

# FBAR—Where We Are and How We Got There

*By Eschrat Rahimi-Laridjani*

Eschrat Rahimi-Laridjani undertakes a thorough review of the requirements to report foreign bank and financial accounts.

In recent months there has been a heightened focus on Form TD F 90-22.1, the Report of Foreign Bank and Financial Accounts (FBAR) among taxpayers and tax practitioners who previously may have been relatively unfamiliar with the details of foreign bank and financial account reporting. The issuance of a revised FBAR form and instructions in October 2008, the ever increasing enforcement pressure with respect to offshore activity generally, the specter of severe civil and criminal penalties for FBAR violations, and pronouncements earlier this year by the IRS dramatically expanding the universe of accounts potentially subject to these reporting requirements have sharply increased interest in, and attention paid to, the FBAR. This article aims to familiarize the reader with the current FBAR form and instructions as well as with their history and to highlight some of the areas of greatest uncertainty.

## **History of the FBAR**

The requirement to report foreign bank and financial accounts dates back to the Currency and Foreign Transactions Reporting Act (“Bank Secrecy Act”) enacted in 1970.<sup>1</sup> The overall purpose of the statutory framework of which the FBAR requirement forms part is to require records and reports with “a high degree of usefulness” that can assist various government agencies in criminal, tax or regulatory investigations or proceedings and in the conduct of intelligence or counterintelligence activities, including anti-terrorist activities.<sup>2</sup> The original aim of the FBAR thus was to aid the U.S. Department of the Treasury in combating money laundering involving international criminal

networks, without, as the statute itself states, “burdening unreasonably persons who legitimately engage in international financial transactions.”<sup>3</sup> In keeping with the focus on money laundering, enforcement authority for the FBAR was delegated to the director of the Financial Crimes Enforcement Network (“FinCEN”), a government-wide financial intelligence and analysis network established within the Treasury.<sup>4</sup>

In 2003, FinCEN redelegated FBAR-related enforcement authority to the IRS.<sup>5</sup> This redelegation occurred in the context of the IRS’s investigations into offshore bank payment cards and its Offshore Voluntary Compliance Initiative<sup>6</sup> and represented a significant step in adapting the FBAR from a tool to combat money laundering to a weapon in the IRS’s international tax enforcement arsenal. Granting enforcement authority to the IRS was seen as a “natural fit,” in particular since the FBAR applies to individuals and is closely related to questions about foreign bank and financial accounts on the individual, trust, estate, tax-exempt, partnership and corporate income tax return forms.<sup>7</sup> It is important to note, however, that unlike tax return information, FBARs can and are shared among government agencies.<sup>8</sup>

The current political climate is marked by the U.S. government’s increased efforts to crack down on offshore tax evasion, the controversy surrounding bank secrecy in general and UBS in particular,<sup>9</sup> and various proposals by the Obama Administration and members of Congress aimed at combating offshore tax avoidance and evasion.<sup>10</sup> Some of these proposals relate directly to existing FBAR requirements.<sup>11</sup> For example, the Obama Administration’s fiscal year 2010 budget proposal (“Green Book”) includes a provision that would require individual taxpayers to provide the information required by the FBAR on their individual income tax returns in addition to filing the

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FBAR itself.<sup>12</sup> Failure to file the FBAR would remain subject to FBAR penalties and failure to disclose the same information on the tax return could be subject to additional penalties under the Internal Revenue Code.<sup>13</sup> In this environment, taxpayers and tax practitioners have become increasingly sensitive to FBAR requirements that were not always fully understood or complied with in the past.<sup>14</sup>

At the same time, rather than providing clarity as to the scope of the reporting requirements, pronouncements by the IRS at the height of this year's FBAR filing season in June have created increased uncertainty as to what accounts and persons are subject to these requirements. Before focusing on some of the controversies surrounding the FBAR, including whether offshore hedge funds and private equity funds constitute foreign accounts for these purposes, this article will outline the basic statutory and regulatory framework underlying the FBAR.

## **Basic Statutory Requirements**

The statute provides that the Treasury "shall require a resident or citizen of the United States or a person in, and doing business in, the United States to keep records, file reports, or 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."<sup>15</sup> Financial agency is defined broadly to include financial institutions, bailees, depository trustees, agents or other persons acting in a similar way related to money, credit, securities, gold or transactions involving the foregoing.<sup>16</sup> "Financial institution" is also defined very broadly for this purpose and includes not only commercial banks, trust companies, private bankers and credit unions but also brokers, securities and commodities dealers, investment bankers, investment companies, dealers in precious metals, stones and jewelry and casinos.<sup>17</sup> These definitions apply not only with respect to the FBAR but also with respect to other reporting and recordkeeping requirements under the Bank Secrecy Act.

The statute prescribes that the FBAR shall require, in the manner and to the extent prescribed, (1) the identity and address of participants in a transaction or relationship; (2) the legal capacity in which the participant is acting; (3) the identity of the real parties in interest; and (4) a description of the transaction.<sup>18</sup> The Treasury is granted discretion to determine, among other things, the magnitude of transactions to be reported on the FBAR, the kinds of

transactions subject to or exempt from the requirement, and reasonable categories of persons subject to or exempt from the requirement.<sup>19</sup>

Finally the statute establishes maximum civil and criminal penalties for failing to comply with the FBAR requirements<sup>20</sup> and a six-year period during which the Treasury can assess civil penalties.<sup>21</sup> Civil penalties for failure to file the FBAR were increased significantly as part of the American Jobs Creation Act of 2004.<sup>22</sup> Subject to a reasonable cause exception, the maximum penalty for each nonwillful violation of an FBAR requirement is \$10,000.<sup>23</sup> The maximum civil penalty for a willful violation of an FBAR requirement (such as willful failure to file, willfully filing an incorrect FBAR or willful failure to keep required records) is the greater of (1) \$100,000 and (2) 50 percent of the amount of the transaction at issue or, in case of failure to report an account, the balance in the account.<sup>24</sup> The Green Book proposes a rebuttable presumption applicable to civil administrative or judicial proceedings providing that a failure to report a financial interest in an account with a balance of more than \$200,000 held with a nonqualified intermediary is willful.<sup>25</sup> In cases of negligent failure to comply with the FBAR requirements, a penalty of \$500 per failure can be imposed, subject to an additional civil penalty of up to \$50,000 in cases of negligent patterns of activity.<sup>26</sup>

Willful violation of the FBAR requirements can also be punished criminally by a fine of up to \$250,000 and/or imprisonment of up to five years.<sup>27</sup> These criminal penalties can be increased to a maximum fine of \$500,000 and/or imprisonment of up to 10 years in cases where the willful violation of the FBAR rules occurs in connection with a violation of another law of the United States or as part of certain patterns of illegal activity.<sup>28</sup> Both civil and criminal penalties can be imposed for the same violation.<sup>29</sup>

