

Strafford

---

*Presenting a live 110-minute teleconference with interactive Q&A*

# Report of Foreign Bank and Financial Accounts: Preparing for 2011 Filings

Evaluating the Final FBAR Regs, Second Voluntary Compliance Offer and Other Developments

---

WEDNESDAY, MAY 4, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

---

Today's faculty features:

Dennis Brager, Founder, **Brager Tax Law Group**, Los Angeles

Brent Lipschultz, Partner, **EisnerAmper**, New York

Kevin Packman, Partner, **Holland & Knight**, Miami, Fla.

Steven Toscher, Principal, **Hochman Salkin Rettig Toscher & Perez**, Beverly Hills, Calif.

**For this program, attendees must listen to the audio over the telephone.**

---

Please refer to the instructions emailed to the registrant for the dial-in information. Attendees can still view the presentation slides online. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.

**TD F 90-22.1**(Rev. March 2011)  
Department of the Treasury**REPORT OF FOREIGN BANK  
AND FINANCIAL ACCOUNTS****Do NOT file with your Federal Tax Return**

OMB No. 1545-2038

1 This Report is for Calendar  
Year Ended 12/31Do not use previous editions of  
this formAmended **Part I Filer Information**

2 Type of Filer a <input type="checkbox"/> Individual    b <input type="checkbox"/> Partnership    c <input type="checkbox"/> Corporation    d <input type="checkbox"/> Consolidated    e <input type="checkbox"/> Fiduciary or Other—Enter type _____			
3 U.S. Taxpayer Identification Number  If filer has no U.S. Identification Number complete Item 4.	4 Foreign identification (Complete only if item 3 is not applicable.) a Type: <input type="checkbox"/> Passport <input type="checkbox"/> Other _____  b Number _____    c Country of Issue _____		5 Individual's Date of Birth MM/DD/YYYY
6 Last Name or Organization Name	7 First Name		8 Middle Initial
9 Address (Number, Street, and Apt. or Suite No.)			
10 City	11 State	12 Zip/Postal Code	13 Country
14 Does the filer have a financial interest in 25 or more financial accounts? <input type="checkbox"/> Yes    If "Yes" enter total number of accounts _____ <b>(If "Yes" is checked, do not complete Part II or Part III, but retain records of this information)</b>  <input type="checkbox"/> No			

**Part II Information on Financial Account(s) Owned Separately**

15 Maximum value of account during calendar year reported	16 Type of account    a <input type="checkbox"/> Bank    b <input type="checkbox"/> Securities    c <input type="checkbox"/> Other—Enter type below		
17 Name of Financial Institution in which account is held			
18 Account number or other designation	19 Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
20 City	21 State, if known	22 Zip/Postal Code, if known	23 Country

**Signature**

44 Filer Signature	45 Filer Title, if not reporting a personal account	46 Date (MM/DD/YYYY)
--------------------	---	----------------------

**File this form with: U.S. Department of the Treasury, P.O. Box 32621, Detroit, MI 48232-0621**

This form should be used to report a financial interest in, signature authority, or other authority over one or more financial accounts in foreign countries, as required by the Department of the Treasury Regulations 31 CFR 1010.350 (formerly 31 CFR 103.24). No report is required if the aggregate value of the accounts did not exceed \$10,000. **See Instructions For Definitions.**

**PRIVACY ACT AND PAPERWORK REDUCTION ACT NOTICE**

Pursuant to the requirements of Public Law 93-579 (Privacy Act of 1974), notice is hereby given that the authority to collect information on TD F 90-22.1 in accordance with 5 USC 552a (e) is Public Law 91-508; 31 USC 5314; 5 USC 301; 31 CFR 1010.350 (formerly 31 CFR 103.24).

The principal purpose for collecting the information is to assure maintenance of reports where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. The information collected may be provided to those officers and employees of any constituent unit of the Department of the Treasury who have a need for the records in the performance of their duties. The records may be referred to any other department or agency of the United States upon the request of the head of such department or agency for use in a criminal, tax, or regulatory investigation or proceeding. The information collected may also be provided to appropriate state, local, and foreign law enforcement and regulatory personnel in the performance of their official duties. Disclosure of this information is mandatory. Civil and criminal penalties, including in certain circumstances a fine of not more than \$500,000 and imprisonment of not more than five years, are provided for failure to file a report, supply information, and for filing a false or fraudulent report. Disclosure of the Social Security number is mandatory. The authority to collect is 31 CFR 1010.350 (formerly 31 CFR 103.24). The Social Security number will be used as a means to identify the individual who files the report.

The estimated average burden associated with this collection of information is 20 minutes per respondent or record keeper, depending on individual circumstances. Comments regarding the accuracy of this burden estimate, and suggestions for reducing the burden should be directed to the Internal Revenue Service, Bank Secrecy Act Policy, 5000 Ellin Road C-3-242, Lanham MD 20706.

**Part II Continued—Information on Financial Account(s) Owned Separately**

Form TD F 90-22.1

Page Number

\_\_\_\_ of \_\_\_\_

**Complete a Separate Block for Each Account Owned Separately**

This side can be copied as many times as necessary in order to provide information on all accounts.

<b>1</b> Filing for calendar year  ____ _		<b>3-4</b> Check appropriate Identification Number <input type="checkbox"/> Taxpayer Identification Number <input type="checkbox"/> Foreign Identification Number  Enter identification number here:		<b>6</b> Last Name or Organization Name	
<b>15</b> Maximum value of account during calendar year reported			<b>16</b> Type of account <b>a</b> <input type="checkbox"/> Bank <b>b</b> <input type="checkbox"/> Securities <b>c</b> <input type="checkbox"/> Other—Enter type below		
<b>17</b> Name of Financial Institution in which account is held					
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country		
<b>15</b> Maximum value of account during calendar year reported			<b>16</b> Type of account <b>a</b> <input type="checkbox"/> Bank <b>b</b> <input type="checkbox"/> Securities <b>c</b> <input type="checkbox"/> Other—Enter type below		
<b>17</b> Name of Financial Institution in which account is held					
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country		
<b>15</b> Maximum value of account during calendar year reported			<b>16</b> Type of account <b>a</b> <input type="checkbox"/> Bank <b>b</b> <input type="checkbox"/> Securities <b>c</b> <input type="checkbox"/> Other—Enter type below		
<b>17</b> Name of Financial Institution in which account is held					
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country		
<b>15</b> Maximum value of account during calendar year reported			<b>16</b> Type of account <b>a</b> <input type="checkbox"/> Bank <b>b</b> <input type="checkbox"/> Securities <b>c</b> <input type="checkbox"/> Other—Enter type below		
<b>17</b> Name of Financial Institution in which account is held					
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country		
<b>15</b> Maximum value of account during calendar year reported			<b>16</b> Type of account <b>a</b> <input type="checkbox"/> Bank <b>b</b> <input type="checkbox"/> Securities <b>c</b> <input type="checkbox"/> Other—Enter type below		
<b>17</b> Name of Financial Institution in which account is held					
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country		
<b>15</b> Maximum value of account during calendar year reported			<b>16</b> Type of account <b>a</b> <input type="checkbox"/> Bank <b>b</b> <input type="checkbox"/> Securities <b>c</b> <input type="checkbox"/> Other—Enter type below		
<b>17</b> Name of Financial Institution in which account is held					
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country		
<b>15</b> Maximum value of account during calendar year reported			<b>16</b> Type of account <b>a</b> <input type="checkbox"/> Bank <b>b</b> <input type="checkbox"/> Securities <b>c</b> <input type="checkbox"/> Other—Enter type below		
<b>17</b> Name of Financial Institution in which account is held					
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held			
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country		

**Part III Information on Financial Account(s) Owned Jointly**

Form TD F 90-22.1

**Complete a Separate Block for Each Account Owned Jointly**

Page Number

\_\_\_\_ of \_\_\_\_

This side can be copied as many times as necessary in order to provide information on all accounts.

<b>1</b>	Filing for calendar year  ____ _	<b>3-4</b>	Check appropriate Identification Number <input type="checkbox"/> Taxpayer Identification Number <input type="checkbox"/> Foreign Identification Number  Enter identification number here:	<b>6</b>	Last Name or Organization Name	
<b>15</b>	Maximum value of account during calendar year reported			<b>16</b>	Type of account   a <input type="checkbox"/> Bank   b <input type="checkbox"/> Securities   c <input type="checkbox"/> Other—Enter type below	
<b>17</b>	Name of Financial Institution in which account is held					
<b>18</b>	Account number or other designation	<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held				
<b>20</b>	City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country		
<b>24</b>	Number of joint owners for this account	<b>25</b> Taxpayer Identification Number of principal joint owner, if known. See instructions.				
<b>26</b>	Last Name or Organization Name of principal joint owner		<b>27</b> First Name of principal joint owner, if known		<b>28</b> Middle initial, if known	
<b>29</b>	Address (Number, Street, Suite or Apartment) of principal joint owner, if known					
<b>30</b>	City, if known	<b>31</b> State, if known	<b>32</b> Zip/Postal Code, if known	<b>33</b> Country, if known		
<b>15</b>	Maximum value of account during calendar year reported			<b>16</b>	Type of account   a <input type="checkbox"/> Bank   b <input type="checkbox"/> Securities   c <input type="checkbox"/> Other—Enter type below	
<b>17</b>	Name of Financial Institution in which account is held					
<b>18</b>	Account number or other designation	<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held				
<b>20</b>	City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country		
<b>24</b>	Number of joint owners for this account	<b>25</b> Taxpayer Identification Number of principal joint owner, if known. See instructions.				
<b>26</b>	Last Name or Organization Name of principal joint owner		<b>27</b> First Name of principal joint owner, if known		<b>28</b> Middle initial, if known	
<b>29</b>	Address (Number, Street, Suite or Apartment) of principal joint owner, if known					
<b>30</b>	City, if known	<b>31</b> State, if known	<b>32</b> Zip/Postal Code, if known	<b>33</b> Country, if known		
<b>15</b>	Maximum value of account during calendar year reported			<b>16</b>	Type of account   a <input type="checkbox"/> Bank   b <input type="checkbox"/> Securities   c <input type="checkbox"/> Other—Enter type below	
<b>17</b>	Name of Financial Institution in which account is held					
<b>18</b>	Account number or other designation	<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held				
<b>20</b>	City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country		
<b>24</b>	Number of joint owners for this account	<b>25</b> Taxpayer Identification Number of principal joint owner, if known. See instructions.				
<b>26</b>	Last Name or Organization Name of principal joint owner		<b>27</b> First Name of principal joint owner, if known		<b>28</b> Middle initial, if known	
<b>29</b>	Address (Number, Street, Suite or Apartment) of principal joint owner, if known					
<b>30</b>	City, if known	<b>31</b> State, if known	<b>32</b> Zip/Postal Code, if known	<b>33</b> Country, if known		
<b>15</b>	Maximum value of account during calendar year reported			<b>16</b>	Type of account   a <input type="checkbox"/> Bank   b <input type="checkbox"/> Securities   c <input type="checkbox"/> Other—Enter type below	
<b>17</b>	Name of Financial Institution in which account is held					
<b>18</b>	Account number or other designation	<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held				
<b>20</b>	City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country		
<b>24</b>	Number of joint owners for this account	<b>25</b> Taxpayer Identification Number of principal joint owner, if known. See instructions.				
<b>26</b>	Last Name or Organization Name of principal joint owner		<b>27</b> First Name of principal joint owner, if known		<b>28</b> Middle initial, if known	
<b>29</b>	Address (Number, Street, Suite or Apartment) of principal joint owner, if known					
<b>30</b>	City, if known	<b>31</b> State, if known	<b>32</b> Zip/Postal Code, if known	<b>33</b> Country, if known		

**Part IV Information on Financial Account(s) Where Filer has Signature Authority but No Financial Interest in the Account(s)**

Form TD F 90-22.1

Page Number

\_\_\_\_ of \_\_\_\_

**Complete a Separate Block for Each Account**

This side can be copied as many times as necessary in order to provide information on all accounts.

<b>1</b> Filing for calendar year  ____ _	<b>3-4</b> Check appropriate Identification Number <input type="checkbox"/> Taxpayer Identification Number <input type="checkbox"/> Foreign Identification Number  Enter identification number here:	<b>6</b> Last Name or Organization Name		
<b>15</b> Maximum value of account during calendar year reported		<b>16</b> Type of account <b>a</b> <input type="checkbox"/> Bank <b>b</b> <input type="checkbox"/> Securities <b>c</b> <input type="checkbox"/> Other—Enter type below		
<b>17</b> Name of Financial Institution in which account is held				
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country	
<b>34</b> Last Name or Organization Name of Account Owner			<b>35</b> Taxpayer Identification Number of Account Owner	
<b>36</b> First Name		<b>37</b> Middle initial	<b>38</b> Address (Number, Street, and Apt. or Suite No.)	
<b>39</b> City	<b>40</b> State	<b>41</b> Zip/Postal Code	<b>42</b> Country	
<b>43</b> Filer's Title with this Owner				
<b>15</b> Maximum value of account during calendar year reported		<b>16</b> Type of account <b>a</b> <input type="checkbox"/> Bank <b>b</b> <input type="checkbox"/> Securities <b>c</b> <input type="checkbox"/> Other—Enter type below		
<b>17</b> Name of Financial Institution in which account is held				
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country	
<b>34</b> Last Name or Organization Name of Account Owner			<b>35</b> Taxpayer Identification Number of Account Owner	
<b>36</b> First Name		<b>37</b> Middle initial	<b>38</b> Address (Number, Street, and Apt. or Suite No.)	
<b>39</b> City	<b>40</b> State	<b>41</b> Zip/Postal Code	<b>42</b> Country	
<b>43</b> Filer's Title with this Owner				
<b>15</b> Maximum value of account during calendar year reported		<b>16</b> Type of account <b>a</b> <input type="checkbox"/> Bank <b>b</b> <input type="checkbox"/> Securities <b>c</b> <input type="checkbox"/> Other—Enter type below		
<b>17</b> Name of Financial Institution in which account is held				
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country	
<b>34</b> Last Name or Organization Name of Account Owner			<b>35</b> Taxpayer Identification Number of Account Owner	
<b>36</b> First Name		<b>37</b> Middle initial	<b>38</b> Address (Number, Street, and Apt. or Suite No.)	
<b>39</b> City	<b>40</b> State	<b>41</b> Zip/Postal Code	<b>42</b> Country	
<b>43</b> Filer's Title with this Owner				
<b>15</b> Maximum value of account during calendar year reported		<b>16</b> Type of account <b>a</b> <input type="checkbox"/> Bank <b>b</b> <input type="checkbox"/> Securities <b>c</b> <input type="checkbox"/> Other—Enter type below		
<b>17</b> Name of Financial Institution in which account is held				
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country	
<b>34</b> Last Name or Organization Name of Account Owner			<b>35</b> Taxpayer Identification Number of Account Owner	
<b>36</b> First Name		<b>37</b> Middle initial	<b>38</b> Address (Number, Street, and Apt. or Suite No.)	
<b>39</b> City	<b>40</b> State	<b>41</b> Zip/Postal Code	<b>42</b> Country	
<b>43</b> Filer's Title with this Owner				

**Part V Information on Financial Account(s) Where the Filer is Filing a Consolidated Report**

Form TD F 90-22.1

Page Number

\_\_\_ of \_\_\_

**Complete a Separate Block for Each Account**

This side can be copied as many times as necessary in order to provide information on all accounts.

