BRYAN CAVE
A Broader Perspective
Bulletin
Private Client Group

To: Our Clients and Friends March 4, 2011

New FBAR Regulations Significantly Expand Reporting

In late February the Financial Crimes Enforcement Network, a bureau of the United States Treasury, amended regulations that govern the reporting by US persons of account relationships with foreign financial institutions and certain other entities (reporting is made on a form commonly called an "FBAR"). The most controversial change is a significant expansion of the circumstances in which an entity must file an FBAR.

The statute under which the regulations have been issued authorizes the Secretary of the Treasury to require reporting by any "resident or citizen of the United States, or a person in, and doing business in, the United States". Thus under the statute reporting is only required of an entity if it is "in, and doing business in, the United States".

The new regulations abandon entirely the statutory "doing business in" qualifier. Instead, reporting is required by all "United States persons", which is defined to include "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, [and certain other US-related jurisdictions]". So starting with calendar year 2010 for example a US limited liability company ("LLC"), or a trust formed under US law, is required to file an annual FBAR even if the only connection the LLC or trust (or its owners) has with the United States is that the entity was formed under US law. The FBARs for 2010 are due 30th June 2011.

Further aspects of the new regulations are worth noting. First, the new regulations specifically require reporting not only of bank accounts, certificates of deposit, brokerage and other security accounts but also of foreign issued (i) life insurance and annuity policies with a cash value, (ii) mutual fund or similar pooled fund investments if shares are available to the general public that have a regular net asset value determination or regular redemption, and (iii) certain accounts with commodity broker/dealers.

Second, the new regulations clarify that a US citizen or resident who is taxed as the grantor of a trust for US income tax purposes is treated as having a financial interest in all relationships of the trust. Unfortunately, however, the new regulations still fail to exempt a US citizen or resident beneficiary who has a more than 50% income or capital "present beneficial interest" in a trust that is a "grantor"

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trust to a foreign person from being treated as having a financial interest in the relationships of such trust.

Third, contrary to various public statements by IRS officials in recent years, the "supplementary information" provided introducing the final regulations states with respect to trust beneficiaries:

(i) "FinCEN does not intend to include a remainder interest within the scope of the term "present beneficial interest"", and

(ii) "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".

Fourth, the longstanding exemption from detailed reporting by a person with a financial interest in 25 or more accounts is made applicable as well to a person with only signature authority over 25 or more accounts. However in the latter case the filer is required to provide not only personal information but also information regarding those with a financial interest in the account.

Certain categories of filers who have not yet complied with these FBAR rules may still do so without penalties either under specific Notices issued in 2010 extending the due date for certain filings to 30th June 2011 or under general penalty exemptions announced under the IRS's most recent "offshore voluntary disclosure" initiative for certain filings made by 31st August 2011. All filings for 2010, however, are due by 30th June 2011 with no extension available.

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