

Contact Information:

Please contact any of the following persons at GSRP if you have any questions regarding the application of the FBAR filing requirements to your situation:

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[i] It should be noted that the proposed regulations make clear that an entity must file regardless of whether it has made a disregarded entity election. Additionally, the deemed owner of a trust under the grantor trust rules must also file.