<b>1</b> Filing for calendar year ____ _	<b>3-4</b> Check appropriate Identification Number <input type="checkbox"/> Taxpayer Identification Number <input type="checkbox"/> Foreign Identification Number Enter identification number here:	<b>6</b> Last Name or Organization Name	
<b>15</b> Maximum value of account during calendar year reported		<b>16</b> Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
<b>17</b> Name of Financial Institution in which account is held			
<b>18</b> Account number or other designation	<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held		
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country
<b>34</b> Corporate Name of Account Owner			<b>35</b> Taxpayer Identification Number of Account Owner
<b>38</b> Address (Number, Street, and Apt. or Suite No.)			
<b>39</b> City	<b>40</b> State	<b>41</b> Zip/Postal Code	<b>42</b> Country
<b>15</b> Maximum value of account during calendar year reported		<b>16</b> Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
<b>17</b> Name of Financial Institution in which account is held			
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held	
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country
<b>34</b> Corporate Name of Account Owner			<b>35</b> Taxpayer Identification Number of Account Owner
<b>38</b> Address (Number, Street, and Apt. or Suite No.)			
<b>39</b> City	<b>40</b> State	<b>41</b> Zip/Postal Code	<b>42</b> Country
<b>15</b> Maximum value of account during calendar year reported		<b>16</b> Type of account a <input type="checkbox"/> Bank b <input type="checkbox"/> Securities c <input type="checkbox"/> Other—Enter type below	
<b>17</b> Name of Financial Institution in which account is held			
<b>18</b> Account number or other designation		<b>19</b> Mailing Address (Number, Street, Suite Number) of financial institution in which account is held	
<b>20</b> City	<b>21</b> State, if known	<b>22</b> Zip/Postal Code, if known	<b>23</b> Country
<b>34</b> Corporate Name of Account Owner			<b>35</b> Taxpayer Identification Number of Account Owner
<b>38</b> Address (Number, Street, and Apt. or Suite No.)			
<b>39</b> City	<b>40</b> State	<b>41</b> Zip/Postal Code	<b>42</b> Country

## General Instructions

Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (the "FBAR"), is used to report a financial interest in or signature authority over a foreign financial account. The FBAR must be **received** by the Department of the Treasury on or before **June 30th** of the year immediately following the calendar year being reported. The June 30th filing date may not be extended.

**Who Must File an FBAR.** A United States person that has a financial interest in or signature authority over foreign financial accounts must file an FBAR if the aggregate value of the foreign financial accounts exceeds \$10,000 at any time during the calendar year. See General Definitions, to determine who is a United States person.

## General Definitions

**Financial Account.** A financial account includes, but is not limited to, a securities, brokerage, savings, demand, checking, deposit, time deposit, or other account maintained with a financial institution (or other person performing the services of a financial institution). A financial account also includes a commodity futures or options account, an insurance policy with a cash value (such as a whole life insurance policy), an annuity policy with a cash value, and shares in a mutual fund or similar pooled fund (i.e., a fund that is available to the general public with a regular net asset value determination and regular redemptions).

**Foreign Financial Account.** A foreign financial account is a financial account located outside of the United States. For example, an account maintained with a branch of a United States bank that is physically located outside of the United States is a foreign financial account. An account maintained with a branch of a foreign bank that is physically located in the United States is not a foreign financial account.

**Financial Interest.** A United States person has a financial interest in a foreign financial account for which:

- (1) the United States person is the owner of record or holder of legal title, regardless of whether the account is maintained for the benefit of the United States person or for the benefit of another person; or
- (2) the owner of record or holder of legal title is one of the following:
  - (a) An agent, nominee, attorney, or a person acting in some other capacity on behalf of the United States person with respect to the account;
  - (b) A corporation in which the United States person owns directly or indirectly: (i) more than 50 percent of the total value of shares of stock or (ii) more than 50 percent of the voting power of all shares of stock;
  - (c) A partnership in which the United States person owns directly or indirectly: (i) an interest in more than 50 percent of the partnership's profits (e.g., distributive share of partnership income taking into account any special allocation agreement) or (ii) an interest in more than 50 percent of the partnership capital;
  - (d) A trust of which the United States person: (i) is the trust grantor and (ii) has an ownership interest in the trust for United States federal tax purposes. See 26 U.S.C. sections 671-679 to determine if a grantor has an ownership interest in a trust;
  - (e) A trust in which the United States person has a greater than 50 percent present beneficial interest in the assets or income of the trust for the calendar year; or
  - (f) Any other entity in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of equity interest or assets, or interest in profits.

**Person.** A person means an individual and legal entities including, but not limited to, a limited liability company, corporation, partnership, trust, and estate.

**Signature Authority.** Signature authority is the authority of an individual (alone or in conjunction with another individual) to control the disposition of assets held in a foreign financial account by direct communication (whether in writing or otherwise) to the bank or other financial institution that maintains the financial account. See Exceptions, Signature Authority.

**United States.** For FBAR purposes, the United States includes the States, the District of Columbia, all United States territories and possessions (e.g., American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the United States Virgin Islands), and the Indian lands as defined in the Indian Gaming Regulatory Act. References to the laws of the United States include the laws of the United States federal government and the laws of all places listed in this definition.

**United States Person.** United States person means United States citizens; United States residents; entities, including but not limited to, corporations, partnerships, or limited liability companies created or organized in the United States or under the laws of the United States; and trusts or estates formed under the laws of the United States.

**Note.** The federal tax treatment of an entity does not determine whether the entity has an FBAR filing requirement. For example, an entity that is disregarded for purposes of Title 26 of the United States Code must file an FBAR, if otherwise required to do so. Similarly, a trust for which the trust income, deductions, or credits are taken into account by another person for purposes of Title 26 of the United States Code must file an FBAR, if otherwise required to do so.

**United States Resident.** A United States resident is an alien residing in the United States. To determine if the filer is a resident of the United States apply the residency tests in 26 U.S.C. section 7701(b). When applying the residency tests, use the definition of United States in these instructions.

## Exceptions

**Certain Accounts Jointly Owned by Spouses.** The spouse of an individual who files an FBAR is not required to file a separate FBAR if the following conditions are met: (1) all the financial accounts that the non-filing spouse is required to report are jointly owned with the filing spouse; (2) the filing spouse reports the jointly owned accounts on a timely filed FBAR; and (3) both spouses sign the FBAR in Item 44. See Explanations for Specific Items, Part III, Items 25-33. Otherwise, both spouses are required to file separate FBARs, and each spouse must report the entire value of the jointly owned accounts.

**Consolidated FBAR.** If a United States person that is an entity is named in a consolidated FBAR filed by a greater than 50 percent owner, such entity is not required to file a separate FBAR. See Explanations for Specific Items, Part V.

**Correspondent/Nostro Account.** Correspondent or nostro accounts (which are maintained by banks and used solely for bank-to-bank settlements) are not required to be reported.

**Governmental Entity.** A foreign financial account of any governmental entity of the United States (as defined above) is not required to be reported by any person. For purposes of this form, governmental entity includes a college or university that is an agency of, an instrumentality of, owned by, or operated by a governmental entity. For purposes of this form, governmental entity also includes an employee retirement or welfare benefit plan of a governmental entity.

**International Financial Institution.** A foreign financial account of any international financial institution (if the United States government is a member) is not required to be reported by any person.

**IRA Owners and Beneficiaries.** An owner or beneficiary of an IRA is not required to report a foreign financial account held in the IRA.

**Participants in and Beneficiaries of Tax-Qualified Retirement Plans.** A participant in or beneficiary of a retirement plan described in Internal Revenue Code section 401(a), 403(a), or 403(b) is not required to report a foreign financial account held by or on behalf of the retirement plan.

**Signature Authority.** Individuals who have signature authority over, but no financial interest in, a foreign financial account are not required to report the account in the following situations:

(1) An officer or employee of a bank that is examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Administration is not required to report signature authority over a foreign financial account owned or maintained by the bank.

(2) An officer or employee of a financial institution that is registered with and examined by the Securities and Exchange Commission or Commodity Futures Trading Commission is not required to report signature authority over a foreign financial account owned or maintained by the financial institution.

(3) An officer or employee of an Authorized Service Provider is not required to report signature authority over a foreign financial account that is owned or maintained by an investment company that is registered with the Securities and Exchange Commission. Authorized Service Provider means an entity that is registered with and examined by the Securities and Exchange Commission and provides services to an investment company registered under the Investment Company Act of 1940.

(4) An officer or employee of an entity that has a class of equity securities listed (or American depository receipts listed) on any United States national securities exchange is not required to report signature authority over a foreign financial account of such entity.

(5) An officer or employee of a United States subsidiary is not required to report signature authority over a foreign financial account of the subsidiary if its United States parent has a class of equity securities listed on any United States national securities exchange and the subsidiary is included in a consolidated FBAR report of the United States parent.

(6) An officer or employee of an entity that has a class of equity securities registered (or American depository receipts in respect of equity securities registered) under section 12(g) of the Securities Exchange Act is not required to report signature authority over a foreign financial account of such entity.

**Trust Beneficiaries.** A trust beneficiary with a financial interest described in section (2)(e) of the financial interest definition is not required to report the trust's foreign financial accounts on an FBAR if the trust, trustee of the trust, or agent of the trust: (1) is a United States person and (2) files an FBAR disclosing the trust's foreign financial accounts.

**United States Military Banking Facility.** A financial account maintained with a financial institution located on a United States military installation is not required to be reported, even if that military installation is outside of the United States.

## Filing Information

**When and Where to File.** The FBAR is an annual report and must be received by the Department of the Treasury on or before June 30th of the year following the calendar year being reported. Do Not file with federal income tax return.

File by mailing to:

Department of the Treasury  
Post Office Box 32621  
Detroit, MI 48232-0621

If an express delivery service is used, file by mailing to:

IRS Enterprise Computing Center  
ATTN: CTR Operations Mailroom, 4th Floor  
985 Michigan Avenue  
Detroit, MI 48226

The FBAR may be hand delivered to any local office of the Internal Revenue Service for forwarding to the Department of the Treasury, Detroit, MI. The FBAR may also be delivered to the Internal Revenue Service's tax attaches located in United States embassies and consulates for forwarding to the Department of the Treasury, Detroit, MI. The FBAR is not considered filed until it is received by the Department of the Treasury in Detroit, MI.

**No Extension of Time to File.** There is no extension of time available for filing an FBAR. Extensions of time to file federal tax returns do NOT extend the time for filing an FBAR. If a delinquent FBAR is filed, attach a statement explaining the reason for the late filing.

**Amending a Previously Filed FBAR.** To amend a filed FBAR, check the "Amended" box in the upper right hand corner of the first page of the FBAR, make the needed additions or corrections, attach a statement explaining the additions or corrections, and staple a copy of the original FBAR to the amendment. An amendment should not be made until at least 90 calendar days after the original FBAR is filed. Follow the instructions in "When and Where to File" to file an amendment.

**Record Keeping Requirements.** Persons required to file an FBAR must retain records that contain the name in which each account is maintained, the number or other designation of the account, the name and address of the foreign financial institution that maintains the account, the type of account, and the maximum account value of each account during the reporting period. The records must be retained for a

period of 5 years from June 30th of the year following the calendar year reported and must be available for inspection as provided by law. Retaining a copy of the filed FBAR can help to satisfy the record keeping requirements.

An officer or employee who files an FBAR to report signature authority over an employer's foreign financial account is not required to personally retain records regarding these accounts.

**Questions.** For questions regarding the FBAR, contact the Detroit Computing Center Hotline at 1-800-800-2877, option 2.

## Explanations for Specific Items

### Part I – Filer Information

**Item 1.** The FBAR is an annual report. Enter the calendar year being reported. If amending a previously filed FBAR, check the "Amended" box.

**Item 2.** Check the box that describes the filer. Check only one box. Individuals reporting only signature authority, check box "a". If filing a consolidated FBAR, check box "d". To determine if a consolidated FBAR can be filed, see Part V. If the type of filer is not listed in boxes "a" through "c", check box "e", and enter the type of filer. Persons that should check box "e" include, but are not limited to, trusts, estates, limited liability companies, and tax-exempt entities (even if the entity is organized as a corporation). A disregarded entity must check box "e", and enter the type of entity followed by "(D.E.)". For example, a limited liability company that is disregarded for United States federal tax purposes would enter "limited liability company (D.E.)".

**Item 3.** Provide the filer's United States taxpayer identification number. Generally, this is the filer's United States social security number (SSN), United States individual taxpayer identification number (ITIN), or employer identification number (EIN). Throughout the FBAR, numbers should be entered with no spaces, dashes, or other punctuation. If the filer does NOT have a United States taxpayer identification number, complete Item 4.

**Item 4.** Complete Item 4 only if the filer does NOT have a United States taxpayer identification number. Item 4 requires the filer to provide information from an official foreign government document to verify the filer's nationality or residence. Enter the document number followed by the country of issuance, check the appropriate type of document, and if "other" is checked, provide the type of document.

**Item 5.** If the filer is an individual, enter the filer's date of birth, using the month, day, and year convention.

**Items 9, 10, 11, 12, and 13.** Enter the filer's address. An individual residing in the United States must enter the street address of the individual's United States residence, not a post office box. An individual residing outside the United States must enter the individual's United States mailing address. If the individual does not have a United States mailing address, the individual must enter a foreign residence address. An entity must enter its United States mailing address. If the entity does not have a United States mailing address, the entity must enter its foreign mailing address.

**Item 14.** If the filer has a financial interest in 25 or more foreign financial accounts, check "Yes" and enter the number of accounts. Do not complete Part II or Part III of the FBAR. If filing a consolidated FBAR, only complete Part V, Items 34-42, for each United States entity included in the consolidated FBAR.

**Note.** If the filer has signature authority over 25 or more foreign financial accounts, only complete Part IV, Items 34-43, for each person for which the filer has signature authority, and check "No" in Part I, Item 14.

Filers must comply with applicable recording keeping requirements. See Record Keeping Requirements.

### Part II – Information on Financial Account(s) Owned Separately

Enter information in the applicable parts of the form only. Number the pages used, and mail only those pages. If there is not enough space to provide all account information, copy and complete additional pages of the required Part as necessary. Do not use any attachments unless otherwise specified in the instructions.

**Item 15. Determining Maximum Account Value.**

**Step 1.** Determine the maximum value of each account (in the currency of that account) during the calendar year being reported. The maximum value of an account is a reasonable approximation of the greatest value of currency or nonmonetary assets in the account during the calendar year. Periodic account statements may be relied on to determine the maximum value of the account, provided that the statements fairly reflect the maximum account value during the calendar year. For Item 15, if the filer had a financial interest in more than one account, each account must be valued separately.

**Step 2.** In the case of non-United States currency, convert the maximum account value for each account into United States dollars. Convert foreign currency by using the Treasury's Financial Management Service rate (this rate may be found at [www.fms.treas.gov](http://www.fms.treas.gov)) from the last day of the calendar year. If no Treasury Financial Management Service rate is available, use another verifiable exchange rate and provide the source of that rate. In valuing currency of a country that uses multiple exchange rates, use the rate that would apply if the currency in the account were converted into United States dollars on the last day of the calendar year.

