

Power Plants, which states that a decision by a licensee to adopt a combination of DECON and SAFSTOR may be based on factors such as the availability of waste disposal sites. The petitioner believes that this wording creates a loophole whereby a site choosing the SAFSTOR option would not be returned to unrestricted use within a period of 60 years from the time reactor operation ceases. The petitioner requests that the NRC amend its regulations to clarify that a licensee's choice of alternative decommissioning strategy must result in the return of the site to unrestricted use within 60 years and that the NRC eliminate the ENTOMB strategy as an option.

The petitioner believes that, if implemented, the reporting and financial assurance amendments proposed would provide reasonable assurance that funds will be available when needed to clean up a plant site and avoid costly legacy sites to be cleaned up at taxpayer expense. With respect to the proposal to clarify the decommissioning strategies available to licensees, the petitioner believes that these proposed amendments assure that portions of the facility containing radioactive contaminants would be removed or decommissioned to a level that permits release of the property for unrestricted use within 60 years after the cessation of operations.

Dated at Rockville, Maryland, this 22nd day of February, 2010.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

[FR Doc. 2010-3989 Filed 2-25-10; 8:45 am]

BILLING CODE 7590-01-P

## DEPARTMENT OF THE TREASURY

### 31 CFR Part 103

#### RIN 1506-AB08

#### Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** FinCEN, a bureau of the Department of the Treasury (Treasury), is proposing to revise the regulations implementing the Bank Secrecy Act (BSA) regarding reports of foreign financial accounts. The proposed rule would clarify which persons will be required to file reports of foreign financial accounts and which accounts

will be reportable. In addition, the proposed rule would exempt certain persons with signature or other authority over foreign financial accounts from filing reports and would include provisions intended to prevent United States persons from avoiding this reporting requirement.

**DATES:** Written comments on the notice of proposed rulemaking may be submitted on or before April 27, 2010.

**ADDRESSES:** You may submit comments, identified by RIN 1506-AB08, by any of the following methods:

- *Federal e-rulemaking portal:* <http://www.regulations.gov>. Refer to Docket Number FinCen-2009-0008 and follow the instructions for submitting comments.

- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include RIN 1506-AB08 in the body of the text.

*Inspection of comments:* Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Vienna, VA. Persons wishing to inspect the comments submitted must request an appointment with the Disclosure Officer by telephoning (703) 905-5034 (not a toll-free call).

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

#### SUPPLEMENTARY INFORMATION:

#### I. Introduction

The provision of the BSA authorizing reports of foreign financial accounts reflects congressional concern that foreign financial institutions were being used to evade domestic criminal, tax, and regulatory laws. The House report on the bill leading to the enactment of the BSA described the use of undisclosed foreign financial accounts for a wide range of abuses.<sup>1</sup> Nearly four

<sup>1</sup> The House report states:

Considerable testimony was received by the Committee from the Justice Department, the United States Attorney for the Southern District of New York, the Treasury Department, the Internal Revenue Service, the Securities and Exchange Commission, the Defense Department and the Agency for International Development about serious and widespread use of foreign financial facilities located in secrecy jurisdictions for the purpose of violating American law. Secret foreign bank accounts and secret foreign financial institutions have permitted proliferation of 'white collar' crime; have served as the financial underpinning of organized criminal operations in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally, and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and exchanges; have served as essential ingredients in frauds including schemes to defraud the United States; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for conglomerate and other corporate stock

decades after the enactment of the BSA, foreign financial accounts continue to be used for many of the abuses cataloged by Congress when it was originally considering the enactment of the BSA. For example, the Senate Permanent Subcommittee on Investigations has found that Americans have continued to use complex schemes to try to conceal their foreign financial accounts in attempts to circumvent United States law.<sup>2</sup>

Considerable effort has been made to address these abuses. The Internal Revenue Service (IRS), for example, has several projects focused on the use of offshore accounts to evade federal income taxes.

## II. Background

### A. 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 counterterrorism matters. The regulations implementing the BSA appear at 31 CFR Part 103. The Secretary's authority to administer the BSA has been delegated to the Director of FinCEN.

