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BENEFITS BRIEF

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Proposed FBAR Regulations Expand "Signature Authority" Exemption But Eliminate Longstanding Limited Reporting for 25+ Foreign Accounts

The Financial Crimes Enforcement Network ("FinCEN"), a division of the U.S. Department of the Treasury, recently proposed significant changes to the Reports of Foreign Bank and Financial Accounts ("FBAR") regulations implemented under the Bank Secrecy Act ("BSA") (the "Proposed Rules"). 81 Fed. Reg. 12613 (Mar. 10, 2016). Current law generally requires that a "U.S. person," which is defined to include U.S. citizens, residents, and domestic business entities, file an FBAR (FinCEN Form 114) if the U.S. person (1) has a financial interest in or signature authority over a foreign financial account, and (2) the value of any such foreign financial accounts exceeded $10,000 during the previous calendar year. 31 CFR §§ 1010.306(c) and 1010.350. The civil penalties for a failure to file an FBAR can range from $500 per violation up to the greater of $100,000 or 50 percent of the account balance, and criminal penalties may apply in some circumstances.

The new package would make 3 changes –

- On the positive side, the Proposed Rules would limit duplicative reporting as result of "overlapping" signature authority by expanding the current signature authority exemption for certain officers, employees, and agents of federally regulated entities, including public companies.

- On the negative side, the Proposed Rules would eliminate a longstanding rule that permitted limited reporting by U.S. persons with financial interests in or signature authority over 25 or more foreign financial accounts.

- The Proposed Rules also provide a new FBAR filing deadline of April 15 (instead of June 30) beginning with the 2016 reporting year.

Each change is discussed in greater detail below.

FinCEN has requested comments on the impact of the Proposed Rules and is accepting comments until May 9. The changes are not expected to be effective until final rules are published.

Background

In 2010, FinCEN caused quite a stir in the corporate and pension communities when it became apparent that FBAR reporting requirements were much broader than many persons knew. These concerns extended beyond filing the FBAR form itself, because a person with either signature authority over, or a financial interest in, a foreign account may be obligated to check a box on his or her own IRS Form 1040, Schedule B, indicating the relationship to the foreign accounts.

The final rules, published in February 2011, addressed a number of concerns, including helpful changes that narrowed the definition of "signature authority" in a way that limited FBAR reporting by plan investment committee members (for example), and clarified that a U.S. person will not have to file an FBAR with respect to a custody account held outside of the U.S. if the U.S. person cannot "directly access" the foreign holdings in that account (for example, there is an intermediary manager or custodian who has the direct access).

On the other hand, the 2011 regulatory guidance imposed substantial FBAR reporting burdens on individuals who have "signature authority" over the accounts of SEC-reporting enterprises. In general, under the current guidance, an exemption from FBAR is available only for U.S. corporate staff responsible for investing the foreign accounts of a U.S. parent company whose stock is publicly traded – or for accounts in the name of a U.S. subsidiary that directly employs the person with such responsibility – as long as all the accounts are reported by the U.S. parent on a consolidated FBAR filing. However, if the employee of the U.S. company also has signature authority over the accounts of foreign subsidiaries, for example, an exception does not apply.

In 2012, we and other organizations recommended that all worldwide employees of SEC-reporting companies be exempt from any individual FBAR filing requirements (and Form 1040, Schedule B reporting) related to such accounts if they only have "signature authority" over the accounts. FinCEN did not act to provide broad relief until now.

Expanded Exemption for "Overlapping" Signature Authority of Corporate Employees

As noted above, the current exemption only applies to officers and employees of the "particular" entity that holds the foreign financial account; individuals with "overlapping" signature authority over foreign financial accounts held by affiliated entities are not exempt and are currently required to file FBARs, unless they are also officers or employees of such affiliated entities. Since multiple persons at a company often have signature authority over the same accounts, FinCEN noted that overlapping signature authority has resulted in numerous duplicative FBAR filings – in some cases 100 FBARs may be filed to report the same information for a corporate account.

The Proposed Rules modify the current exemption in several respects. At the outset, the Proposed Rules expand covered persons to include "agents," in addition to officers and employees, in order to cover both entities and individuals. Most importantly, the Proposed Rules provide that "officers, employees, and agents" of U.S. entities are not required to file FBARs for foreign financial accounts over which they have signature authority but no financial interest if such accounts are already required to be reported by their employer or another entity in the same corporate/business structure (generally applying a 50% ownership test).

While this is helpful to corporate employees of different entities in a controlled corporate group, it may expand FBAR reporting where unrelated entities are involved with the same foreign financial account. For example, employees of an investment advisor with signature authority over a mutual fund's foreign accounts may be exempt under the current guidance provided both are registered with the SEC. However, under the proposal, employees, officers or agents would not be required to report based on their signature authority only if their employer, a parent or subsidiary entity of the employer, or another entity in the same corporate or other business structure of their employer, has a financial interest in the account and files the FBAR. Typically, an officer or employee of an investment adviser would not fall into any of those categories because its employer would not have a financial interest in the account. This would seem to be an issue ripe for comments to FinCEN.

While easing the reporting requirements for many officers, employees, and agents, the Proposed Rules impose additional recordkeeping requirements for entities with financial interests in foreign financial accounts. Specifically, under the Proposed Rules, entities are required to keep information identifying all officers, employees, and agents

"with signature or other authority over a foreign financial account" for five years, and would have to provide this information to regulators upon request.

New Required Reporting for 25 or More Foreign Financial Accounts

For nearly forty years, the FBAR regulations have provided that, while U.S. persons with financial interests in fewer than 25 foreign financial accounts are required to report detailed account information, persons with interests in 25 or *more* foreign accounts are only required to report very basic information, such as the number of accounts, and are only required to furnish detailed information upon request. 31 CFR § 1010.350(g)(1) and (g)(2).

FinCEN notes that the original intent for the differing treatment was to ease reporting for persons with significant international interests. Citing growing law enforcement needs, the Proposed Rules eliminate the longstanding preferential treatment for reporting interests in 25 or more foreign financial accounts, and require reporting detailed account information regardless of the number of foreign financial accounts.

This expanded reporting will likely impact financial institutions with interests in, or signature authority over, large numbers of accounts. As it stands, in 2013 more than 4 million accounts filed FBARs, and we expect this change will dramatically increase the number of filings. Again, comments to FinCEN may be helpful. In particular, FinCEN has requested comments on the expected burden of this change and the timeframe for implementing changes on the BSA e-filing system.

April 15th Deadline for Filing FBARs Beginning in 2017

Currently, the annual filing deadline for FBARs is June 30th. Under the Proposed Rules, beginning with the 2016 reporting year, the FBAR filing deadline is moved up to April 15th with an available extension to October 15th. These dates coincide with the tax filing deadline for Schedule B (Part III), Form 1040, where taxpayers are required to indicate if they hold or have signature authority over "foreign financial accounts."