If the aggregate of the maximum account values exceeds \$10,000, an FBAR must be filed. An FBAR is not required to be filed if the person did not have \$10,000 of aggregate value in foreign financial accounts at any time during the calendar year.

For United States persons with a financial interest in or signature authority over fewer than 25 accounts that are unable to determine if the aggregate maximum account values of the accounts exceeded \$10,000 at any time during the calendar year, complete Part II, III, IV, or V, as appropriate, for each of these accounts and enter "value unknown" in Item 15.

**Item 16.** Indicate the type of account. Check only one box. If "Other" is selected, describe the account.

**Item 17.** Provide the name of the financial institution with which the account is held.

**Item 18.** Provide the account number that the financial institution uses to designate the account.

**Items 19-23.** Provide the complete mailing address of the financial institution where the account is located. If the foreign address does not include a state (e.g., province) or postal code, leave the box(es) blank.

**Part III – Information on Financial Account(s) Owned Jointly**

Enter information in the applicable parts of the form only. Number the pages used, and mail only those pages. If there is not enough space to provide all account information, copy and complete additional pages of the required Part as necessary. Do not use any attachments unless otherwise specified in the instructions.

**For Items 15-23, see Part II.** Each joint owner must report the entire value of the account as determined under Item 15.

**Item 24.** Enter the number of joint owners for the account. If the exact number is not known, provide an estimate. Do not count the filer when determining the number of joint owners.

**Items 25-33.** Use the identifying information of the principal joint owner (excluding the filer) to complete Items 25-33. Leave blank items for which no information is available. If the filer's spouse has an interest in a jointly owned account, the filer's spouse is the principal joint owner. Enter "(spouse)" on line 26 after the last name of the joint spousal owner. See Exceptions, Certain Accounts Jointly Owned by Spouses, to determine if the filer's spouse is required to independently report the jointly owned accounts.

**Part IV – Information on Financial Account(s) Where Filer has Signature Authority but No Financial Interest in the Account(s)**

Enter information in the applicable parts of the form only. Number the pages used, and mail only those pages. If there is not enough space to provide all account information, copy and complete additional pages of the required Part as necessary. Do not use any attachments unless otherwise specified in the instructions.

**25 or More Foreign Financial Accounts.** Filers with signature authority over 25 or more foreign financial accounts must complete only Items 34-43 for each person on whose behalf the filer has signature authority.

**Modified Reporting for United States Persons Residing and Employed Outside of the United States.** A United States person who (1) resides outside of the United States, (2) is an officer or employee of an employer who is physically located outside of the United States, and (3) has signature authority over a foreign financial account that is owned or maintained by the individual's employer should only complete Part I and Part IV, Items 34-43 of the FBAR. Part IV, Items 34-43 should only be completed one time with information about the individual's employer.

**For Items 15-23, see Part II.**

**Items 34-42.** Provide the name, address, and identifying number of the owner of the foreign financial account for which the individual has signature authority over but no financial interest in the account. If there is more than one owner of the account for which the individual has signature authority, provide the information in Items 34-42 for the principal joint owner (excluding the filer). If account information is completed for more than one account of the same owner, identify the owner only once and write "Same Owner" in Item 34 for the succeeding accounts with the same owner.

**Item 43.** Enter filer's title for the position that provides signature authority (e.g., treasurer).

**Part V – Information on Financial Account(s) Where Corporate Filer Is Filing a Consolidated Report**

Enter information in the applicable parts of the form only. Number the pages used, and mail only those pages. If there is not enough space to provide all account information, copy and complete additional pages of the required Part as necessary. Do not use any attachments unless otherwise specified in the instructions.

**Who Can File a Consolidated FBAR.** An entity that is a United States person that owns directly or indirectly a greater than 50 percent interest in another entity that is required to file an FBAR is permitted to file a consolidated FBAR on behalf of itself and such other entity. Check box "d" in Part I, Item 2 and complete Part V. If filing a consolidated FBAR and reporting 25 or more foreign financial accounts, complete only Items 34-42 for each entity included in the consolidated FBAR.

**For Items 15-23, see Part II.**

**Items 34-42.** Provide the name, United States taxpayer identification number, and address of the owner of the foreign financial account as shown on the books of the financial institution. If account information is completed for more than one account of the same owner, identify the owner only once and write "Same Owner" in Item 34 for the succeeding accounts of the same owner.

**Signatures**

**Items 44-46.** The FBAR must be signed by the filer named in Part I. If the FBAR is being filed on behalf of a partnership, corporation, limited liability company, trust, estate, or other entity, it must be signed by an authorized individual. Enter the authorized individual's title in Item 45.

An individual must leave "Filer's Title" blank, unless the individual is filing an FBAR due to the individual's signature authority. If an individual is filing because the individual has signature authority over a foreign financial account, the individual should enter the title upon which his or her authority is based in Item 45.

A spouse included as a joint owner, who does not file a separate FBAR in accordance with the instructions in Part III, must also sign the FBAR (in Item 44) for the jointly owned accounts. See the instructions for Part III.

**Penalties**

A person who is required to file an FBAR and fails to properly file may be subject to a civil penalty not to exceed \$10,000. If there is reasonable cause for the failure and the balance in the account is properly reported, no penalty will be imposed. A person who willfully fails to report an account or account identifying information may be subject to a civil monetary penalty equal to the greater of \$100,000 or 50 percent of the balance in the account at the time of the violation. See 31 U.S.C. section 5321(a)(5). Willful violations may also be subject to criminal penalties under 31 U.S.C. section 5322(a), 31 U.S.C. section 5322(b), or 18 U.S.C. section 1001.

1201). The February-March 2010 proposal called for a two-stage increase. The consumptive use rate was proposed to increase from \$60 to \$90 per million gallons, effective January 1, 2011, and from \$90 to \$120 per million gallons, effective January 1, 2012; and the non-consumptive use rate was proposed to increase from \$.60 to \$.90 per million gallons, effective January 1, 2011, and from \$.90 to \$1.20 per million gallons, effective January 1, 2012. A public hearing on the proposed rate increases was held on April 13, 2010 and written comments were accepted through April 16, 2010.

On September 15, 2010, the Commission approved a single-stage increase of \$20 per million gallons in the consumptive use rate and \$.20 per million gallons in the non-consumptive use rate. Accordingly, effective January 1, 2011, the Commission's water charging rates are \$80 per million gallons for consumptive use and \$.80 per million gallons for non-consumptive use. No change to the list of uses exempt from charges was proposed or adopted. The Commission also authorized the Executive Director to establish a Water Charges Advisory Committee and to identify and develop proposals for studies to address issues affecting water charges. A comment and response document setting forth the Commission's responses in detail was approved by the Commission simultaneously with adoption of the final rule.

Resolution No. 2010-9, the text of the final rule, and a copy of the comment and response document are available on the Commission's Web site, drbc.net.

#### List of Subjects in 18 CFR Part 420

Incorporation by reference, Water resources, Water reservoirs, Water supply, Watersheds.

For the reasons set forth in the preamble, the Delaware River Basin Commission amends 18 CFR part 420 as follows:

#### PART 420—BASIN REGULATIONS—WATER SUPPLY CHARGES

■ 1. The authority citation for part 420 continues to read as follows:

**Authority:** Delaware River Basin Compact, 75 Stat. 688.

■ 2. Amend § 420.41 by revising paragraphs (a) and (b) to read as follows:

##### § 420.41 Schedule of water charges.

- \* \* \* \* \*
- (a) \$80 per million gallons for consumptive use; and
- (b) \$.80 per million gallons for nonconsumptive use.

Dated: February 16, 2011.

**Pamela M. Bush,**

*Commission Secretary and Assistant General Counsel.*

[FR Doc. 2011-3969 Filed 2-23-11; 8:45 am]

**BILLING CODE 6360-01-P**

## DEPARTMENT OF THE TREASURY

### Financial Crimes Enforcement Network

#### 31 CFR Part 1010

**RIN 1506-AB08**

#### Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts

**AGENCY:** Financial Crimes Enforcement Network (FinCEN), Treasury.

**ACTION:** Final rule.

**SUMMARY:** FinCEN is issuing this final rule to amend the Bank Secrecy Act (BSA) regulations regarding reports of foreign financial accounts. The rule addresses the scope of the persons that are required to file reports of foreign financial accounts. The rule further specifies the types of accounts that are reportable, and provides filing relief in the form of exemptions for certain persons with signature or other authority over foreign financial accounts. Finally, the rule adopts provisions intended to prevent persons subject to the rule from avoiding their reporting requirement.

**DATES:** *Effective Date:* This rule is effective March 28, 2011.

*Applicability Date:* This rule applies to reports required to be filed by June 30, 2011 with respect to foreign financial accounts maintained in calendar year 2010 and for reports required to be filed with respect to all subsequent calendar years.

**FOR FURTHER INFORMATION CONTACT:** FinCEN, Regulatory Policy and Programs Division at (800) 949-2732 and select Option 1.

#### SUPPLEMENTARY INFORMATION:

##### I. Statutory and Regulatory Background

The BSA, Titles I and II of Public Law 91-508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314 and 5316-5332, authorizes the Secretary of the Treasury (Secretary), among other things, to issue regulations requiring persons to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, regulatory, and counter-terrorism matters. The regulations implementing the BSA appear at 31 CFR part 103 (31 CFR

Chapter X, effective March 1, 2011).<sup>1</sup> The Secretary's authority to administer the BSA has been delegated to the Director of FinCEN.

Under 31 U.S.C. 5314 the Secretary "shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to \* \* \* keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency." For this purpose, foreign financial agency means "a person acting for a person as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold."<sup>2</sup> The Secretary is authorized to prescribe exemptions to the reporting requirement and to prescribe other matters the Secretary considers necessary to carry out section 5314.

The regulations implementing 31 U.S.C. 5314 appear at 31 CFR 103.24, 103.27, and 103.32. Section 103.24 generally requires each person subject to the jurisdiction of the United States having a financial interest in or signature or other authority over a bank, securities, or other financial account in a foreign country to "report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists, and \* \* \* provide such information as shall be specified in a reporting form prescribed by the Secretary to be filed by such persons." Section 103.27 requires the form to be filed with respect to foreign financial accounts exceeding \$10,000. The form must be filed on or before June 30 of each calendar year for accounts maintained during the previous

<sup>1</sup> On October 26, 2010, FinCEN issued a final rule (the Chapter X Final Rule), creating a new Chapter X in title 31 of the Code of Federal Regulations (CFR) for BSA regulations. (See 75 FR 65806 (October 26, 2010) (Transfer and Reorganization of Bank Secrecy Act Regulations Final Rule)). As discussed in the Chapter X Final Rule, FinCEN reorganized its regulations that previously appeared at 31 CFR part 103 in the new Chapter X. The Chapter X reorganization is effective as of March 1, 2011, and is not intended to have any substantive effect on the BSA regulations. The notice of proposed rulemaking (NPRM) that preceded today's final rule (amending the BSA regulations related to reports of foreign bank and financial accounts) was published prior to the effective date of the Chapter X reorganization. Accordingly, the NPRM used the 31 CFR part 103 numbering system. References in today's final rule generally use the 31 CFR part 103 numbering system. However, the text of the final rule itself is renumbered using the Chapter X numbering system.

<sup>2</sup> See 31 U.S.C. 5312(a)(1) which excepts from the definition of financial agency a person acting for a country, a monetary or financial authority acting as a monetary or financial authority or an international financial institution of which the United States government is a member.

calendar year. Section 103.32 requires records of accounts to be maintained for each person having a financial interest in or signature or other authority over such account. The records must be maintained for a period of five years.

The form used to file the report required by section 103.24 is the Report of Foreign Bank and Financial Accounts—Form TD-F 90–22.1 (FBAR). The instructions to the FBAR specify which persons must file as well as the types of accounts that must be reported.

## II. Notice of Proposed Rulemaking

On February 26, 2010, FinCEN published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) that proposed changes to the rules for the reporting of foreign financial accounts.<sup>3</sup> Most significantly, the NPRM proposed to (1) Define the scope of individuals and entities required to file the FBAR, (2) delineate the types of reportable accounts, and (3) exempt certain persons and accounts from the reporting requirement and provide certain additional relief. The changes proposed in the NPRM were accompanied by proposed changes to the FBAR form instructions, a draft of which appeared in the **Federal Register** as an attachment to the NPRM.

### *Comments on the NPRM—Overview and General Issues*

In response to the NPRM, FinCEN received a total of 42 timely filed comment letters from individuals, entities, and representatives of various groups and industries whose members are affected by FBAR requirements. The comments were generally supportive of the NPRM but sought broader exemptions than in the NPRM and often asked for clarification of the NPRM. In particular, commenters were uncertain about when an account was reportable under the FBAR and the scope of individuals covered by the signature authority definition. To this end, this final rulemaking document—

- Clarifies whether an account is foreign and therefore reportable as a foreign financial account and addresses the treatment of custodial accounts in this context;
- Revises the definition of signature or other authority to more clearly apply to individuals who have the authority to control the disposition of assets in the account by direct communication (whether in writing or otherwise) to the foreign financial institution;
- Clarifies that officers or employees who file an FBAR because of signature or other authority over the foreign

financial account of their employers are not expected to personally maintain the records of the foreign financial accounts of their employers;

- Clarifies that filers may rely on provisions of this final rule in order to determine their filing obligation for FBARs in those cases where filing was properly deferred under prior Treasury guidance.

FinCEN believes that these clarifications and changes should address many of the concerns expressed in the public comments regarding uncertainty about the scope of the NPRM and therefore should make it easier for filers to determine whether the FBAR must be filed.

### A. Reportable Accounts

FinCEN received a large number of comments requesting clarification as to when an account is deemed “foreign” for purposes of triggering the FBAR filing requirement. Commenters requested clarification on this issue with respect to holdings of securities accounts, pension fund accounts, and covered life insurance policies and annuities. FinCEN wishes to clarify that, as a general matter, an account is not a foreign account under the FBAR if it is maintained with a financial institution located in the United States. For example, individuals may purchase securities of a foreign company through a securities broker located in the United States as part of their investment portfolio. The mere fact that the account may contain holdings or assets of foreign entities does not render the account “foreign” for purposes of the FBAR. In this instance, the individual maintains the account with a financial institution in the United States.

FinCEN received a number of comments asking for clarification regarding specific custodial arrangements. Commenters explained that in some cases a United States person may have an account with a financial institution located in the United States, such as a bank. According to the commenters, that U.S. bank may act as a global custodian and hold the person’s assets outside the United States. In many cases, the custody bank creates pooled cash and securities accounts in the non-U.S. market to hold the assets of multiple investors. These accounts, commonly called omnibus accounts, are in the name of the global custodian. Typically, the U.S. customer does not have any legal rights in the omnibus account and can only access their holdings outside of the United States through the U.S. global custodian bank. FinCEN wishes to clarify that in this situation, the U.S.

customer would not have to file an FBAR with respect to assets held in the omnibus account and maintained by the global custodian. In this situation, the U.S. customer maintains an account with a financial institution located in the United States.

However, if the specific custodial arrangement permits the United States person to directly access their foreign holdings maintained at the foreign institution, the United States person would have a foreign financial account.