## **The Regulations**

The Treasury has promulgated regulations that require "each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country" to report on such account annually and to "provide such information as shall be specified in a reporting form prescribed by the Secretary."<sup>30</sup> The regulations relieve persons with a financial interest in 25 or more foreign accounts from having to report detailed information annually. Instead, they must report only that

they own 25 or more accounts and must provide further details only upon request by the Treasury.<sup>31</sup> Records of accounts reported on the FBAR (including account holder's name, account number, name and address of foreign bank, type of account and maximum value of each account during the reporting period) generally must be retained for five years.<sup>32</sup>

Following the statutory authorization to prescribe the magnitude of transactions subject to the FBAR requirement, the Treasury has limited the obligation to file an FBAR to persons whose foreign accounts, in the aggregate, have a value in excess of \$10,000 at any time during the reporting period.<sup>33</sup> FBARs must be received by the IRS no later than June 30 of each calendar year with respect to foreign financial accounts with aggregate balances exceeding the threshold at any time during the preceding calendar year.<sup>34</sup>

The regulations authorize the Treasury to assess civil and criminal penalties.<sup>35</sup> They further provide that any person who knowingly makes a false, fictitious or fraudulent statement on an FBAR may be fined up to \$10,000 or be imprisoned up to five years, or both.<sup>36</sup>

The civil and criminal penalties for FBAR violations are draconian, particularly since they, in principle, apply per violation. Thus, a failure to file an FBAR with respect to an account and a failure to maintain required records with respect to the same account constitute two violations that are each potentially subject to the maximum FBAR penalties. Multiple penalties can also be imposed with respect to a single account that has multiple owners. Thus, maximum FBAR penalties with respect to an account can easily exceed the maximum balance in that account for the reporting year. The IRS has taken the position, however, that multiple penalties or the assertion of separate penalties for multiple violations with respect to a single FBAR should be limited to "the most egregious cases."<sup>37</sup> More generally, the IRS has taken the position that the purpose of the civil penalties is to promote compliance with the FBAR reporting and recordkeeping requirements<sup>38</sup> and has granted examiners discretion to impose lower or no penalties depending upon the circumstances.<sup>39</sup> While these statements provide some comfort, nobody, especially in the current enforcement environment, will want to rely on the mercy of an examiner.

## **The 2008 Form and Instructions**

The statute and regulations provide only limited guidance on who must file the FBAR and what types of

accounts are subject to the requirement. The regulations do, however, require that persons within the jurisdiction of the United States provide "such information as shall be specified in the reporting form" issued by the Treasury. The form itself and its instructions therefore are an important official source of guidance on the scope of the reporting requirement. Additional information can be found on the IRS's Web site, but statements on the Web site do not have the force of law and should not be considered official guidance.<sup>40</sup>

In October 2008 the IRS issued a revised FBAR form and instructions. The requirement to file the FBAR turns on five key concepts:

- (1) It applies to U.S. persons
- (2) with a financial interest in or signature or other authority over
- (3) one or more financial accounts
- (4) located in a foreign country
- (5) with an aggregate value in excess of \$10,000.

In the following sections, this article will address each of these key concepts and summarize some of the uncertainties and controversies surrounding them.

## **U.S. Persons**

The first important adjustment a tax practitioner working with the FBAR must make relates to the definition of "U.S. person." Even though the IRS administers the FBAR, the definition of U.S. person set forth in Code Sec. 7701(a)(30) does not apply. Instead, U.S. person is defined as "a citizen or resident of the United States, or a person in and doing business in the United States."<sup>41</sup> Person for this purpose includes an entity that is disregarded from its sole owner for U.S. federal income tax purposes.<sup>42</sup>

While it is simple to determine whether a person is a U.S. citizen, it is already more difficult to determine whether a person is a U.S. resident. The IRS takes the view that "resident" means permanent resident, *i.e.*, "someone who is living in the United States and not planning to permanently leave the United States."<sup>43</sup> While "resident" for this purpose is not coterminous with the definition of resident alien in Code Sec. 7701(b),<sup>44</sup> the IRS does not treat an individual as a resident for FBAR purposes if the individual can demonstrate that he/she (1) is not a green card holder, (2) does not satisfy the substantial presence test of Code Sec. 7701(b)(3), and (3) has not elected to be treated as a resident alien under Code Sec. 7701(b)(4).<sup>45</sup> Even with this safe harbor uncertainties remain, for example, with respect to individuals who live outside the United States for an indefinite period but nonetheless hold a green card.<sup>46</sup> Persons who

are temporarily in the United States, however, such as foreign artists or athletes or persons visiting the United States to manage personal investments, are not considered residents.<sup>47</sup>

The greatest uncertainty with respect to the definition of U.S. person relates to the category of “persons in and doing business in the United States.”<sup>48</sup> While this formulation is used in the statute, it did not appear in pre-2008 instructions to the FBAR. The current FBAR instructions explain that this language encompasses U.S. branches of foreign entities doing business in the United States,<sup>49</sup> but further guidance is limited to statements on the IRS’s Web site indicating that this category requires a facts and circumstances analysis and is intended to cover persons conducting business in the United States on a regular and continuous basis.<sup>50</sup>

Given the backdrop of severe penalties for failure to file FBARs, changes to the definition of U.S. person triggered questions and comments. In response, the IRS announced that the pre-October 2008 definition of U.S. person would apply with respect to FBARs due on June 30, 2009, and that it would issue additional guidance with respect to FBARs due in subsequent years.<sup>51</sup> Under the old definition, a U.S. person was a citizen or resident of the United States, a domestic partnership, a domestic corporation or a domestic estate or trust.<sup>52</sup> In the announcement, the IRS invited comments by August 31, 2009, regarding the October 2008 FBAR form and instructions.

### **Financial Interest in or Signature or Other Authority over Certain Accounts**

A U.S. person is only required to file an FBAR if it has “a financial interest in or signature or other authority over” a foreign financial account. “Financial interest” and “signature or other authority” are defined broadly. As a result, it is common that multiple U.S. persons will be required to file an FBAR with respect to the same account.