Under 31 U.S.C. 5314 the Secretary is authorized to require any "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 in a transaction in money, credit, securities or gold."<sup>3</sup> The Secretary is also

acquisitions, mergers and takeovers; have covered conspiracies to steal from the U.S. defense and foreign aid funds; and have served as the cleansing agent for 'hot' or illegally obtained monies. H.R. Rep. No. 975 91st Cong. 2d Sess. 12 (1970).

<sup>2</sup> See *Tax Haven Banks and U.S. Tax Compliance*, Staff Report, Permanent Subcommittee on Investigations, Senate Comm. on Homeland Security and Governmental Affairs, (July 17, 2008); *Tax Haven Abuses: The Enablers, the Tools and Secrecy*, Staff Report, Permanent Subcommittee on Investigations, Senate Comm. on Homeland Security and Governmental Affairs, (Aug. 1, 2006).

<sup>3</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

authorized to prescribe exemptions to the reporting requirement and to prescribe other matters the Secretary considers necessary to carry out section 5314.

#### *B. Overview of Current Regulations and Form*

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 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.<sup>4</sup>

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 (the FBAR).<sup>5</sup> The instructions to the FBAR specify which persons must file as well as the types of accounts that must be reported. The instructions also provide exemptions from reporting for certain persons with signature or other authority over the accounts.

The authority to enforce the provisions of 31 U.S.C. 5314 and sections 103.24 and 103.32 has been re-delegated from FinCEN to the Commissioner of Internal Revenue by means of a Memorandum of Agreement between FinCEN and the IRS dated April 2, 2003.<sup>6</sup> With this delegation, FinCEN conferred upon the IRS the authority to enforce the FBAR provisions of the BSA and its implementing regulations, investigate possible violations, and assess and

collect civil penalties in connection therewith. The delegation also conferred upon the IRS the authority to: (1) Respond to public inquiries and requests for advice; (2) issue administrative rulings; and (3) provide related assistance to the public with respect to compliance with FBAR requirements. Finally, the delegation conferred upon the IRS the authority to revise the FBAR form and instructions, and to propose to FinCEN revisions of the applicable regulations for the purpose of enhancing FBAR compliance and enforcement.

A revised Form TD F 90–22.1 that modified several aspects of the FBAR form instructions was issued in October 2008. Most notably, the revised FBAR form instructions broadened the definition of “United States person” to conform more closely to the FBAR’s authorizing statute,<sup>7</sup> and sought to clarify the scope of foreign financial accounts that trigger FBAR filing requirements. In the ensuing months, the IRS received a number of questions and comments seeking guidance on compliance with the revised FBAR instructions. In response to these comments, the IRS published guidance indicating that until further notice, all persons may rely on the definition of “United States person” found in the prior version of the FBAR instructions from 2000. The IRS also extended the FBAR filing deadline for the 2008 and earlier calendar years to September 23, 2009 for certain filers.<sup>8</sup>

In addition, the IRS published Notice 2009–62 on August 10, 2009, which extended the FBAR filing deadline for the 2008 and earlier calendar years to June 30, 2010 for certain filers, and requested comments from the public regarding several FBAR-related issues. Specifically, Notice 2009–62 requested public comment regarding: (1) When a person with signature or other authority over, but no financial interest in, a foreign financial account should be relieved of filing an FBAR for the account; (2) whether to expand the filing exemption currently available to officers and employees of banks and certain publicly traded domestic companies, where such officers and employees have signature or other authority over their employer’s accounts; and (3) when an interest in a foreign entity should trigger an FBAR filing requirement.<sup>9</sup>

### **III. Section-by-Section Analysis**

The proposed rule would include a definition of United States persons and definitions of bank, securities, and other financial accounts in a foreign country. FinCEN believes that inclusion of these definitions will more clearly 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, so that determining a person’s filing obligations will be more straightforward and predictable. In addition, the proposed rule would exempt certain persons with signature or other authority from filing the FBAR. Finally, the proposed rule would include provisions intended to prevent United States persons required to file the FBAR from avoiding this reporting requirement.

#### *A. § 103.24(a)—In General*

FinCEN proposes to amend 31 CFR 103.24 by using a new term “United States person” to indicate persons that would be required to file an FBAR.