### B. Signature or Other Authority, Generally

FinCEN received a large number of comments generally regarding the signature authority requirement. Some commenters sought further clarification of the definition, while other commenters recommended an elimination of the requirement. In the NPRM, FinCEN proposed to 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 delivery of instructions (whether communicated in writing or otherwise) *directly* to the person with whom the financial account is maintained.”<sup>4</sup> To avoid confusion, FinCEN inserted the word “directly” into the definition proposed in the NPRM to place the filing requirement on an individual only if the individual has the authority to directly deliver instructions to the foreign financial institution.<sup>5</sup>

Nonetheless, commenters stated that they were unsure whether the proposed definition of signature authority would apply to an individual who merely participates in the decision to allocate assets or has the ability to instruct or supervise others with signature authority over a reportable account. In light of these comments, FinCEN has decided to revise the proposed definition of signature or other authority as follows:

Signature or other authority means 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.

The test for determining whether an individual has signature or other

<sup>4</sup> 75 FR 8851 (February 26, 2010) (*Emphasis added*).

<sup>5</sup> A revised FBAR form that modified several aspects of the form instructions was issued in October 2008. That revision eliminated the words “direct communication” from the definition of signature or other authority.

<sup>3</sup> See 75 FR 8844 (February 26, 2010).

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. 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.

Some commenters requested that FinCEN eliminate the requirement to report signature or other authority over a foreign financial account. Commenters expressed concern about perceived duplication of reporting as well as a perceived lack of utility to law enforcement when both individuals with signature authority and those with a financial interest file FBARs with respect to the same account. Some commenters suggested that investigators could obtain the relevant information if FinCEN were to modify the FBAR form to enable the person with a financial interest in a reportable account to list all of the individuals with signature or other authority over the account. Another commenter suggested that FinCEN provide an exemption for all employees who have signature authority over but no financial interest in their employer’s foreign financial accounts if the employer provides notice to the employees that the employer has filed an FBAR for its accounts.

Although FinCEN has considered the concerns raised by these commenters, FinCEN has decided not to eliminate the signature authority reporting requirement or revise the obligations as suggested by these commenters. Law enforcement agencies have indicated to FinCEN that FBARs filed by individuals with only signature authority are valuable tools in investigations. Law enforcement representatives disagreed with commenters that the signature authority requirement results in duplication of information. Although FinCEN may receive more than one FBAR with respect to the same foreign financial account, the reports contain information about different individuals with access to the account (either through financial interest or signature authority). Moreover, if FinCEN were to adopt a modified reporting system which relies upon the person with financial interest to report those individuals having signature authority over the account, there would be an increased opportunity to evade reporting because the signature authority requirement also acts as an independent check on FBAR reporting. For example, a person with financial interest may not report the FBAR at all,

or may not identify all individuals with signature authority over the account. In such a case, law enforcement and other agencies would be deprived of valuable information regarding the full range of individuals with access to the account. Likewise, if FinCEN were to adopt an exemption for employees who receive notice from their employers regarding the filing of the FBAR, and the employer falsely provides the notice, law enforcement again would be deprived of valuable information. By adopting an independent reporting requirement for individuals with signature authority, the final rule maintains the check and balance that has existed since 1972, making it more difficult for the account and the individuals having access to that account to escape detection. The signature authority filing requirement is a necessary component of an effective FBAR regulatory regime. Thus, in this final rule, FinCEN continues to require reporting by individuals with signature or other authority.

Finally, FinCEN received one comment that pointed to a discrepancy between the NPRM definition of signature authority and the definition contained in the draft form instructions, which accompanied the NPRM. This comment noted that the draft form instructions slightly varied from the regulatory definition leaving the commenter unclear whether the definition of signature authority was intended to apply more broadly than just to individuals. FinCEN wishes to clarify that the signature authority definition contained in this final rule only applies to individuals. The instructions to the FBAR form have been revised to reflect the language in the final rule.

#### C. Recordkeeping and Truncated Filing Related to Signature or Other Authority

Commenters sought relief from the recordkeeping provisions of 31 CFR 103.32 for individuals with signature authority over their employer’s accounts. These commenters argued that the recordkeeping rules present challenges in such cases, because these individuals do not own the records of the employing firm. Further, these commenters argued that they should not be expected to personally maintain the records of that employer for five years. FinCEN wishes to clarify that in the case of officers or employees who file an FBAR because of signature or other authority over the foreign financial accounts of their employer, we do not expect such officers or employees to personally maintain the records of the foreign financial accounts of their employers.

The preamble of the NPRM noted that a modified form of reporting would be available in the case of United States persons who are employed in a foreign country and who have signature or other authority over foreign financial accounts owned or maintained by their employer. FinCEN received two comments recommending that this modified form of reporting be available to United States persons employed in the United States with respect to foreign financial accounts over which they have signature authority. One of these commenters cited the difficulties in complying with the recordkeeping obligation, while the other commenter did not believe that United States persons should be treated differently based on the location of their employment. As noted above, FinCEN has clarified the recordkeeping obligations of officers and employees with only signature authority over the foreign financial accounts of their employers. FinCEN also wishes to note that in providing the modified reporting for United States persons who are employed overseas, FinCEN was attempting to balance the need for information contained in the FBAR with a recognition that United States persons working overseas are subject to both U.S. law and foreign law. FinCEN has not provided United States persons employed in the United States by a foreign employer with the modified form of reporting. In such cases, FinCEN believes that the foreign employer should expect that U.S. law will apply to these U.S. employees.

Finally, FinCEN received a comment asking that the modified reporting be explicitly available to “officers” employed overseas. The form instructions have been amended to reflect this change. The commenter also asked that FinCEN incorporate the modified reporting into the text of the final rule. FinCEN does not believe that it is necessary to include this form of relief in the text of the final rule itself.

#### D. General Exemptions

The NPRM proposed exemptions from the reporting requirements for certain types of persons and accounts. FinCEN received a number of comments asking for broader exemptions. One commenter requested that FinCEN exempt from the reporting requirement accounts located in jurisdictions that are not considered to be “tax havens” or that have highly functional bank regulation and information exchange with the United States. FinCEN also received comments from individuals living abroad who objected to the FBAR filing requirement. Some of these commenters were married

individuals who raised concerns that their non-U.S. spouses did not want information regarding joint financial accounts to be reported to U.S. government authorities. Another commenter requested that FinCEN exempt regulated financial institutions, such as those that qualify for exempt recipient status for purposes of filing an IRS 1099 series form, to report interest income and dividends.

Finally, FinCEN received several comments requesting a broad exemption for pension plans and welfare benefit plans, or at least for large ERISA plans. These commenters argued that pension plans and welfare benefit plans already are subject to comprehensive regulation and believed that the FBAR filing obligations would be unduly burdensome and duplicative in light of existing reporting requirements, particularly Form 5500, Annual Return/Report of Employee Benefit Plan. Commenters also pointed to the tax-exempt status of certain ERISA plan trusts, and a provision in the customer identification program (CIP) rules which exempts from the CIP rules an account established for the purpose of participating in an ERISA plan as indicating that an exemption from the FBAR rules would be appropriate in the case of ERISA pension and welfare benefit plans.<sup>6</sup> Alternatively, these commenters stated that many of their concerns would be addressed if FinCEN were to clarify the scope of a number of definitions in the NPRM such as signature authority and reportable accounts.

Section 5314 of the BSA mandates that the Secretary require each "resident or citizen of the United States or a person in, and doing business in, the United States" to keep records and file reports that disclose information regarding their foreign financial accounts. Section 5314 authorizes the Secretary to "prescribe a reasonable classification of persons subject to or exempt from" the reporting requirements.

FinCEN does not believe it appropriate to expand the exemptions as recommended by the commenters. Although the commenters noted that certain countries may have a robust set of anti-money laundering laws, the FBAR places the obligation of reporting on the United States person, and individuals and businesses can commit

financial abuses and other crimes using financial institutions in those countries. By requiring United States persons to identify foreign financial accounts, the FBAR creates a financial trail that assists law enforcement and other agencies to identify accounts outside of the United States.

With respect to the comments raised by United States persons living abroad, FinCEN does not believe that an exemption is appropriate simply because a United States person chooses to live outside of the United States. With respect to commenters who recommended exempting certain regulated entities, such as those that qualify for exempt recipient status for purposes of reporting on IRS Form 1099, FinCEN has carefully considered the comments and has decided not to adopt them. While these entities may be entitled to some measure of special treatment under the Federal tax rules, FinCEN wishes to note that the purpose of the FBAR is broader than tax administration.<sup>7</sup>

Finally, FinCEN has considered the concerns raised by commenters regarding the treatment of pension and welfare benefit plans. FinCEN has not adopted the recommendation for a broad exemption for such plans. Because the purpose of the FBAR is broader than tax administration, FinCEN does not believe that it is appropriate to exempt entities from the FBAR requirement based on their tax-exempt status. In addition, while the CIP rule exempts accounts of certain entities, FinCEN does not believe that those CIP provisions which apply in the case of accounts established or maintained at a financial institution located in the United States, are determinative in the case of accounts maintained with a foreign financial institution. However, in response to these commenters' request for greater clarification of the NPRM, the final rule has provided a number of clarifications that address their concerns regarding the scope of foreign financial accounts that are reportable, and the definitions of signature authority and financial interest.<sup>8</sup>

#### E. Other Issues

Commenters raised a number of issues related to the process of filing the FBAR. Specifically, they requested the option to file the form electronically.<sup>9</sup> As noted

in the NPRM, the FBAR form currently available on both the FinCEN and IRS Web sites allows users to complete the form electronically and print a PDF document that can be mailed to the address on the form. FinCEN is in the process of modernizing its IT system and has plans to include the ability to file FBARs electronically.

Commenters requested clarification of the draft instructions regarding how to determine the value of an account. The draft instructions to the FBAR form which accompanied the NPRM provide that periodic account statements may be relied on to determine the maximum value of the account provided that the statements fairly reflect the maximum account value during the calendar year. The commenters were uncertain whether it is possible to rely on periodic statements that provide the value in the account at the end of the statement period. Where *bona fide* statements are prepared in the ordinary course of business, FinCEN believes that such periodic account statements may be relied on for this purpose.

#### F. Applicability Date

The final rules contained in this document apply to FBARs required to be filed by June 30, 2011 with respect to foreign financial accounts maintained in calendar year 2010 and for reports required to be filed with respect to all subsequent calendar years.

FinCEN received several comments regarding the applicability date for the final rule. These commenters specifically asked whether filers would be permitted to rely on favorable provisions of the final rule with respect to foreign financial accounts maintained in calendar years beginning before 2010. We recognize that in certain instances, United States persons might have deferred filing the FBAR for prior reporting years in accordance with guidance issued by Treasury.<sup>10</sup> Although this final rule is not retroactive, filers who properly deferred filing obligations pursuant to IRS Notice 2010-23 may, if they wish, apply the provisions of this final rule in determining their FBAR filing requirements for reports due June 30, 2011, with respect to foreign financial

increasing the filing threshold and changing the due date of the FBAR. The threshold and the due date are established under a regulation section, 31 CFR 103.27 that was not proposed to be amended by the NPRM. Thus, changes suggested by those comments are not addressed in this final rulemaking.

<sup>10</sup> As a result of changes that were made to the FBAR form instructions in October 2008, the IRS extended the FBAR filing deadline for certain filers. See IRS Notice 2009-62 and IRS Notice 2010-23.

<sup>6</sup> The CIP rules require certain financial institutions to collect identifying information about a customer at account opening and implement procedures for verifying the customer's identity that are sufficient to enable the financial institution to form a reasonable belief that it knows the true identity of the customer. See, e.g., 31 CFR 103.121.

<sup>7</sup> 31 U.S.C. 5311.

<sup>8</sup> FinCEN wishes to note that the final rule eliminates the proposed trust protector provision; see the discussion in the Section-by-Section Analysis.

<sup>9</sup> A few commenters raised other issues concerning the filing of the FBAR such as

accounts maintained in calendar years beginning before 2010.

#### G. Coordination With Chapter X

On October 26, 2010, FinCEN finalized a reorganization of all the BSA regulations appearing in part 103 of Title 31 of the Code of Federal Regulations, effective March 1, 2011.<sup>11</sup> As discussed in the preamble of that final rule, BSA regulations that previously appeared in part 103 of Title 31 now appear in new Chapter X of Title 31. The reorganization is not intended to have any substantive effect on the BSA regulations.

Because the NRPM was published prior to the effective date of the Chapter X reorganization, the NPRM used the 31 CFR part 103 numbering system. For consistency with the NPRM, references in this final rule generally continue to use the 31 CFR part 103 numbering system. However, because the effective date of this final rule is March 28, 2011, the text of the regulations finalized today must use the Chapter X numbering system. Thus, instead of being numbered 31 CFR 103.24, today's final rule is numbered 31 CFR 1010.350.

### III. Section-by-Section Analysis

The NPRM set forth general requirements for filing the FBAR and specific definitions applicable to such reporting. The final rule continues these general requirements and includes definitions of United States person, and bank, securities, and other financial accounts in a foreign country. These definitions delineate both the scope of individuals and entities that would be required to file the FBAR and the types of accounts for which such reports should be made. In addition, the final rule exempts certain persons with signature or other authority from filing the FBAR. Finally, the final rule includes provisions intended to prevent United States persons required to file the FBAR from avoiding this reporting requirement.

#### A. Section 103.24(a)—In General

FinCEN received no comments on proposed paragraph (a) of section 103.24 of the NPRM. Accordingly, the final rule adopts this paragraph without change.

#### B. Section 103.24(b)—United States Person

The NPRM defined 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 NPRM provided that the determination of whether an individual is a resident of the United States would be made under the rules of the Internal Revenue Code, specifically, 26 U.S.C. 7701(b) and the regulations thereunder, except that the definition of the term United States provided in 31 CFR 103.11(nn) will be used instead of the definition of United States in the rules under the Internal Revenue Code.

FinCEN received a number of comments about the proposed definition of United States person. Commenters raised questions about the part of the definition of United States person concerning trusts. They also raised questions about the application of the provisions of the Internal Revenue Code with respect to the term "resident."

Commenters generally objected to the inclusion of trust in the definition. They argued that trusts should not have a separate filing obligation in light of the fact that a U.S. trustee would also have an obligation to file an FBAR with respect to the trust. Commenters also believed that the NPRM is unclear about whether a trust that is treated as wholly owned by another person under the Internal Revenue Code would be required to file an FBAR. Finally, commenters believed that the final rule should define trust with reference to the rules of the Internal Revenue Code, specifically section 7701(a)(30), rather than considering whether a trust has been "created, organized, or formed under the laws of the United States \* \* \*".

FinCEN acknowledges that in the case of trusts, a U.S. trustee must file the FBAR for the trust. However, FinCEN has decided to retain trust under the definition of United States person in the same manner that it has retained other entities such as corporations and limited liability companies.

FinCEN does not believe it appropriate to define trust under section 7701(a)(30) of the Internal Revenue Code because that definition might allow trusts formed under the law of a State to be excluded from the scope of FBAR obligations. For example, if a trust is formed under New York law and has one trustee who is a United States person and two trustees who are not United States persons, under section 7701(a)(30) the trust would not be considered a U.S. trust if all substantial trust decisions were not controlled by its U.S. trustee.

