Financial Crimes Enforcement Network Proposes to Revise the Bank Secrecy Act Regarding Foreign Financial Accounts

By: Mildred Gomez, Esq.

The Bank Secrecy Act was originally enacted in 1970 to help detect and prevent money laundering. The Act stemmed from congressional concern that foreign financial institutions were being used to violate American laws – resulting in the proliferation of, among other things, white collar crime, organized criminal operations, tax evasion, concealment of illegal assets and violation of laws and regulations governing securities and exchanges. Despite being enacted nearly forty years ago, U.S. Government agencies continue to find that foreign financial accounts are still being used to evade and circumvent criminal, tax and regulatory laws. The Bank Secrecy Act authorizes the issuance of regulations that require financial institutions and U.S. persons to keep records and file reports related to accounts that may be used in criminal, tax, regulatory and counterterrorism matters.

The Bank Secrecy Act is implemented through 31 C.F.R. Part 103, which requires a U.S. person that has a financial interest in, signature authority or other authority over any bank, securities or other financial account(s) in a foreign country to report such relationship to the Commissioner of the Internal Revenue Service each calendar year in which the aggregate value of such account(s) exceeds $10,000 at any time during the year.[i] If such reporting is required for a calendar year, a "Report of Foreign Bank and Financial Accounts" – Form TD F 90-22.1 (the "FBAR") – must be filed by June 30th of the subsequent year. Records related to such accounts must be maintained for a period of five years.

The instructions to the FBAR identify who must file an FBAR report, what types of foreign accounts trigger the reporting requirement and lists any exemptions that there may be to these requirements. Despite the fact that the instructions to the FBAR make such specifications, there is still much confusion over the filing requirements. Accordingly, the Financial Crimes Enforcement Network ("FinCEN") has proposed to amend 31 C.F.R. § 103.24 in an effort to:

(1) make determining a person's filing obligations more straightforward and predictable;

(2) exempt certain persons with signature or other authority from filing the FBAR; and

(3) include provisions intended to prevent United States persons required to file the FBAR from avoiding the reporting requirement.

To accomplish these goals, the proposed rule, among other changes, includes definitions of several terms. For example, "United States person" will be defined to mean "(1) a citizen of the United States; (2) a resident of the United States . . .; (3) 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." FinCEN believes that this definition will provide uniformity regardless of where in the United States an individual may be and will help in circumventing an individual's attempt to hide their residency in an attempt to obscure the source of their income and/or their assets.

Further, "signature or other authority" will be defined to mean 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 delivery of instructions (whether communicated in writing or otherwise) directly to the person with whom the financial account is maintained." Notwithstanding, the proposed rule also lists certain exceptions for U.S. persons with signature or other authority over accounts that must be reported (namely for officers and employees of financial institutions that have a federal functional regulator, for certain entities that are publicly traded on a U.S. national securities exchange or that are otherwise required to register their equity interests with the SEC).

Definitions for the various accounts subject to reporting (including the terms "bank account," "securities account" and "other financial account") are also included. These definitions are based on the kind of financial services for which the U.S. person is maintaining the account. For example, while a term such as "other financial account" could be interpreted to cover a large range of relationships between a U.S. person and a foreign financial agency, the proposed rule includes a definition which clearly delineates the types of relationships that must be reported. FinCEN believes that using such clear definitions will enhance compliance with the reporting requirements. The proposed rule also includes exceptions for certain accounts for which, despite there being a financial interest in or signature or other authority over, no reporting will be required. For example, no reporting will be required for an account of a department or agency of the United States. The proposed rule also clarifies what it means to have financial interest or signature or other authority in a foreign bank, securities or other financial account. One way in which this is clarified is through the listing of specific situations[ii] in which there is a financial interest in such a foreign account. Finally, the proposed rule lists special rules intended to simplify FBAR filings in certain cases (e.g., when a U.S. person has 25 or more foreign financial accounts such person will only need to provide the number of accounts such person has and some other basic information regarding the accounts, unless and until more detailed information is requested by the Secretary of the Treasury).

For a complete version of the proposed rule, please see Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts, 75 Fed. Reg. 8844 (February 26, 2010) (to be codified at 31 C.F.R. § 103.24), which can be found at:
http://www.fincen.gov/statutes_regs/frn/pdf/2010-4042.pdf

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[i] 31 C.F.R. Part 103 contains the regulations implementing the Bank Secrecy Act ("BSA"). The BSA authorizes the Secretary of the Treasury to administer the BSA. The Secretary of the Treasury delegated this authority to the Director of the Financial Crimes Enforcement Network, which in turn conferred upon the Internal Revenue Service the authority to enforce the FBAR provisions of the BSA.

[ii] For example, situations in which another is acting on behalf of a United States person or those involving corporations and trusts in which United States persons have certain listed interests.