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

FinCEN proposes to define 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. This definition applies to an entity regardless of whether an election has been made under 26 CFR 301.7701–2 or 301.7701–3 to disregard the entity for federal income tax purposes. 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(nm) will be used instead of the definition of “United States” in 26 CFR 301.7701(b)-1(c)(2)(ii). FinCEN believes that this approach is appropriate because it provides for uniformity regardless of where in the United States an individual may be. In addition, FinCEN believes this approach takes into account that individuals may seek to hide their residency in an effort to obscure the source of their income or location of their assets.<sup>10</sup>

financial institution of which the United States government is a member.

<sup>4</sup> This notice of proposed rulemaking would not amend sections 103.27 and 103.32.

<sup>5</sup> The FBAR form currently available on both the FinCEN and IRS Web sites allows users to complete the form electronically and then print a PDF document that can be mailed to the address on the form.

<sup>6</sup> See 31 CFR 103.56(g).

<sup>7</sup> 31 U.S.C. 5314.

<sup>8</sup> Announcement 2009–51, 2009–25 I.R.B. 1005.

<sup>9</sup> In crafting the proposed rule, FinCEN reviewed the public comments received in response to Notice 2009–62.

<sup>10</sup> See *Tax Haven Banks and U.S. Tax Compliance*, Staff Report, Permanent Subcommittee

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

FinCEN proposes to amend 31 CFR 103.24 by adding definitions of the accounts subject to reporting. Section 5314 authorizes the Secretary to require records or reports when a person “makes a transaction or maintains a relation for any person with a foreign financial agency.” Although section 5314 authorizes the Secretary to address both transactions and relations, FinCEN is focusing in this rulemaking on relations. FinCEN believes that when a person maintains an account with a foreign financial institution, the person is maintaining a relation with a foreign financial agency. For this purpose, an account means a formal relationship with such person to provide regular services, dealings and other financial transactions. The length of the time for which service is being provided does not affect the fact that a formal account relationship has been established. For example, in the case of an escrow account, an individual may establish a relationship with a financial institution to service and maintain that account, albeit for a short period of time. However, an account is not established simply by conducting transactions such as wiring money or purchasing a money order where no relationship has otherwise been established.

FinCEN has chosen to define bank, securities, and other financial accounts with reference to the kinds of financial services for which a person maintains an account. FinCEN believes this is necessary because while the BSA provides guidance as to the definition of a financial institution, financial institutions under the BSA are largely defined by reference to United States law and terminology. For example, a financial institution is defined in the BSA to include an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act.<sup>11</sup> Accordingly, the proposed amendment to section 103.24 would include definitions of bank account, securities account, and other financial accounts.

*D. Section 103.24(c)(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. This definition includes 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.

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

The term “securities account” means an account maintained with a person in the business of buying, selling, holding, or trading stock or other securities.

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

The term “other financial account” appears in current section 103.24. While FinCEN understands that the term “other financial account” is broad enough to cover a range of relationships with foreign financial agencies, FinCEN believes that compliance will be enhanced by more clearly delineating the types of relationships that must be reported.

Thus, the proposal would define “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.

The proposed definition includes an account with a person that accepts deposits as a financial agency. FinCEN believes that it is necessary to include this provision to ensure that deposit accounts and similar relationships will be covered despite differences in terminology, operations of financial institutions, and legal frameworks in other countries.

The definition of other financial account also includes an account that is an insurance policy with a cash value or an annuity policy. Life insurance policies that have a cash surrender value are potential money laundering vehicles because cash value can be redeemed by a money launderer. Similarly, annuity contracts pose a money laundering risk because they allow a money launderer to exchange illicit funds for an immediate or deferred income stream or to purchase a deferred annuity and obtain clean funds upon redemption.

The definition of other financial account specifically includes an account with a mutual fund or similar pooled

fund, or other investment fund. FinCEN believes that these types of companies fall within the definition of “investment company,” which is a financial institution under the BSA.<sup>12</sup>

Mutual funds and similar pooled funds are offered to the general public and typically are identifiable by the ability of the account holder to redeem shares on a daily or otherwise regular basis. FinCEN believes that these types of accounts present risks for money laundering. As with other types of financial accounts, money launderers may use mutual fund accounts to layer their funds by sending and receiving money and wiring it quickly through several accounts and multiple institutions. Layering could also involve purchasing funds in the name of a fictitious corporation or an entity designed to conceal the true owner. Most importantly, mutual funds can also be used for integrating illegal income into legitimate assets, allowing illegal proceeds to appear to have a legitimate source when the shares of the fund are redeemed and deposited into a bank account.