Commenters also raised questions with respect to the term "resident" in the

definition of United States person. These commenters sought clarification on the treatment of individuals who make certain elections under section 7701(b) of the Internal Revenue Code. FinCEN believes that individuals who elect to be treated as residents for tax purposes under section 7701(b) should file FBARs only with respect to foreign accounts held during the period covered by the election. A legal permanent resident who elects under a tax treaty to be treated as a non-resident for tax purposes must still file the FBAR. Commenters also sought clarification about the interaction of elections under section 6013(g) and (h) of the Internal Revenue Code and the definition of resident. FinCEN wishes to clarify that the determination of whether an individual is a United States resident should be made without regard to elections under section 6013(g) or 6013(h) of the Internal Revenue Code. In the same vein, a commenter asked whether foreign corporations holding a U.S. real property interest and electing to be treated as a U.S. corporation for U.S. income tax purposes under section 897(i) of the Internal Revenue Code are required to file FBARs. FinCEN wishes to reiterate that, for purposes of FBAR reporting, a corporation is a United States person only if it is 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.

#### C. Section 103.24(c)—Types of Reportable Accounts

FinCEN proposed to amend 31 CFR 103.24 by adding definitions of the accounts subject to reporting. FinCEN has chosen to define the terms bank account, securities account, and other financial account with reference to the kinds of financial services for which a person maintains an account.

#### D. Section 103.24(c)(1)—Bank Account

The NPRM defined "bank account" as a savings deposit, demand deposit, checking, or any other account maintained with a person engaged in the business of banking. The proposed definition would include time deposits such as certificates of deposit accounts that allow individuals to deposit funds with a banking institution and redeem the initial amount along with interest earned after a prescribed period of time. FinCEN received no comments on the proposed definition and, therefore, is adopting this definition without change.

<sup>11</sup> 75 FR 65806, Oct. 26, 2010.

*E. Section 103.24(c)(2)—Securities Account*

The NPRM defined “securities account” as an account maintained with a person in the business of buying, selling, holding, or trading stock or other securities. FinCEN received no comments on the proposed definition and, therefore, is adopting this definition without change.

*F. Section 103.24(c)(3)—Other Financial Account*

The term “other financial account” appears in current section 103.24. In order to enhance compliance, the NPRM proposed certain types of accounts that would fall within the meaning of this term. Specifically, the NPRM defined “other financial account” to mean

- An account with a person that is in the business of accepting deposits as a financial agency;
- An account that is an insurance policy with a cash value or an annuity policy;
- An account with a person that acts as a broker or dealer for futures or options transactions in any commodity on or subject to the rules of a commodity exchange or association; or
- 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.

FinCEN received comments on the parts of the proposed definition addressing life insurance and annuity policies and mutual funds. With respect to life insurance and annuity policies, one commenter was concerned that the treatment of life insurance policies as accounts under the FBAR rule would cause these policies to be treated as accounts under other BSA regulations. The final rule clarifies that this definition is limited to the FBAR requirement.

The commenter also asked FinCEN to revise the definition with respect to life insurance and annuity policies so that the FBAR reporting requirement would apply only to such policies with a cash value or only at the time of the payment of an income stream to the policy holder. FinCEN has considered this comment. We are amending the definition with respect to life insurance and annuities to clearly reflect that only those life insurance or annuity policies with a cash value are covered under this definition. However, we do not believe it appropriate to limit the FBAR requirement to situations in which there is payment of an income stream. As with other types of reportable accounts, such as bank accounts, which are

included in this final rule, the reporting of the FBAR is not limited to situations in which there is payment from the account. FinCEN also received a comment seeking clarification as to whether the obligation to file the FBAR in the case of life insurance rests with the policy holder or the beneficiary. FinCEN would like to clarify that the obligation in such a case rests with the policy holder.

With respect to mutual funds, FinCEN received a number of comments seeking clarification of the definition.

Commenters noted that the term “mutual fund” may have a different meaning outside of the United States and might potentially cover hedge funds and private equity funds that have periodic redemptions. FinCEN wishes to reiterate that the definition of mutual fund includes a requirement that the shares be available to the *general public* in addition to having a regular net asset value determination and regular redemption feature. FinCEN believes that some of the concerns of commenters arose because the draft instructions to the form published with the proposed rule did not include the words “which issues shares available to the general public.” The instructions have been revised to reflect the language of the definition contained in the final rule. As such, FinCEN does not believe it necessary to amend the proposed definition with respect to mutual funds. Accordingly, FinCEN is retaining this part of the definition as proposed. Furthermore, FinCEN notes that the NPRM specifically reserved the treatment of investment companies other than mutual funds or similar pooled funds, and the final rule continues to do so.

*G. Section 103.24(c)(4)—Exceptions for Certain Accounts*

Section 103.24(c)(4) of the NPRM proposed exceptions for certain accounts for which reporting will not be required by persons with a financial interest in or signature or other authority over the accounts. The following accounts were proposed to be excepted from reporting:

- An account of a department or agency of the United States, an Indian Tribe, or any State or any political subdivision of a State, or a wholly-owned entity, agency, or instrumentality of any of the foregoing is not required to be reported. In addition, reporting is not required with respect to an account of an entity established under the laws of the United States, of an Indian Tribe, of any State, or of any political subdivision of any State, or under an intergovernmental compact between

two or more States or Indian Tribes[,] that exercises governmental authority on behalf of the United States, an Indian Tribe, or any such State or political subdivision. For this purpose, an entity generally exercises governmental authority on behalf of the United States, an Indian Tribe, a State, or a political subdivision only if its authorities include one or more of the powers to tax, to exercise the power of eminent domain, or to exercise police powers with respect to matters within its jurisdiction.

A few commenters sought clarification as to the meaning of proposed section 103.24(c)(4)(i). In particular, the commenters asked FinCEN to clarify whether the last sentence of the paragraph concerning the exercise of governmental authority applied to the entire paragraph or only the second sentence of the paragraph. In response, FinCEN clarifies that the last sentence should be read in conjunction with the second sentence of the paragraph, which contains a specific requirement concerning the exercise of governmental authority. FinCEN is also making a minor editorial change to the second sentence so that it will be clearer that the exercise of governmental authority requirement applies to the entire second sentence.<sup>12</sup>

Commenters recommended that the final rule provide an exception for the accounts of foreign insurance companies that elect under section 953(d) of the Internal Revenue Code to be treated as U.S. companies. Their recommendation appears to be based, in part, on a reading of the second sentence of proposed section 103.24(c)(4)(i) as providing an exception for the accounts of any entity organized in the United States. As explained above, the second sentence of proposed section 103.24(c)(4)(i) would only exempt the accounts of certain entities organized under the laws of the United States (or the law of other levels of government, such as State and local governments) if the entities exercise governmental authority. The commenters also indicate that by making a section 953(d) election, these companies are agreeing to comply with U.S. tax law. FinCEN wishes to clarify that making such an election does not render the entity a United States person for purposes of the FBAR.<sup>13</sup> Accordingly, the final rule does not adopt this recommendation.

<sup>12</sup> A comma is added before the word “that”.

<sup>13</sup> FinCEN reaffirms that the FBAR requirement addressed in this document is a requirement under title 31 of the United States Code rather than under the Internal Revenue Code.

The last three exceptions contained in proposed 31 CFR 103.24(c)(4) were as follows:

- An account of an international financial institution of which the United States government is a member is not required to be reported.<sup>14</sup>

- An account in an institution known as “United States military banking facility” (or “United States military finance facility”) operated by a United States financial institution designated by the United States Government to serve United States government installations abroad is not required to be reported even though the United States military banking facility is located in a foreign country.

- Correspondent or nostro accounts that are maintained by banks and used solely for bank-to-bank settlements are not required to be reported.

FinCEN received no comments on these proposed exceptions and, therefore, is adopting these exceptions without change.

#### H. Section 103.24(d)—Foreign Country

The term foreign country includes all geographical areas located outside of the United States as defined in 31 CFR 103.11(nn). FinCEN received no comments on the proposed definition and, therefore, is adopting this definition without change.

#### I. Section 103.24(e)—Financial Interest

The NPRM proposed a definition of financial interest. The proposed definition covered situations in which the United States person is the owner of record or holder of legal title, as well as situations in which the United States person’s ownership or control over the owner of record or holder of legal title rises to such a level that the person should be deemed to have a financial interest in the account.

Section 103.24(e)(1) proposed the following:

- A United States person has a financial interest in each bank, securities, or other financial account in a foreign country for which he is the owner of record or has legal title regardless of whether the account is maintained for his own benefit or for the benefit of others. If an account is maintained in the name of more than one person, each United States person in whose name the account is maintained has a financial interest in that account.

Section 103.24(e)(2) proposed that a United States person also has a financial

interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is one of the following:

- A person acting on behalf of that United States person such as an attorney, agent, or nominee with respect to the account. (Section 103.24(e)(2)(i)).

- A corporation in which the United States person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares, a partnership in which the United States person owns directly or indirectly more than 50 percent of the interest in profits or capital, or any other entity (other than a trust) in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits. (Section 103.24(e)(2)(ii)).

- A trust, if the United States person is the trust settlor and has an ownership interest in the account for United States Federal tax purposes. *See* 26 U.S.C. 671–679 to determine if a settlor has an ownership interest in a trust’s financial account for a year. (Section 103.24(e)(2)(iii)).

- A trust in which the United States person either has a beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the income. (Section 103.24(e)(2)(iv)).

- A trust that was established by the United States person and for which the United States person has appointed a trust protector that is subject to such person’s direct or indirect instruction. (Section 103.24(e)(2)(v)).

FinCEN received one comment seeking clarification on the scope of proposed section 103.24(e)(2)(iii). The commenter noted that although FinCEN incorporates the provisions of 26 U.S.C. 671–679 for determining ownership interest, section 103.24(e)(2)(iii) references the interests of the trust “settlor,” while the provisions of 26 U.S.C. 671–679 refer to “grantor”. The commenter noted that FinCEN did not define the term “settlor.” FinCEN agrees with the commenter and has revised section 103.24(e)(2)(iii) to replace the word “settlor” with the word “grantor”. In addition, the NPRM inadvertently used the word “account” instead of “trust” in section 103.24(e)(2)(iii). The final rule revises the section by using the word “trust.”

FinCEN received a few comments related to the application of the definition of financial interest in the context of trusts, including trusts for pension plans. With respect to trusts generally, commenters raised concerns about determining whether a person has

more than a 50 percent beneficial interest in the trust, when the trust is a discretionary trust. FinCEN recognizes that in the case of trusts, determinations regarding beneficial interest for purposes of filing the FBAR may be difficult if the person is a beneficiary of a discretionary trust or has a remainder interest in a trust. After considering this comment, FinCEN has revised section 103.24(e)(2)(iv) to change the term “beneficial interest” to “present beneficial interest.” FinCEN does not intend for a beneficiary of a discretionary trust to have a financial interest in a foreign account simply because of his status as a discretionary beneficiary. Further, FinCEN does not intend to include a remainder interest within the scope of the term “present beneficial interest” for purposes of filing an FBAR. Finally, the final rule adds the word “current” before the word “income” which was inadvertently omitted from the text of the NPRM.

FinCEN also received comments regarding the trust protector provision in section 103.24(e)(2)(v). Commenters were concerned that the trust protector provision could be read in an overly broad manner, particularly in the case of pension plans, and another commenter believed that the trust protector provision would not adequately address situations in which the grantor has retained control over the trust. Although FinCEN has considered these comments and is removing the trust protector provision from the final rule, FinCEN remains concerned with the potential for abuse when a trust protector is appointed.<sup>15</sup> FinCEN believes that instances of abuse or arrangements designed to obfuscate ownership in the context of trusts, including the use of a trust protector to evade an FBAR reporting obligation, are sufficiently captured through the anti-avoidance provision discussed below.

Finally, the NPRM provided that a United States person that causes an entity to be created for a purpose of evading the FBAR reporting requirement would have a financial interest in any bank, securities, or other financial account in a foreign country for which the entity is the owner of record or holder of legal title. The term “evading” as used in the anti-avoidance rule is not intended to apply to persons who make a good faith effort to comply with the final rule.

<sup>14</sup> This exception does not limit the operation of the International Organization Immunities Act of December 29, 1945 (22 U.S.C. 288).

<sup>15</sup> *See*, the Senate Permanent Subcommittee on Investigations (PSI), Committee on Homeland Security and Governmental Affairs 2006 report titled, *Tax Haven Abuses: the Enablers, the Tools and Secrecy*, Senate Hearing 109–797, 109th Cong., 2d Sess. (August 1, 2006).

FinCEN received one comment on the proposed anti-avoidance provision, which recommended that the provision specifically incorporate rules found in 26 CFR 1.671–2(e)(4), relating to the treatment of transfer companies used to disguise the fact that a trust had a United States grantor. FinCEN believes that the anti-avoidance rule is sufficiently broad as to make it unnecessary to specifically incorporate 26 CFR 1.671–2(e)(4) because the rule captures all situations in which entities, including trusts, are used to evade an FBAR reporting obligation.

#### J. Section 103.24(f)—Signature or Other Authority

Current section 103.24 requires reporting by United States persons with signature or other authority over bank, securities, or other financial accounts in a foreign country. The NPRM proposed to continue this requirement and to define signature or other authority. As discussed in Section II.B above, the final rule revises the definition and continues the signature authority filing requirement.

#### K. Signature Authority Exceptions

The NPRM proposed to grant relief from the obligation to report signature or other authority over a foreign financial account to the officers and employees of five categories of entities subject to specific types of Federal regulation. These exceptions would apply, however, only where the officers or employees have no financial interest in the reportable account. These entities would still be obligated to report their financial interest in these reportable accounts. Officers and employees would be able to avail themselves of these exceptions without receiving notice that the entities had filed an FBAR with respect to these accounts.

FinCEN received a number of comments on the signature authority exceptions. Some commenters sought additional relief in the form of new exceptions. FinCEN received comments requesting relief from the signature authority filing requirement for the officers and employees of entities located in countries that FinCEN would designate as “low-risk,” of entities listed on a foreign securities exchange, of foreign-located banks that have entered into a Qualified Intermediary agreement with the IRS, and of 501(c)(3) private colleges and universities. FinCEN wishes to reiterate that although certain countries may have a robust set of anti-money laundering laws, the FBAR places the obligation of reporting on the United States person, and the purpose of the FBAR is to create a financial trail

of foreign accounts. Likewise, the fact that a foreign bank may have entered into a Qualified Intermediary agreement with the IRS for tax purposes or that an entity is exempt from tax under the Internal Revenue Code does not eliminate the need for law enforcement and other agencies to have information about the existence of foreign financial accounts of United States persons.

Commenters also submitted specific comments on the proposed exceptions. We are addressing these concerns below in connection with the specific provisions of the NPRM.

The NPRM provided the following exceptions:

- *31 CFR 103.24(f)(2)(i)*. An officer or employee of a bank that is examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Administration need not report that he has signature or other authority over a foreign financial account owned or maintained by the bank if the officer or employee has no financial interest in the account.

This exception would be available to officers or employees of banks examined by the Federal banking agencies. Several commenters asked that the exemption be expanded to cover officers and employees of trust companies and credit unions that lack a Federal functional regulator. We proposed this exception for officers and employees of entities that are subject to functional regulation by Federal agencies that also examine them for compliance with the BSA. Limiting the exemption as proposed provides for a degree of uniformity in functional regulation and BSA examination and compliance that may not necessarily exist on the part of State or even other Federal agencies with little or no involvement in BSA compliance.

