

March 7, 2016

# FBAR Reporting Requirements for Foreign Financial Accounts

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## FinCEN Releases Notice of Proposed Rulemaking to Revise Certain Provisions of the FBAR Regulations

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### SUMMARY

The Financial Crimes Enforcement Network of the Department of the Treasury (“FinCEN”) released a notice of proposed rulemaking (the “NPRM”) on March 3, 2016 that would, if finalized, replace certain current exceptions (the “Current Exceptions”) from the requirement to file a Report of Foreign Bank and Financial Accounts (an “FBAR”) with a new exemption (the “New Exemption”) for officers, employees and agents of an entity who only have signature or other authority, but no financial interest, in the accounts of the entity or a related entity. The New Exemption would apply only if the entity or a related entity is required to file an FBAR in respect of the account. The NPRM would also remove a special rule (the “Special Rule”) that provides for simplified reporting for persons with financial interest in, or signature or other authority over, 25 or more accounts.

### BACKGROUND

The FBAR rules require a U.S. person to report any financial interest in, or signature or other authority over, bank, securities, or other financial accounts in a foreign country.<sup>1</sup> An FBAR must be filed for each calendar year in which the value of the relevant accounts exceeds \$10,000 in the aggregate. The FBAR in respect of 2016 and subsequent years must be received by the Department of the Treasury on or before April 15th of the year following the year to which it relates.

In 2011, FinCEN published final regulations (the “Current Regulations”) under the Bank Secrecy Act.<sup>2</sup> The Current Regulations provide the Current Exceptions from filing for individuals employed by, or officers of, certain types of entities, so long as the individuals have no financial interest in the relevant accounts.

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The Current Exceptions apply to officers and employees of (i) banks examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve system, the FDIC, the Office of Thrift Supervision or the National Credit Union Administration, (ii) financial institutions registered with and examined by the SEC or the Commodity Futures Trading Commission, (iii) entities with equity listed on a U.S. national securities exchange, and (iv) entities with equity registered under section 1(g) of the Securities Exchange Act. The Current Exceptions also apply to officers and employees of an “Authorized Service Provider,”<sup>3</sup> and provide that these officers and employees are not required to report signature authority over a foreign financial account owned or maintained by an investment company registered under the Investment Company Act of 1940.

In addition, pursuant to a series of notices issued by FinCEN,<sup>4</sup> the FBAR filing deadlines have been extended to April 15, 2017 (the “Filing Extensions”) for (i) officers and employees of any of the entities listed in the previous paragraph in respect of accounts of entities controlled by their employers, (ii) officers and employees of entities controlled by any of the entities listed in the previous paragraph in respect of accounts of entities controlling their employers or accounts of entities controlled by such controlling entities, and (iii) officers and employees of SEC-registered investment advisors in respect of accounts of persons that are not registered investment companies, in all cases so long as the individuals have no financial interest in the relevant accounts.

The Current Regulations also contain the Special Rule that allows for simplified reporting for persons with financial interest in, or signature or other authority over, 25 or more accounts. Under the Special Rule, a person is only required to report the number of accounts and certain other basic information, but is not required to provide detailed information regarding each account, unless specifically requested to do so by the Secretary of the Treasury or his delegate.

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## THE PROPOSED CHANGES

The NPRM proposes to replace the Current Exceptions with the New Exemption. The rationale for doing so is that FinCEN no longer sees value in having multiple filings in respect of a single account arising out of employees filing reports in respect of their employers’ accounts. The NPRM explains that in the past FinCEN saw value in such requirements as a check to ensure that the employers had themselves properly complied with their reporting requirements. However, FinCEN now believes that there is limited practical value to such duplicate reporting because employers generally file FBARs on behalf of their employees with signature authority because the employers maintain the relevant account information.

Under the New Exemption, an officer, employee or agent of an entity would not be required to file an FBAR in respect of signature or other authority in an account in which such entity, or a subsidiary, parent, or other entity within the same corporate or business structure of such entity has a financial interest, provided that (i) the officer, employee or agent has no financial interest in the account, and (ii) the entity or any other entity within the same corporate or business structure is required to file an FBAR in respect

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of the account. Entities would, however, be required to maintain for five years information identifying all officers, employees and agents with signature or other authority in foreign financial accounts in which the entities have financial interest and to provide this information when so requested by FinCEN.

The New Exemption would thus provide a much broader exemption than the Current Exceptions, since the New Exemption would apply to officers, employees and agents of any kind of entity (without regard to whether the entity is regulated by the Federal Reserve, SEC or other relevant agency) and would in addition apply to accounts owned not only by the person's employer or principal, but also to accounts owned by related parties. The New Exemption would, however, not exempt everyone that is exempt under the Current Exceptions, because the New Exemption would only apply to cases in which the entity or a related entity is required to file an FBAR in respect of the account, while the Current Exceptions apply to exempt the relevant officers and employees even if no entity is required to file an FBAR.

The NPRM would also remove the Special Rule that provides for simplified reporting for persons with financial interest in, or signature or other authority over, 25 or more accounts. The NPRM explains that since the special rule was first enacted over 35 years ago, the ease with which individuals can establish overseas accounts, which could be used for money laundering, terrorism support or other financial crimes, has increased, and accordingly FinCEN believes it important to receive more detailed information with respect to all accounts. Moreover, due to technological advances and the fact that all FBARs are now required to be filed electronically, FinCEN believes that filers would not find it overly burdensome to provide such information and that FinCen now has the analytical tools that would allow it to analyze larger amounts of data effectively.

FinCEN has requested public comments in connection with the NPRM in respect of the following issues:

- Whether, and to what extent, the New Exemption would reduce burden;
- Whether the New Exemption should apply to FBARs in respect of previous years that are currently deferred under the Filing Extensions;
- Whether, and to what extent, the removal of the Special Rule would increase burden;
- If technological modifications are necessary as a result of the removal of the Special Rule, what would be the time frame to implement such modifications; and
- Whether, and to what extent, the combination of the New Exemption and the removal of the Special Rule would reduce or increase burden.

Written comments may be submitted on or before April 25, 2016.

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ENDNOTES

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- <sup>1</sup> 31 C.F.R. § 1010.350(a).
- <sup>2</sup> A detailed discussion of the Final Regulations can be found in the Sullivan & Cromwell LLP publication entitled “Reporting Requirements for Foreign Financial Accounts – Final FinCEN Regulations on Foreign Bank and Financial Account Reporting” (February 25, 2011). This publication may be obtained by following the instructions at the end of this publication.
- <sup>3</sup> An Authorized Service Provider is an entity registered with the Securities and Exchange Commission that provides services to registered investment companies.
- <sup>4</sup> FinCEN Notices 2011-1, 2012-1, 2013-1, 2014-1 and 2015-1.

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