#### ***Financial Interest***

“Financial interest” is defined in the instructions to the FBAR as an interest (1) as legal or record owner of an account (whether or not the account is maintained for the legal owner’s benefit or for the benefit of a non-U.S. person); (2) in an account for which the legal or record owner is (a) acting as a nominee, agent or otherwise on behalf of the U.S. person or (b) a corporation, partnership or trust in which the U.S. person owns more than 50 percent by vote or value (in the case of a corporation), 50 percent of capital or profits (in the case of a partnership) or has a more than 50 percent current

beneficial interest in the assets or receives more than 50 percent of current income of a trust; and (3) in an account legally owned by a trust, or person acting on behalf of a trust, established by the U.S. person and for which a trust protector has been appointed.<sup>53</sup>

Since a financial interest includes an interest in a foreign account held through a majority-owned U.S. corporation, partnership or trust or through a disregarded entity, duplicate filings at both the individual and entity levels are required. Consolidated reporting to avoid duplicative filings is permitted for corporate parents and their direct or indirect more than 50 percent controlled subsidiary corporations.<sup>54</sup> Commentators have requested that consolidated reporting be made more widely available, including with respect to limited partnerships and limited liability companies owned by corporations and with respect to groups that are not headed by a corporation.<sup>55</sup>

#### ***Signature or Other Authority over Certain Accounts***

While the definition of financial interest itself already gives rise to the possibility of multiple filings, even greater numbers of U.S. persons are swept into the FBAR net on the basis that they have “signature or other authority” over a foreign account.

Pursuant to the instructions to the FBAR, a person has signature or other authority over an account if it can control the disposition of money or other property in the account by delivering a document bearing its signature to the person maintaining the account or otherwise exercises comparable power by direct or indirect, oral or written communication with the person maintaining the account.<sup>56</sup> It is important to note that, in the absence of a power of disposition, a power to invest the assets in an account is not considered signature or other authority for these purposes.<sup>57</sup>

#### ***Exemptions and Special Rules***

The foregoing rules require considerable numbers of persons to file FBARs with respect to accounts in which they do not have any financial interest, such as accounts of an employer over which they have signature authority. Consistent with the statutory grant of authority to establish a reasonable classification of persons exempt from the FBAR requirements, the Treasury has established exemptions for certain persons that have signature or other authority over foreign accounts but have no financial interest in those accounts. These exemptions apply to (1) officers and employees of banks that are currently examined for soundness and safety by

federal bank supervisory agencies, and (2) officers and employees of listed or widely held U.S. corporations (and certain domestic and foreign subsidiaries of such corporations), provided that the officer or employee has been properly informed that the U.S. corporation has filed an FBAR reporting the relevant account(s).<sup>58</sup>

The purpose of the foregoing exemptions appears to be to minimize duplicative filings and to reduce the burden on certain individual filers by exempting employees of entities, such as federally supervised banks, that are already subject to comprehensive reporting and record-keeping requirements under the Bank Secrecy Act from having to file FBARs as individuals for accounts in which they have no financial interest. Recent comments to the IRS have requested that the exemption for officers and employees with signature or other authority over, but no financial interest in, foreign accounts should be extended to U.S. branches of foreign banks,<sup>59</sup> to broker-dealers registered with the Securities and Exchange Commission and to futures commission merchants regulated by the Commodity Futures Trading Commission since existing anti-money laundering, reporting and recordkeeping requirements applicable to those entities should already be adequate to serve the purposes underlying the FBAR.<sup>60</sup> There has also been a call for exempting officers and employees who have signature authority over certain foreign investments of U.S. retirement plans and other tax-exempt entities from the FBAR filing requirement, since existing regulations should be adequate and the potential for abuse is very limited.<sup>61</sup> Revising the FBAR form itself to permit multiple individuals with signature powers over a single account or a series of accounts to file a single form would also reduce the filing burden and volume of forms.<sup>62</sup>

The IRS recently extended the special rule permitting persons with a financial interest in 25 or more foreign accounts to report only that fact (and to provide detailed information on the accounts if and when requested by the Treasury) to persons with signature or other authority over foreign financial accounts.<sup>63</sup> This should somewhat alleviate the burden on persons with mere signature or similar powers, and commentators have called for more permanent guidance extending this abbreviated filing rule.<sup>64</sup>

On August 7, 2009, the IRS went a step further and extended the deadline for filing FBARs for 2008 and prior years for persons with signature or other authority over, but no financial interest in, foreign financial accounts until June 30, 2010.<sup>65</sup> While the Notice provides welcome relief to many filers and their employers by granting them more time to compile and review all

necessary records, substantive guidance narrowing the scope of the filing requirement for persons with mere signature authority would be welcome. Not only would it relieve significant administrative burdens imposed on many individual filers and their employers, in furtherance of the statutory aim of collecting information without unreasonably burdening international financial transactions,<sup>66</sup> it would also save the IRS the effort of sifting through numerous filings relating to the same accounts and allow it to concentrate on cases involving serious abuse.<sup>67</sup> In the Notice, the IRS announced that the Treasury intends to issue regulations in this area and requested comments on how to expand the exemption for employees and officers with signature authority over, but no financial interest in, an account and on how to apply the FBAR requirements to persons with signature authority over accounts owned by clients of their employers. Further guidance in this area thus should be forthcoming.<sup>68</sup>

## Financial Accounts

The greatest uncertainty surrounding the scope of FBAR filing obligations relates to the question of what the term “financial account” encompasses.<sup>69</sup> The instructions to the FBAR state that “the term [account] includes any bank, securities, securities derivatives or other financial instruments accounts.”<sup>70</sup> They go on to say that “[s]uch accounts generally also encompass any accounts in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund (including mutual funds).”<sup>71</sup> While financial accounts include savings, demand, checking, deposit, time deposit, debit card and prepaid credit card accounts maintained with financial institutions, they do not include individual bonds, notes or stock certificates or unsecured loans to a foreign trade or business that is not a financial institution.<sup>72</sup> Correspondent or “nostro” accounts maintained by banks for purposes of bank-to-bank settlement also are not required to be reported on the FBAR.<sup>73</sup> Other than the instructions to the FBAR, very little guidance is available as to what constitutes a financial account, but that guidance points towards an expansive reading.<sup>74</sup>

While the contours of foreign financial accounts are reasonably clear with respect to typical deposit or securities accounts, the concept of “commingled fund” remained somewhat obscure—beyond the reference to interests in mutual funds. Until recently, it was widely believed—with some encouragement from the IRS—that interests in offshore investment

funds, other than mutual funds, did not constitute foreign financial accounts.<sup>75</sup>

Against this background, representatives of the IRS created a stir when they told participants in a teleconference sponsored by the American Bar Association and the American Institute of Certified Public Accountants on June 12, 2009, at the height of the FBAR filing season, that an offshore hedge fund was a “foreign financial account.”<sup>76</sup> A spokesman for the IRS reiterated this position, expanding it to include offshore private equity funds, in a statement to Tax Analysts on June 26.<sup>77</sup>