- *31 CFR 103.24(f)(2)(ii)*. An officer or employee of a financial institution that is registered with and examined by the Securities and Exchange Commission or Commodity Futures Trading Commission need not report that he has signature or other authority over a foreign financial account owned or maintained by such financial institution if the officer or employee has no financial interest in the account.

This exception would be available to officers or employees of financial institutions which are registered with, and examined by, the SEC or CFTC. As with the first exception, this is available to officers and employees of entities that are subject to functional regulation by Federal agencies that also examine such

entities for compliance with the BSA. Commenters sought clarification on whether this exception would apply to SEC registered investment advisers when they are providing advisory services to clients that are not registered investment companies. FinCEN wishes to clarify that this exception does not apply in this situation. The exception applies to officers and employees of “financial institutions,” which is a defined term under 31 CFR 103.11(n). Investment advisers are not included in that definition of financial institution.

- *31 CFR 103.24(f)(2)(iii)*. An officer or employee of an Authorized Service Provider need not report that he has signature or other authority over a foreign financial account owned or maintained by an investment company that is registered with the Securities and Exchange Commission if the officer or employee has no financial interest in the account. “Authorized Service Provider” means an entity that is registered with and examined by the Securities and Exchange Commission and provides services to an investment company registered under the Investment Company Act of 1940.

The NPRM included this exception to address the fact that mutual funds do not have employees of their own. Instead, the day-to-day operations of such a fund are performed by individuals who are employed by fund service providers, such as investment advisors. This exception would be available to officers or employees of an Authorized Service Provider that is registered with and examined by the SEC, provided that the fund serviced by the Authorized Service Provider is also registered with the SEC.

Commenters sought clarification on the scope of this exception and specifically asked how this exception relates to the exception provided in the NPRM under section 103.24(f)(2)(ii). FinCEN wishes to reiterate that the exception in 103.24(f)(2)(ii) applies to officers and employees of financial institutions as defined in 31 CFR 103.11(n) that are registered with and examined by the SEC or CFTC. Thus, section 103.24(f)(2)(ii) does not apply to officers and employees of investment advisers. These commenters also sought clarification as to the scope of accounts covered by the exception contained in section 103.24(f)(2)(iii). FinCEN wishes to clarify that officers and employees of an Authorized Service Provider may avail themselves of this exception only with respect to the reportable accounts of those clients which are investment companies registered under the Investment Company Act of 1940 and are managed by the Authorized Service

Provider. If FinCEN were to expand the exception as requested beyond clients that are registered investment companies, the exception would apply even in situations where the officer and employee is providing service to individuals. FinCEN does not believe that such a change is appropriate.

Likewise, commenters asked that FinCEN consider expanding the scope of the proposed exception to cover service providers to registered investment companies even when the service providers are not registered with the SEC. These commenters noted that the preamble to the anti-money laundering rules for mutual funds permits the fund contractually to delegate the implementation and operation of their AML program to a service provider that is not registered with the SEC. FinCEN has considered this comment but declined to expand the exception as requested by these commenters. First, FinCEN believes that this exception is appropriate not only because the service provider and the fund are registered with the SEC, but also because the investment companies registered under the 1940 Act have obligations under the BSA. Further, we note that under the AML rules, the mutual fund remains responsible for AML compliance. Under this exception, however, officers and employees of the Authorized Service Provider would be relieved of the reporting obligations of this rule.

- *31 CFR 103.24(f)(2)(iv)*. An officer or employee of an entity with a class of equity securities listed on any United States national securities exchange need not report that he has signature or other authority over a foreign financial account of such entity if the officer or employee has no financial interest in the account. An officer or employee of a United States subsidiary of such entity need not file a report concerning signature or other authority over a foreign financial account of the subsidiary if he has no financial interest in the account and the United States subsidiary is named in a consolidated FBAR report of the parent filed under proposed paragraph (g)(3) of 31 CFR 103.24.

This exception would be available to officers and employees of entities with a class of equity securities listed upon a U.S. national securities exchange, regardless of whether the entity is domestic or foreign. Officers and employees of a U.S. subsidiary of such listed U.S. entities are also covered by this exception if the U.S. subsidiary is named in a consolidated FBAR report of the parent.

FinCEN received a number of comments on this exception. Most of these comments addressed the interaction between the exception for officers and employees of corporations listed on a United States national securities exchange and the special rule for consolidated FBARs. Some commenters questioned whether the exception contained in section 103.24(f)(2)(iv), which discusses consolidated FBARs filed by a parent, enables a foreign listed parent to file a consolidated report on behalf of its United States subsidiaries. FinCEN notes that by its terms the special rule for consolidated FBAR reporting only applies to United States persons.

FinCEN received a number of comments regarding the treatment of U.S. subsidiaries of foreign parents. Some commenters noted that a foreign listed parent cannot file a consolidated FBAR report, and, therefore, the officers and employees of its U.S. subsidiaries cannot avail themselves of the signature authority exceptions. Commenters recommended that in the case of foreign entities listed on a U.S. national securities exchange, the U.S. subsidiary of that foreign entity be permitted to file a consolidated report for other U.S. subsidiaries. Other commenters recommended that the exception be revised to apply to the officers and employees of U.S. subsidiaries whose foreign parent is listed on a foreign exchange, provided that FinCEN determined that the foreign exchange was subject to suitable regulation. Some of these commenters suggested that FinCEN allow the foreign parent to voluntarily file a consolidated FBAR on behalf of its U.S. subsidiaries.

FinCEN has considered these comments but has decided to retain the exception as originally proposed. In the NPRM, FinCEN considered it appropriate to provide an exception for officers and employees of a U.S. subsidiary when the U.S. parent files a consolidated FBAR in light of both the listed parent's regulation by the SEC and its legal obligation to file the FBAR. In the case of a U.S. subsidiary with a foreign parent listed on a U.S. national securities exchange, the parent has no legal obligation to file the FBAR, and the subsidiary is not required to file the same reports with the SEC as the U.S. listed parent.<sup>16</sup> For similar reasons,

<sup>16</sup> To make the application of the exception clearer in the context of the special rule for consolidated FBARs, the final rule revises the second sentence of the exception by deleting the words "such entity" and adding the words "a United States entity with a class of equity securities listed on a United States security exchange." FinCEN believes that this change will clarify that the second

FinCEN has decided not to extend the exception to U.S. subsidiaries of foreign parents listed on foreign exchanges. Furthermore, because the FBAR rules apply only to United States persons, FinCEN will not permit voluntary filing by the foreign parent to satisfy the filing obligations of the officers and employees of U.S. subsidiaries.<sup>17</sup>

Finally, commenters asked that a U.S. subsidiary be permitted to rely on this exception if its U.S. listed parent does not file a consolidated FBAR. While the rules permit the parent to file a consolidated FBAR, if it chooses not to do so for its own reasons, FinCEN does not believe it necessary to provide a special treatment for such U.S. subsidiaries.

FinCEN received two comments seeking an expansion of the exception when an employee of a U.S. parent also has signature authority over the foreign accounts of a U.S. parent's subsidiary which have been included in the consolidated FBAR report. These commenters noted that under the proposed exception, officers or employees of the parent who have signature authority over the foreign accounts of the subsidiary would not benefit from the exception, which is limited to the accounts of the employer. The commenter further noted that in this situation, officers or employees of the subsidiary would benefit from the exception with respect to the subsidiary's foreign accounts. Likewise, one of the commenters asked for similar treatment when the officers and employees of the subsidiary have signature authority over the accounts of the listed parent.

FinCEN has considered these comments and has decided not to revise the exception as recommended. Given the revision in the final rule to the signature authority definition, the clarifications provided regarding the scope of the signature authority filing requirement and the recordkeeping rules, FinCEN does not believe that a further relaxation of the rule is appropriate.

FinCEN also received a comment recommending that the exception be extended to employees with respect to the accounts of an employee benefit trust established by an entity listed

sentence of the exception does not apply in the case of parent companies that are not U.S. entities.

<sup>17</sup> FinCEN also received comments requesting that we adopt a provision in the instructions to the 2008 version of the FBAR that provided officers and employees of a foreign subsidiary with an exception to the signature authority obligation. In light of the broader set of changes made with respect to the signature authority provisions, FinCEN has decided not to adopt this recommendation.

upon a U.S. national securities exchange. The commenter argued that in this situation, the entity is required to report the assets and liabilities of its employee benefit plans on its own financial statements filed with the SEC, and the trust accounts are subject to oversight and examination by the Department of Labor. FinCEN has considered this comment and decided not to adopt the recommendation because an employee benefit trust itself is not a listed entity. Further, FinCEN believes that the clarifications previously discussed concerning the scope of foreign financial accounts that are reportable and the definitions of signature authority and financial interest should address some of the concerns regarding FBAR filing obligations.

- *31 CFR 103.24(f)(2)(v)*—An officer or employee of a United States corporation that has a class of equity securities registered under section 12(g) of the Securities Exchange Act need not report that he has signature or other authority over the foreign financial accounts of such corporation if he has no financial interest in the accounts.

This exception as proposed would apply to officers and employees of U.S. corporations whose size in terms of assets and shareholders<sup>18</sup> requires them to register their stock with the SEC and makes them subject to reporting under the Securities Exchange Act. FinCEN received a comment requesting a similar exception for officers or employees of a mutual insurance company with assets of more than \$10 million and more than 500 policy holders. FinCEN has decided not to adopt such an exception because these companies are not subject to the SEC regulation that applies to companies covered by the exception.

FinCEN also received comments seeking an amendment to the proposed exceptions contained in sections 103.24(f)(2)(iv) and 103.24(f)(2)(v) to include listed American Depository Receipts (ADRs), unlisted ADRs that are traded over-the-counter if they are listed on the Designated Offshore Securities Market, ADRs with unlisted trading privileges on a national securities exchange, ADRs registered under section 12(g) or ADRs with unlisted trading privileges under section 12(f) of the Securities Exchange Act. After considering these comments, FinCEN believes that listed ADRs would be covered by the first sentence of the exception in section 103.24(f)(2)(iv). In

<sup>18</sup> Currently, these are corporations which have more than \$10 million in assets and more than 500 shareholders of record. See 15 U.S.C. 78l(g) (2006) and the regulations thereunder.

addition, if a foreign issuer has registered under section 12(g) a class of equity securities underlying ADRs, FinCEN believes it should be covered by the exception under section 103.24(f)(2)(v). The final rule makes appropriate changes to reflect this coverage. FinCEN does not believe that other ADRs are subject to the same requirements as listed entities on a U.S. national securities exchange or entities registered under section 12(g), and, therefore, we have not adopted the recommendations to include other types of ADRs.

Accordingly, the final rule adopts these exceptions as revised.

#### *L. 103.24(g)—Special Rules*

The NPRM proposed the following special rules to simplify FBAR filings in certain cases.

- *25 or more foreign financial accounts.* A United States person having a financial interest in 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate. Similarly, a United States person having 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 report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.

Commenters raised concerns that the simplified reporting requirements for filers having signature authority over 25 or more foreign financial accounts requires more information than the simplified reporting for persons having financial interest in 25 or more foreign financial accounts. In the case of simplified reporting for persons with a financial interest, filers are required to provide identifying information about themselves and indicate that they have a financial interest in 25 or more foreign financial accounts. Where persons have signature authority over 25 or more such accounts, filers are required to provide identifying information about themselves as well as those who have a financial interest in the accounts. FinCEN notes that where filers have only signature authority, the FBAR requires identifying information about the persons with a financial interest to ensure that law enforcement receives meaningful information about these accounts.

- *Consolidated reports.* 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 entity.<sup>19</sup>

One commenter urged additional consolidated filing relief be available to funds organized by the same fund manager, specifically all foreign financial account information for all funds in the same fund family should be reportable in a single consolidated FBAR filing. FinCEN believes that this issue is better addressed in the form of specific guidance because the factual situations may vary.

- *Participants and beneficiaries in certain retirement plans.* Participants and beneficiaries in retirement plans under sections 401(a), 403(a) or 403(b) of the Internal Revenue Code as well as owners and beneficiaries of individual retirement accounts under section 408 of the Internal Revenue Code or Roth IRAs under section 408A of the Internal Revenue Code will not be required to file an FBAR with respect to a foreign financial account held by or on behalf of the retirement plan or IRA.

FinCEN received one comment proposing an across-the-board exemption for all pension plan participants and beneficiaries. The commenter was concerned about the filing obligations of participants and beneficiaries of other types of plans not covered by the exemption. In proposing this exemption, FinCEN considered that participants and beneficiaries of these plans were less likely to be aware of the existence of foreign financial accounts because they were unlikely to exceed the 50 percent ownership threshold. Participants and beneficiaries that are not covered by this exemption should look to the 50 percent ownership indicia to determine whether a filing obligation exists.

- *Certain trust beneficiaries.* A beneficiary of a trust described in proposed paragraph (e)(2)(iv) is not required to report the trust's foreign financial accounts if the trust, trustee of the trust, or agent of the trust is a United States person that files an FBAR disclosing the trust's foreign financial accounts and provides any additional information as required by the report.

This provision is intended to provide relief to beneficiaries of trusts if the

<sup>19</sup> One commenter recommended that we provide for consolidated filing where the listed parent's ownership in the subsidiary exceeds 20 percent so that a broader range of officers and employees may take advantage of the signature authority exception. We believe that 20 percent is too low of an ownership interest for purposes of the consolidated filing.

trust, trustee of the trust, or agent of the trust is a United States person and has filed the FBAR as required. FinCEN is adopting this provision without change.

#### IV. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), FinCEN certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The final rule revises a rule in existence since 1972 that requires reports to be made to Treasury with respect to certain foreign financial accounts. Because this final rule addresses the scope of reportable accounts and financial interest, and revises the definition of signature authority and narrows the scope of individuals and entities subject to reporting and recordkeeping requirements, the final rule will reduce regulatory obligations overall.

The final rule will not affect a substantial number of small entities. The final rule applies to United States persons, a term that includes entities of all sizes, if they have reportable accounts under this rule. However, we expect that small entities will be less likely to have reportable foreign financial accounts or to have many such accounts unlike larger entities, which have a broader base of business operations.

In any event, the final rule will not have a significant economic impact on small entities. As explained above, the final rule revises an existing rule that requires reports to be made to Treasury with respect to certain foreign financial accounts. Filing the reports will require entities to transfer basic information that they will often have received on account statements from the foreign financial institution at which the account is opened and maintained. Those statements will provide the entity with the information about the account needed to file the FBAR. No special accounting or legal skills are necessary to transfer the basic information required to be reported, such as the name of the foreign financial institution, the type of account, and the account number, to the FBAR. Furthermore, the final rule continues a simplified reporting method for persons with a financial interest in 25 or more foreign financial accounts and also provides a similar simplified reporting method to persons with signature or other authority over 25 or more foreign financial accounts.

In the NPRM, FinCEN requested comments on the accuracy of the statement that the proposed rule would not have a significant economic impact on a substantial number of small

entities. FinCEN received no comments that directly challenged the accuracy of that statement.

#### V. Executive Order 12866

It has been determined that the final rule is a "significant regulatory action" for purposes of Executive Order 12866 (although not economically significant) and has been reviewed by the Office of Management and Budget.

#### VI. Paperwork Reduction Act Notices

The collection of information burden contained in this rule (31 CFR 1010.350) has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) (Paperwork Reduction Act) under control number (1506-0009). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

*Estimate Number of Affected Filing Individuals and Entities:* 400,000.