FinCEN recognizes that outside of mutual funds and similar pooled funds, individuals may invest in other types of pooled investment companies, such as private equity funds, venture capital funds and hedge funds. Because these kinds of funds are privately offered funds, their characteristics vary greatly. In addition, the lack of functional regulation over these kinds of funds makes it difficult to define and distinguish certain types of these funds from others. FinCEN is aware, however, of pending legislative proposals that would apply additional regulation and oversight over the operations of some of these investment companies. Accordingly, FinCEN has determined that, at this time, the proposal should reserve the treatment of investment companies other than mutual funds or similar pooled funds. Treasury remains concerned about the use of, for example, hedge funds to evade taxes and FinCEN will continue to study this issue.<sup>13</sup>

<sup>12</sup> See 31 U.S.C. 5312(a)(2)I.

<sup>13</sup> Concerns about the use of hedge funds to evade taxes is discussed in The Report of the President’s Working Group on Financial Market, *Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management* (April 1999). “In the tax area, the fact that a significant number of hedge funds are established in offshore financial centers that are tax havens has focused attention on whether offshore hedge funds are associated with illegal tax avoidance and are taking advantage of their offshore situs for other inappropriate purposes.” Id. at 4. FinCEN is also aware of pending legislative proposals that would require United States individuals to annually report to the IRS with respect to foreign hedge funds and private equity funds, for example.

on Investigations, Senate Comm. on Homeland Security and Governmental Affairs at 8 (July 17, 2008).

<sup>11</sup> See 31 U.S.C. 5312(a)(2)A.

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

Paragraph (c)(4) includes 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 are 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.

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

- 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.

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

The first three exceptions take into account the governmental status and functions of the entities and agencies. The last exception for nostro accounts takes into account the limited access to the account.

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

Foreign country includes all geographical areas located outside of the United States as defined in 31 CFR 103.11(nn).

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

**Financial Interest When the United States Person Is the 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 holds 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.

**Financial Interest When Another Is Acting on Behalf of the United States Person**

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 a person acting on behalf of that United States person such as an attorney, agent or nominee with respect to the account.

**Other Situations Giving Rise to a Financial Interest**

Further, a United States person is deemed to have a financial interest in a bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is—

- 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.

- 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.

- 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 current income.

- 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.<sup>14</sup>

Finally, a United States person that causes an entity to be created for a purpose of evading the reporting requirement 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. 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 regulations implementing section 5314.

The definition of financial interest includes certain instances where a 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. FinCEN believes that these rules are necessary to ensure that these financial interests of United States persons are reported on the FBAR regardless of how the interest is held or structured. Lastly, FinCEN has included an anti-avoidance rule to capture reporting in instances where persons seek to evade the requirement to file an FBAR through the use of devices such as transfer companies. Such devices have been documented in reports by the Senate Permanent Subcommittee on Investigations as methods by which United States persons have tried to hide ownership of foreign financial accounts.<sup>15</sup>

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

FinCEN has included in proposed section 103.24 provisions that would address signature or other authority over

<sup>14</sup> As described by the Senate Permanent Subcommittee on Investigations (PSI), Committee on Homeland Security and Governmental Affairs, in its 2006 report, *Tax Haven Abuses: the Enablers, the Tools and Secrecy*, Senate Hearing 109–797, 109th Cong., 2d Sess. (August 1, 2006), arrangements such as “trust protectors” have been employed by United States taxpayers to achieve substantial control over assets held in offshore trusts. In some cases trust protectors serve to safeguard trust assets from misappropriation. However, many offshore trusts are established with the intention of maintaining client control. In such cases trust protectors can serve as conduits of the client’s instructions to the trustees, with the trustees merely rubber stamping the protectors’ directions. Such an arrangement permits greater client control while maintaining the appearance of trustee independence.