The June 12 statement, coming as it did shortly before the FBAR filing deadline, resulted in immediate calls for clarification that offshore funds are not accounts that had to be reported by June 30.<sup>78</sup> On June 24, the IRS announced on its Web site that it was extending the 2008 FBAR filing deadline for persons who were not previously aware of an FBAR filing requirement, *i.e.*, investors in offshore hedge and private equity funds, until September 23, 2009, the date previously established as the final date for voluntary disclosure of previously unreported offshore activities.<sup>79</sup> On August 7, the IRS went a step further and extended the deadline for persons with a financial interest in, or signature authority over, a foreign commingled fund to file FBARs for 2008 and earlier years until June 30, 2010.<sup>80</sup>

Since the IRS announced that minority investors in offshore hedge and private equity funds must file FBARs, numerous practitioners have submitted comments questioning the IRS’s new position.<sup>81</sup> The arguments of these commentators fall into four categories: (1) hedge funds and private equity funds do not present the same kinds of money laundering opportunities as cash, securities or liquid mutual fund accounts; (2) offshore funds are generally foreign corporations or partnerships and thus closely analogous to investments in individual stocks, which are exempt from FBAR requirements; (3) the new approach directly contradicts the FBAR instructions that only require reports with respect to accounts owned by more than 50 percent owned corporations or partnerships;<sup>82</sup> and (4) existing reporting requirements already provide the IRS with adequate information about the investments in question. Commentators have also queried whether offshore feeder funds that serve as blockers for tax-exempt investors and that invest solely and directly into a domestic master fund should constitute “foreign financial accounts.”<sup>83</sup>

With respect to the money-laundering concerns underlying the FBAR (at least historically), com-

mentators have noted that offshore funds differ from typical offshore accounts, including mutual funds, which permit holders to access their accounts on a daily basis.<sup>84</sup> Offshore hedge funds typically have lengthy lock-up periods during which interests cannot be redeemed and, even after the lock-up period expires, only allow redemptions on specified dates (often quarterly). Investors in offshore private equity funds make investments for the life of the fund and do not have redemption rights at all. Thus, these kinds of funds do not lend themselves as vehicles for laundering money or financing terrorism. Given that the FBAR has increasingly become a tool for identifying offshore tax evasion, however, it is not clear to what extent the IRS will be persuaded by the argument that these funds are not suitable for money laundering.

Commentators have also noted that offshore hedge funds and private equity funds require significant minimum investments, so that a fund investment typically will trigger information reporting requirements that should provide the IRS with adequate information about the investment.<sup>85</sup> Moreover, qualified retirement plans, which make up a significant portion of U.S. investors in these funds, are required to report all investments to the IRS on an annual basis.<sup>86</sup> Inundating the IRS with multiple forms reporting the same investments is not likely to further the purposes underlying the FBAR.

The IRS has announced that the Treasury intends to issue regulations clarifying FBAR filing requirements for persons with financial interests in, or signature or other authority over, a foreign commingled fund and requested comments by October 6, 2009, as to when an interest in a foreign entity should be subject to FBAR reporting.<sup>87</sup>

## Located in a Foreign Country

Compared to the issues arising with respect to the other key concepts related to the FBAR, the determination of whether an account is located in a foreign country is relatively simple. The instructions make clear that foreign countries include all geographical areas located outside the United States.<sup>88</sup> Thus, accounts located in a foreign country, including accounts with affiliates or branches of U.S. financial institutions must be reported.<sup>89</sup> Conversely, accounts with U.S. branches of foreign financial institutions are not required to be reported.

Once the universe of “accounts” is expanded to include foreign hedge funds and private equity funds, however, the question of what constitutes an

account located in a foreign country becomes more complicated given the difficulty in determining the geographical location of an investment fund.<sup>90</sup> The simplest and most conservative approach would be to treat any fund formed outside the United States as foreign for this purpose, even if all management and back-office functions are performed in the United States. It remains to be seen whether the Treasury will adopt this approach in future guidance.<sup>91</sup>

### Minimum Value in Excess of \$10,000

Consistent with the regulations, the instructions limit the obligation to file an FBAR to persons whose foreign accounts, in the aggregate, have a value in excess of \$10,000 at any time during the reporting period.<sup>92</sup> A filer must report the maximum value of each account during the relevant calendar year. The fair market value of assets in an account must be determined at the end of the calendar year (or upon withdrawal of an asset).<sup>93</sup> Similarly, foreign currency must be converted using the official exchange rate at the end of the year.<sup>94</sup> If private investment funds constitute foreign financial accounts, guidance is needed to clarify whether the reportable maximum value is the value of the investment fund as a whole (on the basis that the fund is the relevant account) or instead the value of the reporting investor's interest (on the basis that the interest in the foreign fund is the relevant account).<sup>95</sup>

The Green Book proposes a rebuttable presumption applicable to civil administrative or judicial proceedings providing that any foreign account in which a U.S. person has an interest or over which such person has signature or other authority contains more than \$10,000.<sup>96</sup> An exception would apply with respect to accounts held with financial

institutions recognized as qualified intermediaries.<sup>97</sup> If enacted, this presumption may encourage persons with accounts below the threshold to file FBARs on a protective basis, increasing the ever-growing flood of FBARs.<sup>98</sup>

### Conclusion

Increased awareness of and improved compliance with the FBAR filing requirement should be welcomed. Given the severity of the FBAR penalties, it is critical, however, that the Treasury provide greater certainty, through formal guidance rather than through informal statements by officials and internet postings, regarding the scope of the requirement. Clarity as to what constitutes a "commingled fund" is essential to delineate the universe of offshore investments that will be treated as foreign financial accounts subject to FBAR requirements. Similarly, clarification as to who "is in and doing business in the United States," the development of additional exemptions for individuals with mere signature authority over foreign accounts of employers or the clients of employers and an expansion of consolidated FBAR reporting should make the FBAR requirements more administrable for taxpayers and the IRS alike. Notice 2009-62 makes clear that the Treasury is seriously considering these issues. It can be hoped that regulations will be issued in the near future and that this guidance (possibly along with a redesigned form) will further the aim of collecting information to assist the government in combating tax evasion and other illegal activity involving offshore accounts without unreasonably burdening persons engaging in international financial transactions.

### ENDNOTES

<sup>1</sup> See Act Secs. 241-42, Title II, of the Currency and Foreign Transactions Reporting Act (P.L. 91-508).

<sup>2</sup> 31 USC §5311 (references to combating terrorist activities were added in 2001).

<sup>3</sup> Act Sec. 241(a), Title II, of P.L. 91-508. Virtually identical language appears in the current statute. See 31 USC §5314(a).