*Estimate Average Annual Burden Hours Per Affected Filer:* The estimated average burden associated with the recordkeeping requirement in this rule will vary depending on the number of reportable accounts. We estimate that the recordkeeping burden will range from five minutes to sixty minutes, and that the average burden will be thirty minutes. The estimated average burden associated with the reporting requirement (FBAR form completion) will also vary depending on the number of reportable accounts and whether the filer will be able to take advantage of the exceptions provided in this rule. We estimate that the average reporting burden will range from approximately twenty minutes to one hour and that the average reporting burden will be approximately 45 minutes. The reporting burden is reflected in the burden listed for completing TD-F 90-22.1 (*See* OMB Control Number 1506-0009/1545-2038). The burden associated with reporting a financial interest in or signature or other authority over a foreign financial account to the Commissioner of Internal Revenue is reflected in the burden for the appropriate income tax return or schedule.

*Estimated Total Annual Burden:* 500,000 hours.

FinCEN received one comment on the estimated number of filers. The commenter believed that the number of filers should be higher. The commenter stated that estimates of Americans living abroad may be as high as 5 million, and that approximately 2 million of those

Americans might be affected by the FBAR rules. The commenter did not provide a verifiable source or methodology for arriving at those estimates. As stated above, the rule contained in this document addresses the FBAR rules that have been in existence since 1972. FinCEN's estimate of the number of affected filing individuals and entities (400,000) is based on the number of FBARs annually filed in recent previous years.

One commenter noted that several of its clients had spent considerably more time than the NPRM estimated for complying with the FBAR requirement. FinCEN believes that changes made by the NPRM and incorporated in this document, such as addressing the scope of persons that are required to file reports of foreign financial accounts, specifying the types of reportable accounts, and providing relief in the form of exemptions for certain persons with signature or other authority over foreign financial accounts from filing reports, will assist filers in complying with the rule. Further, clarifications in this document regarding the scope of terms in the NPRM, such as reportable accounts and financial interest, as well as revisions to the definition of signature authority and the provision of truncated filing, will assist filers in complying with the rule. Accordingly, FinCEN has not increased the average estimated burden.

Finally, several commenters recommended that filers be allowed to file the FBAR electronically. As noted earlier in this document, FinCEN is in the process of modernizing its IT system and has plans to include the ability to file FBARs electronically.

#### VII. Unfunded Mandates Act of 1995 Statement

Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), Public Law 104-4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. FinCEN has determined that it is not required to prepare a written statement under section 202 and has concluded that on balance the proposals in the Notice of Proposed Rulemaking provide the most cost-effective and least burdensome

alternative to achieve the objectives of the rule.

#### List of Subjects in 31 CFR Part 1010

Administrative practice and procedure, Banks, Banking, Brokers, Currency, Foreign banking, Foreign currencies, Gambling, Investigations, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

#### Amendment

For the reasons set forth above in the preamble, 31 CFR part 1010, published October 26, 2010 (75 FR 65812), is amended as follows:

#### PART 1010—GENERAL PROVISIONS

■ 1. The authority citation for part 1010 continues to read as follows:

**Authority:** 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314, Pub. L. 107–56, 115 Stat. 307.

■ 2. Section 1010.350 is revised to read as follows:

#### § 1010.350 Reports of foreign financial accounts.

(a) *In general.* Each United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country shall report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 to be filed by such persons. The form prescribed under section 5314 is the Report of Foreign Bank and Financial Accounts (TD-F 90–22.1), or any successor form. See paragraphs (g)(1) and (g)(2) of this section for a special rule for persons with a financial interest in 25 or more accounts, or signature or other authority over 25 or more accounts.

(b) *United States person.* For purposes of this section, the term “United States person” means—

(1) A citizen of the United States;

(2) A resident of the United States. A resident of the United States is an individual who is a resident alien under 26 U.S.C. 7701(b) and the regulations thereunder but using the definition of “United States” provided in 31 CFR 1010.100(hhh) rather than the definition of “United States” in 26 CFR 301.7701(b)–1(c)(2)(ii); and

(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.

(c) *Types of reportable accounts.* For purposes of this section—

(1) *Bank account.* The term “bank account” means a savings deposit, demand deposit, checking, or any other account maintained with a person engaged in the business of banking.

(2) *Securities account.* The term “securities account” means an account with a person engaged in the business of buying, selling, holding or trading stock or other securities.

(3) *Other financial account.* The term “other financial account” means—

(i) An account with a person that is in the business of accepting deposits as a financial agency;

(ii) An account that is an insurance or annuity policy with a cash value;

(iii) An account with a person that acts as a broker or dealer for futures or options transactions in any commodity on or subject to the rules of a commodity exchange or association; or

(iv) An account with—

(A) *Mutual fund or similar pooled fund.* 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; or

(B) *Other investment fund.* [Reserved]

(4) *Exceptions for certain accounts.*

(i) An account of a department or agency of the United States, an Indian Tribe, or any State or any political subdivision of a State, or a wholly-owned entity, agency or instrumentality of any of the foregoing is not required to be reported. In addition, reporting is not required with respect to an account of an entity established under the laws of the United States, of an Indian Tribe, of any State, or of any political subdivision of any State, or under an intergovernmental compact between two or more States or Indian Tribes, that exercises governmental authority on behalf of the United States, an Indian Tribe, or any such State or political subdivision. For this purpose, an entity generally exercises governmental authority on behalf of the United States, an Indian Tribe, a State, or a political subdivision only if its authorities include one or more of the powers to tax, to exercise the power of eminent domain, or to exercise police powers with respect to matters within its jurisdiction.

(ii) An account of an international financial institution of which the United States government is a member is not required to be reported.

(iii) An account in an institution known as a “United States military banking facility” (or “United States

military finance facility”) operated by a United States financial institution designated by the United States Government to serve United States government installations abroad is not required to be reported even though the United States military banking facility is located in a foreign country.

(iv) Correspondent or nostro accounts that are maintained by banks and used solely for bank-to-bank settlements are not required to be reported.

(d) *Foreign country.* A foreign country includes all geographical areas located outside of the United States as defined in 31 CFR 1010(hhh).

(e) *Financial interest.* A financial interest in a bank, securities or other financial account in a foreign country means an interest described in this paragraph (e):

(1) *Owner of record or holder of legal title.* A United States person has a financial interest in each bank, securities or other financial account in a foreign country for which he is the owner of record or has legal title whether the account is maintained for his own benefit or for the benefit of others. If an account is maintained in the name of more than one person, each United States person in whose name the account is maintained has a financial interest in that account.

(2) *Other financial interest.* A United States person has a financial interest in each bank, securities or other financial account in a foreign country for which the owner of record or holder of legal title is—

(i) A person acting as an agent, nominee, attorney or in some other capacity on behalf of the United States person with respect to the account;

(ii) A corporation in which the United States person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares, a partnership in which the United States person owns directly or indirectly more than 50 percent of the interest in profits or capital, or any other entity (other than an entity in paragraphs (e)(2)(iii) through (iv) of this section) in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits;

(iii) A trust, if the United States person is the trust grantor and has an ownership interest in the trust for United States Federal tax purposes. See 26 U.S.C. 671–679 and the regulations thereunder to determine if a grantor has an ownership interest in the trust for the year; or

(iv) A trust in which the United States person either has a present beneficial interest in more than 50 percent of the

assets or from which such person receives more than 50 percent of the current income.

(3) *Anti-avoidance rule.* A United States person that causes an entity, including but not limited to a corporation, partnership, or trust, to be created for a purpose of evading this section shall have a financial interest in any bank, securities, or other financial account in a foreign country for which the entity is the owner of record or holder of legal title.

(f) *Signature or other authority*—(1) *In general.* Signature or other authority means 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.

(2) *Exceptions*—(i) An officer or employee of a bank that is examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Administration need not report that he has signature or other authority over a foreign financial account owned or maintained by the bank if the officer or employee has no financial interest in the account.

(ii) An officer or employee of a financial institution that is registered with and examined by the Securities and Exchange Commission or Commodity Futures Trading Commission need not report that he has signature or other authority over a foreign financial account owned or maintained by such financial institution if the officer or employee has no financial interest in the account.

(iii) An officer or employee of an Authorized Service Provider need not report that he has signature or other authority over a foreign financial account owned or maintained by an investment company that is registered with the Securities and Exchange Commission if the officer or employee has no financial interest in the account. “Authorized Service Provider” means an entity that is registered with and examined by the Securities and Exchange Commission and that provides services to an investment company registered under the Investment Company Act of 1940.

(iv) An officer or employee of an entity with a class of equity securities listed (or American depository receipts listed) on any United States national securities exchange need not report that he has signature or other authority over

a foreign financial account of such entity if the officer or employee has no financial interest in the account. An officer or employee of a United States subsidiary of a United States entity with a class of equity securities listed on a United States national securities exchange need not file a report concerning signature or other authority over a foreign financial account of the subsidiary if he has no financial interest in the account and the United States subsidiary is included in a consolidated report of the parent filed under this section.

(v) An officer or employee of an entity that has a class of equity securities registered (or American depository receipts in respect of equity securities registered) under section 12(g) of the Securities Exchange Act need not report that he has signature or other authority over the foreign financial accounts of such entity or if he has no financial interest in the accounts.

(g) *Special rules*—(1) *Financial interest in 25 or more foreign financial accounts.* A United States person having a financial interest in 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.

(2) *Signature or other authority over 25 or more foreign financial accounts.* A United States person having 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 report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.

(3) *Consolidated reports.* An entity that is a United States person and which owns directly or indirectly more than a 50 percent interest in one or more other entities required to report under this section will be permitted to file a consolidated report on behalf of itself and such other entities.

(4) *Participants and beneficiaries in certain retirement plans.* Participants and beneficiaries in retirement plans under sections 401(a), 403(a) or 403(b) of the Internal Revenue Code as well as owners and beneficiaries of individual retirement accounts under section 408 of the Internal Revenue Code or Roth IRAs under section 408A of the Internal Revenue Code are not required to file an FBAR with respect to a foreign financial account held by or on behalf of the retirement plan or IRA.

(5) *Certain trust beneficiaries.* A beneficiary of a trust described in paragraph (e)(2)(iv) of this section is not required to report the trust’s foreign financial accounts if the trust, trustee of the trust, or agent of the trust is a United States person that files a report under this section disclosing the trust’s foreign financial accounts.

Dated: February 16, 2011.

**James H. Freis, Jr.,**  
Director, Financial Crimes Enforcement  
Network.

[FR Doc. 2011–4048 Filed 2–23–11; 8:45 am]

**BILLING CODE 4810–02–P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 17 and 59

RIN 2900–AN57

#### Updating Fire Safety Standards

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule with request for comments.

**SUMMARY:** This document adopts as a final rule, with changes, the proposed rule to amend the Department of Veterans Affairs (VA) regulations concerning community residential care facilities, contract facilities for certain outpatient and residential services, and State home facilities. The final rule will clarify current regulations and update the standards for VA approval of such facilities, including standards for fire safety and heating and cooling systems. The final rule will help ensure the safety of veterans in the affected facilities. This document also implements and seeks comments regarding a new interim final sprinkler system requirement for certain facilities.

**DATES:** *Effective Date:* This final rule is effective March 28, 2011.

*Comment Date:* Comments on the interim final amendments to 38 CFR 59.130 only must be received on or before April 25, 2011.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this rule as of March 28, 2011.

**ADDRESSES:** Written comments may be submitted through <http://www.regulations.gov>; by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to “RIN 2900–AN57—Updating Fire Safety

# Offshore Voluntary Disclosure— The Next Generation

By Dennis Brager

Dennis Brager examines the next generation of partial tax amnesty for taxpayers who have failed to meet the myriad of disclosure requirements imposed on owners of foreign assets: Offshore Voluntary Disclosure Initiative (OVDI).

In February of 2011 the IRS announced a partial tax amnesty for owners of offshore financial accounts, and others who have failed to meet the myriad of disclosure requirements imposed on owners of foreign assets. This new partial tax amnesty dubbed the “Offshore Voluntary Disclosure Initiative” (OVDI) is the successor to the previous partial tax amnesty known as the “Offshore Voluntary Disclosure Program (OVDP), and is designed to be more onerous than the OVDP.

Before discussing the nuts and bolts of the OVDI it is useful to examine how we came to this point. Over the years an ever expanding reporting regime has been imposed on owners of offshore investments. This has been due to a perception that the use of foreign accounts is a prevalent means of tax evasion. In addition, law enforcement agencies believe that the use of foreign accounts disguises a host of non-tax crimes including money laundering, drug smuggling, and international terrorism.

The failure to file the appropriate reporting forms can result in substantial if not ruinous penalties even if there are no tax consequences. These penalties include:

- A penalty for failure to file Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*. Generally, U.S. persons are required to report transactions involving foreign trusts including the creation of foreign trusts, transfers of property to a foreign trust, and receipt of distributions from a foreign trust.<sup>1</sup> The penalty for failing to file, or for filing an incomplete form is the greater of \$10,000 or 35 percent of the gross reportable amount.<sup>2</sup>
- A penalty for failure to report the receipt of a gift or bequest of more than \$100,000 from a non-resident alien individual or a foreign estate.<sup>3</sup> The penalty is five percent of the gift per month, up to a maximum penalty of 25 percent of the gift.<sup>4</sup>
- A penalty for failing to file Form 3520-A, *Information Return of Foreign Trust With a U.S. Owner*. This form reports ownership interests in foreign trusts by United States persons with various interests in and powers over those trusts.<sup>5</sup> The penalty for failing to file, or for filing an incomplete return, is five percent of the gross value of trust assets owned by the United States person.<sup>6</sup>
- A penalty for failing to file Form 5471, *Information Return of U.S. Persons with Respect to Certain Foreign Corporations*. This form is required to be filed by certain United States persons who are officers, directors or shareholders in certain foreign corporations.<sup>7</sup> The penalty for failing to file each

---

**Dennis Brager** is a former IRS senior trial attorney, a California State Bar Certified Tax Specialist, and founder of Brager Tax Law Group, A P.C.—a nationally recognized tax controversy firm in Los Angeles, California.

one of these information returns is \$10,000, with an additional \$10,000 added for each month the failure continues beginning 90 days after the taxpayer is notified of the delinquency, up to a maximum of \$50,000 per return.<sup>8</sup>

- A penalty for failing to file Form 5472, *Information Return of a 25 percent Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business*. Taxpayers may be required to report transactions between a 25 percent foreign-owned domestic corporation or a foreign corporation engaged in a trade or business in the United States and a related party.<sup>9</sup> The penalty for failing to file each one of these information returns, or to keep certain records regarding reportable transactions, is \$10,000, plus an additional \$10,000 per month for each month the failure continues beginning 90 days after the taxpayer is notified of the delinquency.<sup>10</sup> There is no maximum additional penalty.