<sup>15</sup> The PSI reported the use of transfer companies, single purpose companies used solely to disguise the transfer of funds from an entity controlled by a taxpayer to the account of another entity controlled by the taxpayer. See *Tax Haven Banks and U.S. Tax Compliance*, Staff Report, Permanent Subcommittee on Investigations, Senate Comm. on Homeland Security and Governmental Affairs, at 4, 65 (July 17, 2008).

a bank, securities, or other financial account in a foreign country.

#### Signature or Other Authority In General

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 proposal would continue this requirement and would define signature or other authority. Signature or other authority means 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.

#### Exceptions for Signature or Other Authority

FinCEN is including in the proposed rule certain exceptions for United States persons with signature or other authority over reportable accounts. These exceptions generally apply to officers and employees of financial institutions that have a federal functional regulator, and certain entities that are publicly traded on a United States national securities exchange, or that are otherwise required to register their equity securities with the Securities and Exchange Commission. FinCEN believes that such relief is appropriate in light of the federal oversight of these entities. These exceptions apply, however, only where the officer or employee has no financial interest in the reportable account. These institutions would still be obligated to report their financial interest in these reportable accounts. FinCEN is proposing the following exceptions.

- 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 is available to officers or employees of banks examined by the federal banking agencies. Officers or employees can avail themselves of this exemption without receiving notice from the bank that the bank has filed an FBAR with respect to the reportable accounts over which it has a financial interest.

- 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 is available to officers or employees of financial institutions such as securities broker dealers or futures commission merchants which are registered with and examined by, the Securities and Exchange Commission or Commodity Futures Trading Commission. Again, officers or employees of such financial institutions can avail themselves of this exemption without receiving a notice from the employer.

- 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.

This exception has been included 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. Officers or employees of an Authorized Service Provider which is registered with and examined by the Securities and Exchange Commission may avail themselves of this exemption without receiving notice from the employer provided that the fund they service is also registered with the Securities and Exchange Commission. FinCEN believes that this exception is appropriate in light of the requirement that both the service provider and the fund are registered with the Securities and Exchange Commission.

- 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 is available to officers and employees of entities which are listed upon a United States national securities exchange, regardless of whether the entity is domestic or foreign. Officers and employees of a United States subsidiary of such listed entities are also covered by this exception if the United States subsidiary is named in a consolidated FBAR report of the parent.

- 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 applies to officers and employees of United States corporations whose size in terms of assets and shareholders<sup>16</sup> requires them to register their stock with the Securities and Exchange Commission and makes them subject to reporting under the Securities Exchange Act.

#### K. 103.24(g)—Special Rules

FinCEN is proposing 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.

- *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

<sup>16</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. 781(g) (2006) and the regulations thereunder.

report under this section will be permitted to file a consolidated report on behalf of itself and such other entity.

- *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.<sup>17</sup>

- *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.<sup>18</sup>

In addition, FinCEN anticipates that 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, the instructions to the FBAR form will prescribe a modified form of reporting for such persons.

#### IV. Proposed Changes to the FBAR Instructions

The changes proposed by this notice of proposed rulemaking, if adopted as a final rule, would also require changes to the instructions to the FBAR. A draft of revised changes to the FBAR instructions appears as an attachment at the end of this notice of proposed rulemaking.

#### V. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), FinCEN certifies that these proposed regulation revisions will not have a significant

<sup>17</sup> This proposed exemption is not intended to affect the filing requirements with respect to qualified pension plans or individual retirement accounts. FinCEN believes that, in most cases, such entities (which are subject to a number of statutory requirements and limitations) are in a better position to be aware of the presence of a foreign financial account). An IRA is an individual retirement account described in section 408 of the Internal Revenue Code (i.e., a traditional IRA, IRA annuity, SEP IRA, SIMPLE IRA, or deemed IRA) or a Roth IRA (including a Roth IRA annuity or a deemed Roth IRA) described in section 408A of the Internal Revenue Code.

<sup>18</sup> FinCEN believes that, in most cases, the trust or its trustees are in a better position than the beneficiaries to be aware of the presence of a foreign financial account and the information needed to file the FBAR as well as whether individual beneficiaries exceed the 50 percent threshold.

economic impact on a substantial number of small entities. The proposed rule revises an existing rule that requires reports to be made to Treasury with respect to certain foreign financial accounts. Because this proposal clarifies the existing rules and narrows the scope of individuals and entities subject to reporting and recordkeeping requirements, we will reduce regulatory obligations overall.