<sup>4</sup> According to FinCEN's Web site, FinCEN's mission is to enhance U.S. national security, deter and detect criminal activity, and safeguard financial systems from abuse by promoting transparency in the United States and international financial systems. Available online at [www.fincen.gov/about\\_fincen/www/mission.html](http://www.fincen.gov/about_fincen/www/mission.html).

<sup>5</sup> See 31 CFR §103.56(g); 68 FR 26489 (May

16, 2003); IRS News Release 2003-48 (Apr. 10, 2003). The enforcement powers explicitly redelegated include the authority to (1) assess and collect civil penalties, (2) investigate possible civil violations, (3) employ certain summons powers, (4) issue administrative rulings interpreting the application of part 103, and (5) take other action necessary to enforce the FBAR provisions. The IRS was separately granted authority to investigate criminal FBAR violations. See 31 CFR §103.56(c)(2).

<sup>6</sup> See Rev. Proc. 2003-11, 2003-1 CB 311 (setting forth requirements for participating in this initiative). FBAR penalties were waived for taxpayers participating in the initiative. Rev. Proc. 2003-11, §2.02, 2003-1 CB

311.

<sup>7</sup> See, e.g., IRS Form 990, Part V, Question 4; IRS Form 1040, Schedule B, Part III; IRS Form 1041, *Other Information*, Question 3; IRS Form 1065, Schedule B, Question 10; IRS Form 1120, Schedule N, Question 6. A crossreference to the FBAR has appeared on the face of IRS Forms 1040, 1041 and 1065 for many years. Available online at [www.irs.gov/pub/irs-prior/f1040sab--1983.pdf](http://www.irs.gov/pub/irs-prior/f1040sab--1983.pdf); [www.irs.gov/pub/irs-prior/f1041--1990.pdf](http://www.irs.gov/pub/irs-prior/f1041--1990.pdf); [www.irs.gov/pub/irs-prior/f1065--1990.pdf](http://www.irs.gov/pub/irs-prior/f1065--1990.pdf). Schedule N to IRS Form 1120 has been in use since the 2000 tax year. Available online at [www.irs.gov/pub/irs-prior/f1120sn--2000.pdf](http://www.irs.gov/pub/irs-prior/f1120sn--2000.pdf). Previously, the question appeared on IRS Form 1120 itself. Available online at