- A penalty for failing to file Form 8865, *Return of U.S. Persons With Respect to Certain Foreign Partnerships*. United States persons with certain interests in foreign partnerships use this form to report interests in and transactions of the foreign partnerships, transfers of property to the foreign partnerships, and acquisitions, dispositions and changes in foreign partnership interests under Code Secs. 6038, 6038B, and 6046A. Penalties include \$10,000 for failure to file each return, with an additional \$10,000 added for each month the failure continues beginning 90 days after the taxpayer is notified of the delinquency, up to a maximum of \$50,000 per return, and ten percent of the value of any transferred property that is not reported, subject to a \$100,000 limit.<sup>11</sup>

The big kahuna is the penalty for the failure to file Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts* (FBAR). Any U.S. citizen or resident who has signatory authority over, or a financial interest in, a financial account located in another country is required to file an FBAR if the balance in the account was more than \$10,000 at any time during the calendar year. The willful failure to do so

is a felony punishable by a fine of \$250,000 or five years in jail or both.<sup>12</sup> The civil penalty for the willful failure to file the FBAR is the *greater* of \$100,000 or 50 percent of the account balance; and the penalty can be imposed on an annual basis, which can easily exceed the amount in the account.<sup>13</sup> However, if there is reasonable cause for the failure to file then no penalty is imposed.<sup>14</sup>

Even a negligent failure to file an FBAR is subject to a civil penalty of \$10,000 per violation.<sup>15</sup> Of course if any of these foreign accounts gener-

ate income that income must be reported on the relevant income tax return. A willful failure to report the income can be treated as the evasion of tax which is felony punishable by a fine of as much as \$100,000 or five years in jail, or both.<sup>16</sup>

**The failure to file the appropriate reporting forms can result in substantial if not ruinous penalties even if there are no tax consequences.**

On the civil side the willful failure to report could constitute tax fraud with a penalty of 75 percent of the tax evaded.<sup>17</sup>

It is against this dark background which the OVDI must be considered. Under OVDI the vast bulk of these potential penalties, and some additional ones will disappear. OVDI is not, however a free lunch. The guidelines for the OVDI are set forth in a series of Frequently Asked Questions published on the IRS Web site in early February of 2011.<sup>18</sup> A person who enters the OVDI program must agree, *inter alia*, to the following:

- The filing of amended income tax returns for the years 2003 through 2010<sup>19</sup>
- Payment of all taxes due on the returns, plus interest<sup>20</sup>
- An accuracy related penalty of 20 percent of the tax due pursuant to Code Sec. 6662, and if applicable, the failure to file and failure to pay penalties under Code Sec. 6651(a)(1) and (a)(2)
- A “miscellaneous Title 26 offshore penalty” equal to 25 percent of the highest aggregate balance in foreign bank accounts/entities or the value of foreign assets during the period covered by the voluntary disclosure<sup>21</sup>

The 25-percent penalty is reduced in several narrow circumstances. If the highest aggregate offshore balance does not exceed \$75,000 at any time during the OVDI disclosure period then the penalty will be

12.5 percent of the highest aggregate balance.<sup>22</sup> All other terms of the OVDI remain unchanged.

A five-percent penalty is available in two very limited situations.<sup>23</sup> To qualify for the first category the taxpayer must (a) not have opened or caused the account to be opened (unless the bank required that a new account be opened, rather than allowing a change in ownership of an existing account, upon the death of the owner of the account); (b) have exercised minimal, infrequent contact with the account (e.g., to request the account balance or update accountholder information such as a change in address, contact person, or e-mail address); (c) have, except for a withdrawal closing the account and transferring the funds to an account in the United States, not withdrawn more than \$1,000 from the account in any year covered by the voluntary disclosure; and (d) be able to establish that all applicable U.S. taxes have been paid on funds deposited to the account (*i.e.*, only account earnings have escaped U.S. taxation). This category is intended to apply to persons who inherit their foreign bank accounts. It appears to address some of the criticisms leveled at the five-percent penalty established under the OVDP.<sup>24</sup>

Item (d) may be a sticking point if the owner of the foreign account was a U.S. resident or citizen at any time during the past 20 years. In cases where funds were deposited before January 1, 1991, the presumption is that they were properly taxed.<sup>25</sup> However for deposits made after that date it is up to the taxpayer to prove the funds had been taxed, or were not subject to U.S. tax. Depending on the degree of proof required it could be difficult to establish the source of deposits into the foreign account. This is especially true because it is highly unlikely that foreign bank records will be available going all the way back to 1991.

The second category of taxpayer who will qualify for the five-percent penalty is a person who was a foreign resident, and was "unaware" he was a U.S. citizen.<sup>26</sup> It is hard to understand the IRS' reasoning in including this category. A taxpayer who did not know he was a U.S. citizen would presumably have reasonable cause for not filing the FBAR, and would not be subject to any penalties.

The OVDI does not apply to those taxpayers who reported all of their taxable income, but simply failed to file the FBAR, or one of the foreign information returns such as the Form 5471, or Form 3520, and owed no tax.<sup>27</sup> This includes taxpayers who had an FBAR requirement solely as a result of being a signatory on a foreign financial account, but did not have a financial interest in the account.<sup>28</sup> These taxpayers are to follow a separate procedure which involves the filing of delinquent forms by August 31, 2011. These taxpayers will not incur any penalties.<sup>29</sup>

The penalty base for the miscellaneous offshore penalty is not limited to foreign financial accounts required to be reported on an FBAR. Instead the 25-percent (or 12.5-percent or five-percent) penalty applies to all of the taxpayer's offshore holdings that are related in any way to "tax noncompliance." The penalty applies to all assets directly owned by the taxpayer, including tangible assets such as real estate or art; and intangible assets such as patents or stock or other interests in a U.S. or foreign business. If the assets are indirectly held or controlled by the taxpayer through an entity, the penalty may be applied to the taxpayer's interest in the entity.<sup>30</sup>

Tax noncompliance is defined to include a failure to report income from the assets, as well as failure to pay U.S. tax that was due with respect to the funds used to acquire the asset.<sup>31</sup> For example, a taxpayer owns real estate in Israel worth \$1 million. If the taxpayer rents it out, and fails to report the income the value of the real estate will be included in the penalty base despite the fact that there was no FBAR filing requirement for the real estate.<sup>32</sup> The result is unchanged even

though as a result of foreign tax credits there would have been no tax due had the income been reported.<sup>33</sup> If the real estate generated no income, but was acquired with assets that improperly escaped U.S. taxation the real estate would also be included in the penalty base.<sup>34</sup>

A foreign account over which the taxpayer has only signature authority would not be included in the penalty base since there is no tax noncompliance because there was no income to report.<sup>35</sup> However, there is no such thing as being a "little bit pregnant." FAQ 33 states there is no "*de minimis*" amount of unreported income which will provide an exception

**The big kahuna is the penalty for the failure to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR).**

to the 25-percent penalty. Thus a taxpayer with a \$100,000 account earning one percent can expect to pay a \$25,000 penalty even though both the income earned, and the tax due would be minimal.

Taxpayers who wish to enter the OVDI must submit all necessary documents to the IRS no later than August 31, 2011.<sup>36</sup> These documents are detailed in FAQ 25, and also on the IRS Web site at [www.irs.gov/businesses/international/article/0,,id=235690,00.html](http://www.irs.gov/businesses/international/article/0,,id=235690,00.html). In general the package must include all of the following:

- Copies of previously filed original (and, if applicable, previously filed amended) federal income tax returns for tax years covered by the voluntary disclosure
- Amended federal income tax returns with applicable schedules detailing the amount and type of previously unreported income from the account or entity
- A completed “Foreign Account or Asset Statement” for each previously undisclosed foreign account or asset during the voluntary disclosure period (available on the IRS Web site)
- For taxpayers disclosing offshore financial accounts with an aggregate highest account balance in any year of \$1 million or more, a completed “Foreign Financial Institution Statement” for each foreign financial institution with which the taxpayer had undisclosed accounts or transactions during the voluntary disclosure period (available on the IRS Web site)
- “Taxpayer Account Summary With Penalty Calculation” (available at on the IRS Web site)
- A check in full payment of the total tax, interest and all applicable penalties<sup>37</sup>
- For taxpayers disclosing offshore financial accounts with an aggregate highest account balance in any year of \$500,000 or more, copies of offshore financial account statements reflecting all account activity for each of the tax years covered by the voluntary disclosure
- For those taxpayers disclosing offshore financial accounts with an aggregate highest account balance of less than \$500,000, copies of offshore financial account statements reflecting all account activity for each of the tax years covered by the

**Practitioners, however, should advise their clients before they submit OVDI applications that there appears to be little wiggle room.**

voluntary disclosure must be readily available upon request

- Waivers extending the time for the IRS to assess Title 26 tax, interest and penalty as well as FBAR penalties

Once the package has been submitted a civil examiner will review the submission to “certify the accuracy and completeness” of the disclosure.<sup>38</sup> Generally there will be no audit of the tax return.<sup>39</sup>

The IRS is not predicting how long the process of certification will take,<sup>40</sup> and practitioners should expect questions regarding the submission.<sup>41</sup>

Prior to submitting documents or information it would be wise to take advantage of the IRS pre-

clearance process. Pre-clearance is accomplished through Criminal Investigation, and allows for taxpayers to make certain that they are likely to be eligible for the OVDI.<sup>42</sup> The pre-clearance process is important because not all taxpayers are eligible for the OVDI. It could be a disaster to submit detailed information to the IRS, and waive various privileges including Fifth Amendment rights only to discover that the IRS is unwilling to proceed under the OVDI. If the IRS has initiated a civil examination of a taxpayer he is not eligible to participate even if the audit has nothing to do with foreign income. Taxpayers under criminal investigation by the IRS are also not eligible to participate.<sup>43</sup> If the IRS obtains information under a John Doe summons regarding the taxpayer’s noncompliance he may also be ineligible for the OVDI.<sup>44</sup>

There are many more details to the OVDI which can be ascertained only by a complete reading of the entire set of 53 FAQs, and by the time you read this article the IRS may have issued additional clarifications and guidance.

Practitioners, however, should advise their clients before they submit OVDI applications that there appears to be little wiggle room. Clients who would clearly qualify for reduced penalties because their conduct was not willful may not wish to enter the OVDI because the IRS has made it clear that it will not consider any reasonable cause or willfulness arguments.<sup>45</sup> Thus it is entirely possible that making a disclosure under OVDI will result in higher penalties than if no disclosure had been made. This is especially so because of the inclusion of non-financial assets in the penalty base.

On the other hand because reasonable cause, and willfulness determinations are inherently factual, even practitioners who have had experience with dozens and dozens of voluntary disclosures will be hard pressed in some cases to predict with the certainty that their clients would like whether the failure

to disclose will result in the imposition of draconian penalties, both civil and criminal. It is this uncertainty, and the very high cost, both financial and emotional, of the IRS discovering an undisclosed foreign account which will make OVDI the lesser of the two evils for some clients.

## ENDNOTES

- <sup>1</sup> Code Sec. 6048.  
<sup>2</sup> Code Sec. 6677(a)(2).  
<sup>3</sup> See Code Sec. 6039F, and instructions to Form 3520.  
<sup>4</sup> Code Sec. 6039F(c).  
<sup>5</sup> See Code Sec. 6048(b).  
<sup>6</sup> Code Sec. 6677(b).  
<sup>7</sup> Code Secs. 6035, 6038 and 6046.  
<sup>8</sup> Code Sec. 6679.  
<sup>9</sup> Code Secs. 6038A and 6038C.  
<sup>10</sup> Code Secs. 6038A(d) and 6038C(c).  
<sup>11</sup> Code Secs. 6038(b), 6038B(c) and 6679.  
<sup>12</sup> 31 USC §5322. The penalties are imposed pursuant to the Bank Secrecy Act, codified as part of Title 31 of the U.S. Code, and not Title 26, the Internal Revenue Code.  
<sup>13</sup> 31 USC §5321(a)(5)(C).  
<sup>14</sup> 31 USC §5321(a)(5)(B)(ii).  
<sup>15</sup> 31 USC §5321(a)(5)(A). This penalty applies only to violations occurring after Oct. 22, 2004. See IRM 4.26.16.4.4 (July 1, 2008).  
<sup>16</sup> Code Sec. 7201.  
<sup>17</sup> Code Sec. 6673.  
<sup>18</sup> All references to FAQs are to the 2011 Offshore Voluntary Disclosure Initiative Frequently Asked Questions and Answers as published on the IRS' Web site at [www.irs.gov/businesses/international/article/0,,id=235699,00.html](http://www.irs.gov/businesses/international/article/0,,id=235699,00.html) as of March 1, 2011. If past experience is any guide there will be a series of additions and tweaks to these FAQs as time goes on.  
<sup>19</sup> Generally the OVDI framework applies to the 2003 to 2010 tax years, however, if in any year the foreign accounts, or foreign entities are disclosed then those years are not part of the OVDI disclosure period. FAQ 9.  
<sup>20</sup> Many taxpayers and their advisors will be shocked to learn that foreign mutual funds are generally classified as Passive Foreign Investment Companies (PFICs) subject to taxation even if no distributions are received. See Code Sec. 1291 *et. seq.* The IRS is allowing for a simplified mark to mark method of calculating the tax due on PFICs under the OVDI. FAQ 10.  
<sup>21</sup> FAQ 7.  
<sup>22</sup> FAQ 53.  
<sup>23</sup> FAQ 52.  
<sup>24</sup> For example, most owners of inherited accounts could not qualify for the five-percent penalty under the OVDI because once the funds were inherited a new foreign account was opened to receive the proceeds of the decedent's foreign account. Expect issues to arise under the OVDI as to whether the bank "required" the opening of the new account, or was done at the request of the estate administrator.  
<sup>25</sup> FAQ 52.  
<sup>26</sup> The FAQ makes clear that it does not apply to someone who is aware he is a U.S. citizen, but fails to inquire into his U.S. reporting obligations.  
<sup>27</sup> FAQs 17 and 18.  
<sup>28</sup> FAQ 17.  
<sup>29</sup> FAQs 17 and 18.  
<sup>30</sup> FAQ 35.  
<sup>31</sup> *Id.*  
<sup>32</sup> See FAQ 36.  
<sup>33</sup> See FAQ 36: "Tax noncompliance includes failure to report income from the assets, as well as failure to pay U.S. tax that was due with respect to the funds used to acquire the asset." (Emphasis supplied.) See also FAQ 17 "... if you reported and paid tax on all taxable income but did not file FBARs, do not use the voluntary disclosure process." (Emphasis supplied.) The OVDI contained similar verbiage; many practitioners read the word "and" in the disjunctive. The IRS did not.  
<sup>34</sup> *Id.*  
<sup>35</sup> FAQ 38.  
<sup>36</sup> FAQ 1.  
<sup>37</sup> Taxpayers who cannot afford to pay the entire amount are to submit IRS financial statements on Form 433-A and/or Form 433-B. FAQ 35. It is unclear whether in appropriate cases the IRS will enter into an Offer in Compromise or whether payment arrangements will be limited to installment agreements.  
<sup>38</sup> FAQ 27.  
<sup>39</sup> *Id.*  
<sup>40</sup> FAQ 28.  
<sup>41</sup> See FAQ 27.  
<sup>42</sup> FAQ 23.  
<sup>43</sup> FAQ 14.  
<sup>44</sup> FAQ 21.  
<sup>45</sup> FAQ 50.

This article is reprinted with the publisher's permission from the TAXES—THE TAX MAGAZINE, a monthly journal published by CCH, a Wolters Kluwer business. Copying or distribution without the publisher's permission is prohibited. To subscribe to the TAXES—THE TAX MAGAZINE® or other CCH Journals please call 800-449-8114 or visit [www.CCHGroup.com](http://www.CCHGroup.com). All views expressed in the articles and columns are those of the author and not necessarily those of CCH.