The proposed rule will not affect a substantial number of small entities. The proposed rule applies to United States persons, a term which 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 proposed rule will not have a significant economic impact on small entities. As explained above, the proposed 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 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 would be 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 proposed rule continues a simplified reporting method for persons with a financial interest in 25 or more foreign financial accounts and extends the relief of this simplified reporting method to persons with signature or other authority over 25 or more foreign financial accounts. FinCEN requests comments on the accuracy of the statement that the regulations in this document will not have a significant economic impact on a substantial number of small entities.

#### VI. Paperwork Reduction Act Notices

The reporting requirement contained in this proposed rule (31 CFR 103.24) is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). This proposed rulemaking seeks to clarify the scope of existing definitions and related rules. By making requirements clearer for reporting

persons, there is a potential that certain reporting persons may see an increase in the collection and reporting of information, but any such potential increase may likely be offset by the corresponding exceptions and clarifications in the proposal. Moreover, to the extent that we have clarified the existing rules and narrowed the scope of individuals or entities subject to reporting or recordkeeping requirements, we will have reduced regulatory obligations overall.<sup>19</sup>

Comments concerning the estimated burden and other questions should be sent to the Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503 with a copy to FinCEN and the IRS SBSE by mail or comments may also be submitted by e-mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov). Please submit comments by one method only. Comments are welcome and must be received by April 27, 2010.

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

In accordance with requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), and its implementing regulations, 5 CFR part 1320, the following information concerning the collection of information of the Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Bank and Financial Accounts is presented to assist those persons wishing to comment on the information collection.

#### *Description of Affected Filers:*

Individuals and certain entities that maintain foreign financial accounts reportable under 31 CFR 103.24.

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

*Estimated Average Annual Burden Hours per Affected Filer:* The estimated average burden associated with the recordkeeping requirement in this proposed 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

<sup>19</sup> This proposed amendment to 31 CFR 103.24 clarifies the filing requirement for certain foreign persons thereby reducing the overall burden of BSA recordkeeping and reporting requirements.

advantage of the exceptions provided in this proposed 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.

## 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 103

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 103 is proposed to be amended as follows:

## PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for part 103 is revised 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 103.24 is revised to read as follows:

### § 103.24 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 103.11(nn) 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—*(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 policy with a cash value or an annuity policy;

(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 103.11(nn).

(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 (v) 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 settlor and has an ownership interest in the account for United States federal tax purposes. See 26 U.S.C. 671–679 and the regulations thereunder to determine if a settlor has an ownership interest in a trust's financial account for a year;

(iv) 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; or

(v) 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.

(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 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.

(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 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 included in a consolidated report of the parent filed under this section.

(v) An officer or employee of a United States entity 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 entity 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 23, 2010.

**James H. Freis, Jr.,**

*Director, Financial Crimes Enforcement Network.*

**Note:** The following attachment will not appear in the Code of Federal Regulations. Attachment: Draft instructions to the Report of Foreign Bank and Financial Accounts—Form TDF90–22.1(FBAR)

### General Instructions

Form TD F 90–22.1 (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. Unlike the filing date for an income tax return, the June 30th filing date for the FBAR may not be extended.

#### Who Must File an FBAR.

The following persons are required to file an FBAR:

A United States citizen;

A United States resident;

An entity, including but not limited to, a corporation, partnership, or limited liability company created or organized in the United States or under the laws of the United States; and

A trust or estate formed under the laws of the United States.

See definition of United States below.

If the person has:

A financial interest in or signature authority over any foreign financial account and the aggregate value of the financial account(s) exceeds \$10,000 at any time during the calendar year. See Part II, Item 15, regarding the \$10,000 threshold.

*The 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 still 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.*

See Exceptions below.

### 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 surrender value (such as a variable annuity or a whole life insurance policy), an annuity, and shares in a mutual fund or similar pooled fund (i.e., a fund with a regular net asset value determination and redemptions).

**Foreign Financial Account.** A foreign financial account is a financial account that is located outside of the United States. For example, an account maintained with a foreign branch of a United States bank is a foreign financial account. An account maintained with a United States branch of a foreign bank is not a foreign financial account. An insurance or annuity policy that is purchased outside of the United States, as defined in 31 CFR § 103.11(nn), from a non-United States issuer is a foreign financial account.