ENDNOTES

- [www.irs.gov/pub/irs-prior/f1120--1990.pdf](http://www.irs.gov/pub/irs-prior/f1120--1990.pdf).
- <sup>8</sup> Code Sec. 6103 imposes confidentiality only with respect to tax returns and information contained therein.
- <sup>9</sup> See, e.g., Nancy Moore, *California Man with UBS Account Agrees to Plead Guilty to Tax Charge*, 156 DTR K-2 (Aug. 17, 2009) (California man pled guilty to failing to file FBAR); *Florida UBS Client Pleads Guilty to Filing False Returns*, 2009 TNT 121-38 (June 26, 2009) (in addition to failing to report offshore income, Boca Raton resident admitted intentional failure to report foreign account on personal tax return and to file FBARs). More prosecutions for FBAR violations should be expected in the wake of the recent agreement with UBS.
- <sup>10</sup> Notably, Act Sec. 201 of the Foreign Account Tax Compliance Act of 2009 (FATCA), introduced by Chairman Rangel in the House of Representatives (H.R. 3933) and Chairman Baucus in the Senate (S. 1934) on October 27, 2009, would require each individual taxpayer holding “a specified foreign financial asset” to file a disclosure statement with his/her tax return, provided the aggregate value of all his/her specified foreign financial assets exceeds \$50,000 (or a higher threshold prescribed by the Treasury). Specified foreign financial assets would include financial accounts maintained with foreign financial institutions as well as stocks, securities and financial instruments of non-U.S. issuers. This new disclosure requirement would be imposed in addition to the requirement to file the FBAR. Additional penalties would apply where a taxpayer fails to comply with the disclosure obligation, unless he/she can demonstrate that the failure was due to reasonable cause. Where a taxpayer provides insufficient information to demonstrate the value of specified foreign assets, the assets will be presumed to exceed the applicable threshold. See Joint Committee on Taxation, Technical Explanation of the Foreign Account Tax Compliance Act of 2009, JCX-42-09 (Oct. 27, 2009). This provision of FATCA has been included as section 511 of the Tax Extenders Act of 2009 (H.R. 4213) introduced in the House of Representatives on December 7, 2009. For a further discussion of similarities and differences between the proposed disclosure requirement and the existing FBAR requirement, see Joint Committee on Taxation, Technical Explanation of H.R. 4213, the Tax Extenders Act of 2009, as introduced in the House of Representatives on December 7, 2009, JCX-60-09, 143-152 (Dec. 8, 2009).
- <sup>11</sup> See *Senate Finance Committee Releases Draft Bill to Improve Offshore Tax Compliance*, 2009 TNT 46-19 (Mar. 12, 2009) (draft legislation would require FBARs to be filed with income tax returns and treat relevant provisions of the Bank Secrecy Act as internal revenue laws). For a more detailed discussion of FBAR-related proposals in this draft bill, see New York State Bar Ass’n Tax Section, *Letter Commenting on Offshore Evasion Proposals*, reprinted in 2009 TNT 175-67 (Sept. 14, 2009) (hereinafter, “NYSBA Offshore Evasion Report”).
- <sup>12</sup> General Explanations of the Administration’s Fiscal Year 2010 Revenue Proposals, U.S. Department of the Treasury, May 2009 (hereinafter, “Green Book”), at 47.
- <sup>13</sup> *Id.* Failure to file FBAR information with the taxpayer’s return also would subject the taxpayer to increased understatement penalties. See Green Book, *supra* note 12, at 56. For a more detailed discussion of FBAR-related proposals in the Green Book, see NYSBA Offshore Evasion Report, *supra* note 11.
- <sup>14</sup> See New York State Bar Ass’n Tax Section, *Letter Requesting Formal Guidance on FBAR Reporting Obligations*, reprinted in 2009 TNT 137-13 (July 21, 2009) (hereinafter “NYSBA FBAR Report”), footnote 8 and accompanying text (citing recent Congressional testimony that FBAR compliance has been low because potential filers were unaware or confused about the requirement). In recent years, the IRS has tried to increase awareness by issuing fact sheets and news releases about upcoming FBAR deadlines. See, e.g., IRS News Release 2008-79, June 17, 2008, IRS News Release 2007-116, June 13, 2007, IRS Fact Sheet 2007-15, Feb. 2007.
- <sup>15</sup> 31 USC §5314(a).
- <sup>16</sup> 31 USC §5312(a)(1).
- <sup>17</sup> 31 USC §5312(a)(2).
- <sup>18</sup> 31 USC §5314(a)(1)–(4).
- <sup>19</sup> 31 USC §5314(b).
- <sup>20</sup> 31 USC §§5321(a)(5), (6), 5322.
- <sup>21</sup> 31 USC §5321(b)(1).
- <sup>22</sup> Act Sec. 821(a) of the American Jobs Creation Act of 2004 (P.L. 108-357).
- <sup>23</sup> 31 USC §5321(a)(5)(B).
- <sup>24</sup> 31 USC §5321(a)(5)(C).
- <sup>25</sup> Green Book, *supra* note 12, at 52.
- <sup>26</sup> 31 USC §5321(6)(A) and (B). See also Workbook on the Report of Foreign Bank and Financial Accounts (FBAR), available online at [www.irs.gov/businesses/small/article/0,,id=159757,00.html](http://www.irs.gov/businesses/small/article/0,,id=159757,00.html). Negligence penalties only apply to businesses.
- <sup>27</sup> 31 USC §5322(a).
- <sup>28</sup> 31 USC §5322(b).
- <sup>29</sup> 31 USC §5321(d).
- <sup>30</sup> 31 CFR §103.24(a).
- <sup>31</sup> *Id.*
- <sup>32</sup> 31 CFR §103.32.
- <sup>33</sup> 31 CFR §103.27(c).
- <sup>34</sup> *Id.* See also IRM 4.26.16.3.7, filing (July 1, 2008) (FBAR considered filed when received in Detroit, not when postmarked).
- <sup>35</sup> 31 CFR §103.57(g), (h), 103.59(b), (c). The regulations still set forth the maximum civil penalties in effect prior to their increase in 2004 as part of the American Jobs Creation Act.
- <sup>36</sup> 31 CFR 103.59(d).
- <sup>37</sup> IRM 4.26.16.4.7, FBAR Penalties, Examiner Discretion (July 1, 2008).
- <sup>38</sup> IRM 4.26.16.4.4, Nonwillfulness Penalty (July 1, 2008) (warning letters may be issued instead of penalties).
- <sup>39</sup> IRM 4.26.16.4.7, FBAR Penalties, Examiner Discretion (July 1, 2008). The INTERNAL REVENUE MANUAL contains detailed FBAR civil penalty mitigation guidelines. See IRM 4.26.16.4.6, Mitigation (July 1, 2008). Special mitigation guidelines apply to persons participating in the Last Chance Compliance Initiative. IRM 4.26.16.4.6.4, FBAR Penalty—LCCI Mitigation Guideline Conditions (July 1, 2008); IRM 4.26.16.4.6.5, FBAR Penalty—LCCI Mitigation Levels (July 1, 2008).
- <sup>40</sup> See, e.g., NYSBA FBAR Report, *supra* note 14, footnote 12 and accompanying text; Fred Feingold, *Further Guidance Needed for the Required Reporting of Foreign Bank and Financial Accounts*, 54 TAX NOTES INT’L 605, 606 (May 18, 2009). For a discussion of the limits on the IRS’s authority to issue formal FBAR guidance, such as regulations, see NYSBA Offshore Evasion Report, *supra* note 11, footnotes 101–03 and accompanying text.
- <sup>41</sup> General Instructions to Form TD F 90-22.1 (hereinafter, “FBAR Instructions”), at 6 (tracking language in 31 USC §5314(a)). It is unclear whether governmental entities, such as state pension plans, are captured by this definition. See Groom Law Group, *Comments on FBAR Filing Requirement for Pension Plans*, DTR Tax Core, October 8, 2009 (hereinafter, “Groom Law October Letter”); Annette Wiemann, *Comments on Notice 2009-62 on FBAR Reporting for Governmental Agencies on Criminal, Tax, Regulatory, Intelligence Activities*, DTR Tax Core, Sept. 11, 2009 (hereinafter, “Wiemann Letter”).
- <sup>42</sup> 31 CFR 103.11(z) (person includes any unincorporated organization and all entities cognizable as legal personalities); FAQ 8, Frequently Asked Questions Regarding Report of Foreign Bank and Financial Accounts (FBAR)—United States Person, available online at [www.irs.gov/businesses/small/article/0,,id=210252,00.html](http://www.irs.gov/businesses/small/article/0,,id=210252,00.html).
- <sup>43</sup> IRM 4.26.16.3.1.1, U.S. Person: Definition (July 1, 2008).
- <sup>44</sup> The INTERNAL REVENUE MANUAL similarly does not cross-reference the concept of permanent residence as used for immigration law purposes.
- <sup>45</sup> IRM 4.26.16.3.1.1, U.S. Person: Definition (July 1, 2008).