**Financial Interest.** A person has a financial interest in each financial account for which

(1) the person is the owner of record or holder of legal title, regardless of whether the account is maintained for that person’s benefit 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 authorized to act on behalf of the person with respect to the account;

(b) A corporation in which the 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 person owns directly or indirectly: (i) an interest in more than 50 percent of the partnership’s profits (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, if the person: (i) is the trust settlor; and (ii) has an ownership interest in the trust for United States federal tax purposes. See 26 U.S.C. §§ 671 through 679 to determine if a person has an ownership interest in a trust for a year for United States federal tax purposes;

(e) A trust, if the person has more than a 50 percent beneficial interest in the assets or income of the trust for the calendar year, as determined under all of the facts and circumstances, including the terms of the trust and any accompanying documents;

(f) A trust that was established by the person and for which the person has appointed a trust protector that is subject to such person’s direct or indirect instruction; or

(g) Any other entity, if the 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 includes an individual and all legal entities including, but not limited to, limited liability companies, corporations, partnerships, trusts, and estates.

**Signature Authority.** Signature authority is the authority (alone or in conjunction with any other individual) 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 financial institution (or other person performing the services of a financial institution), with which the financial account is maintained. See Exception for Signature Authority.

**United States.** For FBAR purposes, the United States includes the States, the District of Columbia, all territories and possessions (for example American Samoa, the Commonwealth of the Northern Marianas 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 Resident.** A United States resident is an alien residing in the United States. To determine if the filer is a resident

of any place listed in the definition of United States, apply the residency tests in 26 U.S.C. § 7701(b).

### 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 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. If the filer’s spouse is required to file an FBAR for any account that is not jointly owned with the filer, the filer’s spouse must file a separate FBAR for all accounts, including those owned jointly with the filing spouse.

**Consolidated FBAR.** If a person is named in a consolidated FBAR filed by a more than 50 percent owner, the person 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 on an FBAR.

**Governmental Entity.** A foreign financial account of any governmental entity is not required to be reported on an FBAR by any person. For purposes of this form, governmental entity includes: (1) a college or university that is an agency or instrumentality of, or owned or operated by, a governmental entity; and (2) an employee retirement or welfare benefit plan of a governmental entity.

**International Financial Institution.** A foreign financial account of any international financial institution of which the United States is a member is not required to be reported on an FBAR by any person.

**IRA Owners and Beneficiaries.** An owner or beneficiary of an IRA is not required to file an FBAR with respect to 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 § 401(a), 403(a), or 403(b) is not required to file an FBAR with respect to a foreign financial account held by or on behalf of the retirement plan.

**Signature Authority.** Signature authority over a foreign financial account need not be reported on an FBAR by an individual with no financial interest in the foreign financial 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 need not 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 regulated or examined by the Securities and Exchange Commission or Commodity Futures Trading Commission need not 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 need not 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 whose class of equity securities is listed on any United States national securities exchange need not report signature authority over a foreign financial account in which the entity has a financial interest. An officer or employee of a United States subsidiary of such entity need not report signature authority over a foreign financial account of the subsidiary.

(5) An officer or employee of a United States entity that has a class of securities registered under section 12(g) of the Securities and Exchange Act need not report signature authority over a foreign financial account of such corporation.

**Trust Beneficiaries.** A trust beneficiary with a financial interest described in section 2(f) 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 citizen, a United States resident, an entity created or organized in the United States or under the laws of the United States, or a trust formed under the laws of the United States; and (2) files an FBAR disclosing the trust's foreign financial accounts.

**United States Military Banking Facility.** An FBAR need not be filed for a financial account maintained with a financial institution located on a United States military installation, even if that military installation is outside of the United States.

#### **Filing Information—Do NOT file with Federal Income Tax Return**

**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.

File by mailing the FBAR 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 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.

**Verification of Filing.** Ninety days after the date of filing, the filer can request verification that the FBAR was received. An FBAR filing verification request may be made by calling 1-800-800-2877 and selecting option 2. Up to five documents may be verified over the phone. There is no fee for this verification. Alternatively, an FBAR filing verification request may be made in writing and must include the filer's name, taxpayer identification number, and the filing period. There is a \$5.00 fee for verifying five or fewer FBARs and a \$1.00 fee for each additional FBAR. A copy of the filed FBAR can be obtained at a cost of \$0.15 per page. Check or money order should be made payable to the United States Treasury.

The request and payment should be mailed to:

IRS Enterprise Computing Center/Detroit, ATTN: Verification, P.O. Box 32063, Detroit, MI 48232

**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 five years from June 30th of the year following the calendar year reported and must be available for inspection as provided by law. Persons filing an FBAR should retain a copy for their records.

#### **Explanations for Specific Items**

##### **Part I**

**Item 1.** The FBAR is an annual report. Enter the calendar year being reported.

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 FBAR is filed. Follow the instructions in "When and Where to File" to file an amendment.

**Item 2.** Check the appropriate box describing the filer. Check only one box. Individuals filing based on 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 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 its type of person and the term "(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 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). Numbers should be entered with no spaces, dashes, or other punctuation throughout the FBAR. 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 (Continuation of Separate Accounts) or Part III (Joint Accounts) of the Report.

If filing a consolidated FBAR, only complete Part V, Items 34 through 42, for each person included in the consolidated FBAR.

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

The filer must retain the detailed account information otherwise required by the FBAR for five years from June 30th of the year following the calendar year reported. The information must be available for inspection. See Filing Information, Record Keeping Requirements.

##### **Part II**

*Enter information in the applicable parts of the form only. 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 is to 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 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.

If a foreign financial account is jointly owned by two or more persons, each person must report the entire value of the account.

**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

*Enter information in the applicable parts of the form only. 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.**

**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 identity information of the principal joint owner (excluding the filer) to complete Items 25–33. Leave blank items for which no information is available. A spouse having an interest in a jointly owned account with the filing spouse is the principal joint owner. Enter the term "(spouse)" on Line 26 after the last name of the joint spousal owner.

If the filer's spouse is required to report only jointly owned financial accounts that are reported on the filer's FBAR, the filer's spouse need not file a separate FBAR but must also sign the filer spouse's FBAR to fulfill his or her reporting obligation. See Items 44–46 on page one. If the filer's spouse is required to file an FBAR for any account that is not jointly owned with the filer, the filer's spouse must file a separate FBAR for all of the accounts, including those owned jointly with the other spouse.

### Part IV—Signature Authority

*Enter information in the applicable parts of the form only. 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 financial accounts must complete only Items 34–43 for each person on whose behalf the filer has signature authority.

**For Items 15–23, see Part II.**

**Items 34–42.** Provide the name, address, and identifying number of the owner of a foreign financial account for which the individual has signature authority but no financial interest. 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 of the same owner.

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

A United States person who is employed in a foreign country and who has signature authority over a foreign financial account that is owned or maintained by the individual's employer should only complete Part 1 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.

### Part V—Consolidated FBAR

*Enter information in the applicable parts of the form only. 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.*

**Who Can File a Consolidated FBAR.** An entity that owns directly or indirectly more than a 50 percent interest in a legal entity that is required to file an FBAR is permitted to file a consolidated FBAR on behalf of itself and such other legal entity. Check box "d" in

Part I, Item 2 and complete Part V. If filing a consolidated FBAR and reporting 25 or more financial accounts, complete only Items 34–42 for each person included in the consolidated FBAR.

**For Items 15–23, see Part II.**

**Items 34–42.** Provide the name, 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 legal entity, it must be signed by an authorized individual. The authorized individual's title is entered in Item 45. An authorized official of the person filing the consolidated FBAR must sign the FBAR.

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. § 5321(a)(5). Willful violations may also be subject to criminal penalties under 31 U.S.C. § 5322(a), 31 U.S.C. § 5322(b), or 18 U.S.C. § 1001.

[FR Doc. 2010–4042 Filed 2–25–10; 8:45 am]

BILLING CODE 4810–02–P

## DEPARTMENT OF EDUCATION

### 34 CFR Subtitle B, Chapter II

[Docket ID ED–2010–OESE–0001]

RIN 1810–AB08

### Teacher Incentive Fund Program

**AGENCY:** Office of Elementary and Secondary Education, Department of Education.