## ENDNOTES

- <sup>46</sup> See Pamela Drucker, *Questions, Comments on FBAR Reporting Procedures, Rules*, DTR Tax Core, July 11, 2009 (questioning whether green card holders living outside the United States and dual status residents claiming residence in a treaty country for tax purposes are residents of the United States for FBAR purposes).
- <sup>47</sup> FAQ 3 & 4, Frequently Asked Questions Regarding Report of Foreign Bank and Financial Accounts (FBAR)—United States Person, available online at [www.irs.gov/businesses/small/article/0,,id=210252,00.html](http://www.irs.gov/businesses/small/article/0,,id=210252,00.html).
- <sup>48</sup> For a detailed discussion of the uncertainties surrounding the definition of U.S. person and in particular the concept of “in and doing business in the United States” see New York Bar Ass’n Tax Section, *Report on the Rules Governing Reports on Transactions with Foreign Financial Agencies (FBARs)*, reprinted in 2009 TNT 210-15 (Nov. 3, 2009) (hereinafter, “NYSBA October 30 Report”); Feingold, *supra* note 40, at 607–10.
- <sup>49</sup> FBAR Instructions, at 6.
- <sup>50</sup> FAQ 2, Frequently Asked Questions Regarding Report of Foreign Bank and Financial Accounts (FBAR)—United States Person, available online at [www.irs.gov/businesses/small/article/0,,id=210252,00.html](http://www.irs.gov/businesses/small/article/0,,id=210252,00.html). Since the FBAR is not a U.S. federal income tax requirement, it is uncertain to what extent case law relating to “regular” and “continuous” business activity is relevant for FBAR purposes. Cf. *A.R.E. Pinchof*, CA-2, 40-2 USTC ¶9592, 113 F2d 718 (U.S. trade or business exists for income tax purposes where activities are “considerable,” “continuous” and “regular”); *Continental Trading, Inc.*, CA-9, 59-1 USTC ¶9316, 265 F2d 40 (“isolated and noncontinuous” commercial activity by holding company otherwise engaged only in investment activities not U.S. trade or business for income tax purposes).
- <sup>51</sup> Announcement 2009-51, IRB 2009-25, 1105.
- <sup>52</sup> *Id.*
- <sup>53</sup> FBAR Instructions, at 6. See also Workbook on the Report of Foreign Bank and Financial Accounts (FBAR), available online at [www.irs.gov/businesses/small/article/0,,id=159757,00.html](http://www.irs.gov/businesses/small/article/0,,id=159757,00.html). A trust protector is a person who monitors the trustee and has authority to influence or replace the trustee. Trust protectors are commonly used in connection with offshore asset protection trusts, which have been used to protect assets from U.S. tax enforcement. For a discussion of issues raised by the current FBAR Instructions with respect to reporting by trusts, see American Bar Association, Section of Real Property, Trust and Estate Law, *Comments on Filing Requirements for Reports of Foreign Bank and Financial Accounts*, DTR Tax Core, Oct. 8, 2009; NYSBA FBAR Report, *supra* note 14.
- <sup>54</sup> FBAR Instructions, at 8.
- <sup>55</sup> See, e.g., Lawrence Uhlick, *Comments on Announcement 2009-51 on FBAR Reporting*, DTR Tax Core, Aug. 11, 2009.
- <sup>56</sup> FBAR Instructions, at 7.
- <sup>57</sup> Workbook on the Report of Foreign Bank and Financial Accounts (FBAR), available online at [www.irs.gov/businesses/small/article/0,,id=159757,00.html](http://www.irs.gov/businesses/small/article/0,,id=159757,00.html).
- <sup>58</sup> FBAR Instructions, at 6. See also Workbook on the Report of Foreign Bank and Financial Accounts (FBAR), available online at [www.irs.gov/businesses/small/article/0,,id=159757,00.html](http://www.irs.gov/businesses/small/article/0,,id=159757,00.html).
- <sup>59</sup> The Institute of International Bankers believes that the existing exemption should cover employees and officers of U.S. branches and agencies of foreign banks since those branches and agencies are subject to examination for soundness and safety by a federal bank supervisory agency but has requested the Treasury to confirm this conclusion. Uhlick, *supra* note 55.
- <sup>60</sup> See Covington & Burling LLP Letter to IRS on FBAR Exemptions for Bank Employees, Broker Dealers, DTR Tax Core, July 24, 2009 (hereinafter, “Covington letter”); Uhlick, *supra* note 55.
- <sup>61</sup> See Groom Law October Letter, *supra* note 41; Wiemann Letter, *supra* note 41; Groom Law Group, *Request for Temporary Suspension of FBAR Filing Requirement for Pension Plans*, DTR Tax Core, July 31, 2009; Pillsbury Winthrop Letter to IRS Requesting Guidance on Financial Accounts, Pension Plans under FBAR, DTR Tax Core, July 23, 2009 (hereinafter, “Pillsbury Letter”); Caplin & Drysdale Letter Seeking Private Foundation Exemption From New FBAR Reporting Rules in Announcement 2009-51, Tax Core, June 26, 2009 (hereinafter, “Caplin Letter”).
- <sup>62</sup> See Lee Sheppard, *FBAR Filing for Hedge Funds*, 55 TAX NOTES INT’L 496, 503 (Aug. 17, 2009).
- <sup>63</sup> Headliner Volume 265 (Apr. 2, 2009) (providing guidance on how persons with only signature or comparable authority should complete the form), available online at [www.irs.gov/businesses/small/self-employed/article/0,,id=206219,00.html](http://www.irs.gov/businesses/small/self-employed/article/0,,id=206219,00.html).
- <sup>64</sup> Uhlick, *supra* note 55, footnote 5; Steve Osterhart, *Comments on Announcement 2009-51 on FBAR Reporting*, DTR Tax Core, Aug. 10, 2009 (requesting that FBAR Instructions be updated to reflect this abbreviated filing rule).
- <sup>65</sup> Notice 2009-62, IRB 2009-35, 260.
- <sup>66</sup> Commentators have noted that non-U.S. companies may be discouraged from hiring, or may decide to fire, U.S. citizens or residents where the relevant position would expose the foreign company to FBAR recordkeeping and, through the employee’s individual filings, disclosure obligations. See Uhlick, *supra* note 55.
- <sup>67</sup> For a detailed discussion of the issues faced by companies and their U.S. employees and suggestions for streamlining the provision of relevant information to the IRS, see Uhlick, *supra* note 55. For detailed proposals on how to streamline filing requirements and reduce duplicative filings, see NYSBA October 30 Report, *supra* note 48.
- <sup>68</sup> Additional FBAR guidance for retirement plans should be issued in the near future. See Florence Olsen, *Employee Plans Guidance on FBAR in Final Review Stages*, IRS Official Says, 145 DTR-4 (July 31, 2009). Commentators have recommended that the Treasury will begin a formal notice-and-comment rulemaking process for FBAR guidance. See NYSBA October 30 Report, *supra* note 48.
- <sup>69</sup> For a more detailed discussion of issues relating to the concept of “foreign financial account,” see the NYSBA FBAR Report, *supra* note 14.
- <sup>70</sup> FBAR Instructions, at 6.
- <sup>71</sup> *Id.*
- <sup>72</sup> *Id.* A discussion of the distinction between debit and nonprepaid credit card accounts for FBAR purposes can be found in ILM 200603026 (Sept. 1, 2005), reprinted in 2006 TNT 14-14 (Jan. 23, 2006).
- <sup>73</sup> FBAR Instructions, at 6–7.
- <sup>74</sup> See *United States v. Cline*, 958 F2d 578 (4th Cir. 1992) (treating informal capital account ledger maintained by financial and investment management company as account for FBAR purposes). See also Thomas D. Greenaway, *Worldwide Taxation, Worldwide Enforcement*, 54 TAX NOTES INT’L 759, 764 (June 1, 2009).
- <sup>75</sup> See NYSBA October 30 Report, *supra* note 48. NYSBA FBAR Report, *supra* note 14, footnote 21 and accompanying text (describing how in 2007 representatives of the IRS stated that no FBAR filing was required with respect to an IRA owning a minority interest in a foreign hedge fund); Caplin Letter, *supra* note 61 (noting that it had been understood that investments in a foreign corporation (including an offshore fund) were not financial accounts for FBAR purposes). It should be noted, however, that representatives of the IRS issued contradictory statements on this question over the years, with some representatives suggesting as early as 2005 that hedge funds constituted foreign financial accounts, and that the IRS did not issue guidance on the issue requested by the Managed Funds Association. See NYSBA FBAR Report, *supra* note 14, footnotes 20–22 and accompanying text; Sheppard, *supra* note 62, at 498.
- <sup>76</sup> See, e.g., Malini Manickavasagam, *Recent IRS Remarks on FBAR Obligations of Offshore Funds Prompt Call for Guidance*, 118

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- DTR G-1 (June 23, 2009).
- <sup>77</sup> See Kristen Parillo, *Hedge Fund, Private Equity Investors Must File FBAR, IRS Confirms*, 2009 TNT 122-3. A Q&A on the IRS's Web site reaches the conclusion that "if [a] hedge fund is located in the United States, a financial interest in the hedge fund is not an interest in a foreign financial account ... even though the hedge fund may have foreign operations," creating a negative inference that an offshore hedge fund would constitute a foreign financial account. FAQ 10, *Frequently Asked Questions Regarding Report of Foreign Bank and Financial Accounts (FBAR)—Financial Accounts*, available online at [www.irs.gov/businesses/small/article/0,,id=210249,00.html](http://www.irs.gov/businesses/small/article/0,,id=210249,00.html).
- <sup>78</sup> See *Managed Funds Group Seeks IRS Guidance on Application of FBAR Requirements to Private Investment Funds*, 2009 WTD 119-25 (June 24, 2009); Manickavasagam, *supra* note 76.
- <sup>79</sup> Available online at [www.irs.gov/newsroom/article/0,,id=210174,00.html](http://www.irs.gov/newsroom/article/0,,id=210174,00.html); Q&As 9 and 43, *Voluntary Disclosure: Questions and Answers*, available online at [www.irs.gov/newsroom/article/0,,id=210027,00.html](http://www.irs.gov/newsroom/article/0,,id=210027,00.html). The deadline for disclosing hidden offshore accounts was subsequently extended until October 15, 2009. IRS News Release 2009-84 (Sept. 21, 2009).
- <sup>80</sup> Notice 2009-62, IRB 2009-35, 260. The FBAR filing deadline for persons with financial interests in accounts other than foreign commingled funds who only recently learned about FBAR filing obligations remains September 23, 2009. See Q&A 9, *Voluntary Disclosure: Questions and Answers*, available online at [www.irs.gov/newsroom/article/0,,id=210027,00.html](http://www.irs.gov/newsroom/article/0,,id=210027,00.html). The NYSBA Tax Section has recommended that any efforts to impose the FBAR requirement with respect to equity interests in offshore private equity and hedge funds and similar vehicles should be applied only prospectively. See NYSBA October 30 Report, *supra* note 48.
- <sup>81</sup> See, e.g., Gary Rice, *Comments on Notice 2009-62 on FBAR Reporting for Governmental Agencies on Criminal, Tax, Regulatory, Intelligence Activities*, DTR Tax Core, Sept. 11, 2009 (hereinafter, "Private Equity Council Letter"); Caplin Letter, *supra* note 61; Pillsbury Letter, *supra* note 61; NYSBA FBAR Report, *supra* note 14.
- <sup>82</sup> See Caplin Letter, *supra* note 61; Pillsbury Letter, *supra* note 61. This argument seems to assume that the instructions as to when an investor must report an account owned by a corporation or partnership are relevant to determining when a corporation or partnership (or an investor's interest therein) itself constitutes a foreign financial account.
- <sup>83</sup> Jennifer Eller and Michael Kreps, *Memo to Plan Fiduciaries on Announcement 2009-51 Rules for Reporting Offshore Investments on FBAR*, 28 TAX MGMT. WEEKLY RPT. 859, 860 (July 6, 2009).
- <sup>84</sup> For a more comprehensive discussion of the differences between mutual funds and offshore hedge and private equity funds, see NYSBA October 30 Report, *supra* note 48. Private Equity Council Letter, *supra* note 81; NYSBA FBAR Report, *supra* note 14; see also *Managed Funds Group Seeks IRS Guidance on Application of FBAR Requirements to Private Investment Funds*, 2009 WTD 119-25 (June 24, 2009); Pillsbury Letter, *supra* note 61.
- <sup>85</sup> Groom Law October Letter, *supra* note 41; Private Equity Council Letter, *supra* note 81; Pillsbury Letter, *supra* note 61; Caplin Letter, *supra* note 61.
- <sup>86</sup> See Schedule D to IRS Form 5500; Groom Law October Letter, *supra* note 41; Pillsbury Letter, *supra* note 61.
- <sup>87</sup> The IRS has specifically requested comments as to whether the principles of Code Secs. 1297 and 1298(b) should be applied to determine whether an interest in an entity should be subject to FBAR reporting. The NYSBA has expressed the view that these principles should not apply. See NYSBA October 30 Report, *supra* note 48.
- <sup>88</sup> FBAR Instructions, at 6. For these purposes United States is defined to include the States, the District of Columbia, Indian lands and the territories and insular possessions. 31 CFR §103.11(nn); see also Report of Foreign Bank and Financial Accounts, available online at [www.irs.gov/businesses/small/article/0,,id=148849,00.html](http://www.irs.gov/businesses/small/article/0,,id=148849,00.html).
- <sup>89</sup> An exception applies with respect to accounts maintained at a U.S. military banking facility operated by a designated U.S. financial institution outside the United States. FBAR Instructions, at 6.
- <sup>90</sup> See NYSBA October 30 Report, *supra* note 48. NYSBA FBAR Report, *supra* note 14.
- <sup>91</sup> It has been proposed that foreign funds that file IRS Form 1065 and provide Schedules K-1 should not be treated as foreign for these purposes. See Jean Rigney, *Comments on Notice 2009-62 on FBAR Reporting for Governmental Agencies on Criminal, Tax, Regulatory, Intelligence Activities*, DTR Tax Core, Sept. 11, 2009.
- <sup>92</sup> FBAR Instructions, at 6. Commentators have proposed to raise the reporting threshold to \$25,000 and to index it for inflation in order to reduce the number of "ordinary" accounts picked up by the FBAR requirement. See NYSBA October 30 Report, *supra* note 48.
- <sup>93</sup> FBAR Instructions, at 8.
- <sup>94</sup> FBAR Instructions, at 7-8.
- <sup>95</sup> See NYSBA FBAR Report, *supra* note 14.
- <sup>96</sup> Green Book, *supra* note 13, at 51.
- <sup>97</sup> *Id.*
- <sup>98</sup> The risk of large numbers of protective filings could be mitigated by providing clear guidance as to what evidence an account holder would need to produce to rebut the presumption. See NYSBA Offshore Evasion Report, *supra* note 11 (expressing support for proposed evidentiary presumption provided it is clarified that the presumption can be rebutted by producing bank statements or similar evidence).

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