

**DEPARTMENT OF THE TREASURY**

**Financial Crimes Enforcement Network**

**31 CFR Part 1010**

**RIN 1506-AB08**

**Amendment to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts**

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

**ACTION:** Final rule.

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

**DATES:** Effective Date: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

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

## **SUPPLEMENTARY INFORMATION:**

### **I. Statutory and Regulatory Background**

The BSA, Titles I and II of Public Law 91-508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314 and 5316-5332, authorizes the Secretary of the Treasury (Secretary), among other things, to issue regulations requiring persons to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, regulatory, and counter-terrorism matters. The regulations implementing the BSA appear at 31 CFR Part 103 (31 CFR Chapter X, effective March 1, 2011).<sup>1</sup> The Secretary's authority to administer the BSA has been delegated to the Director of FinCEN.

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

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

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

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

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

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

## **II. Notice of Proposed Rulemaking**

On February 26, 2010, FinCEN published in the Federal Register a Notice of Proposed Rulemaking (NPRM) that proposed changes to the rules for the reporting of foreign financial accounts.<sup>3</sup> Most significantly, the NPRM proposed to (1) define the scope of individuals and entities required to file the FBAR, (2) delineate the types of

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

reportable accounts, and (3) exempt certain persons and accounts from the reporting requirement and provide certain additional relief. The changes proposed in the NPRM were accompanied by proposed changes to the FBAR form instructions, a draft of which appeared in the Federal Register as an attachment to the NPRM.

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

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

- Clarifies whether an account is foreign and therefore reportable as a foreign financial account and addresses the treatment of custodial accounts in this context;
- Revises the definition of signature or other authority to more clearly apply to individuals who have the authority to control the disposition of assets in the account by direct communication (whether in writing or otherwise) to the foreign financial institution;
- Clarifies that officers or employees who file an FBAR because of signature or other authority over the foreign financial account of their employers are not expected to personally maintain the records of the foreign financial accounts of their employers;

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

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

*A. Reportable Accounts*

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

FinCEN received a number of comments asking for clarification regarding specific custodial arrangements. Commenters explained that in some cases a United States person may have an account with a financial institution located in the United States, such as a bank. According to the commenters, that U.S. bank may act as a global

custodian and hold the person's assets outside the United States. In many cases, the custody bank creates pooled cash and securities accounts in the non-U.S. market to hold the assets of multiple investors. These accounts, commonly called omnibus accounts, are in the name of the global custodian. Typically, the U.S. customer does not have any legal rights in the omnibus account and can only access their holdings outside of the United States through the U.S. global custodian bank. FinCEN wishes to clarify that in this situation, the U.S. customer would not have to file an FBAR with respect to assets held in the omnibus account and maintained by the global custodian. In this situation, the U. S. customer maintains an account with a financial institution located in the United States.

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

*B. Signature or Other Authority, Generally*

FinCEN received a large number of comments generally regarding the signature authority requirement. Some commenters sought further clarification of the definition, while other commenters recommended an elimination of the requirement. In the NPRM, FinCEN proposed to define "signature or other authority" as the "authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by delivery of instructions (whether communicated in writing or otherwise) *directly* to the person with whom the financial account is maintained."<sup>4</sup> To avoid confusion, FinCEN inserted the word "directly" into the definition proposed in the NPRM to place the filing requirement on an individual only

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

if the individual has the authority to directly deliver instructions to the foreign financial institution.<sup>5</sup>

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

Signature or other authority means the authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained.

The test for determining whether an individual has signature or other authority over an account is whether the foreign financial institution will act upon a direct communication from that individual regarding the disposition of assets in that account. The phrase “in conjunction with another” is intended to address situations in which a foreign financial institution requires a direct communication from more than one individual regarding the disposition of assets in the account.

Some commenters requested that FinCEN eliminate the requirement to report signature or other authority over a foreign financial account. Commenters expressed concern about perceived duplication of reporting as well as a perceived lack of utility to law enforcement when both individuals with signature authority and those with a financial interest file FBARs with respect to the same account. Some commenters

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

suggested that investigators could obtain the relevant information if FinCEN were to modify the FBAR form to enable the person with a financial interest in a reportable account to list all of the individuals with signature or other authority over the account. Another commenter suggested that FinCEN provide an exemption for all employees who have signature authority over but no financial interest in their employer's foreign financial accounts if the employer provides notice to the employees that the employer has filed an FBAR for its accounts.

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



full range of individuals with access to the account. Likewise, if FinCEN were to adopt an exemption for employees who receive notice from their employers regarding the filing of the FBAR, and the employer falsely provides the notice, law enforcement again would be deprived of valuable information. By adopting an independent reporting requirement for individuals with signature authority, the final rule maintains the check and balance that has existed since 1972, making it more difficult for the account and the individuals having access to that account to escape detection. The signature authority filing requirement is a necessary component of an effective FBAR regulatory regime. Thus, in this final rule, FinCEN continues to require reporting by individuals with signature or other authority.

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

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

Commenters sought relief from the recordkeeping provisions of 31 CFR 103.32 for individuals with signature authority over their employer's accounts. These commenters argued that the recordkeeping rules present challenges in such cases, because these individuals do not own the records of the employing firm. Further, these

commenters argued that they should not be expected to personally maintain the records of that employer for five years. FinCEN wishes to clarify that in the case of officers or employees who file an FBAR because of signature or other authority over the foreign financial accounts of their employer, we do not expect such officers or employees to personally maintain the records of the foreign financial accounts of their employers.

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

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

*D. General Exemptions*

The NPRM proposed exemptions from the reporting requirements for certain types of persons and accounts. FinCEN received a number of comments asking for broader exemptions. One commenter requested that FinCEN exempt from the reporting requirement accounts located in jurisdictions that are not considered to be “tax havens” or that have highly functional bank regulation and information exchange with the United States. FinCEN also received comments from individuals living abroad who objected to the FBAR filing requirement. Some of these commenters were married individuals who raised concerns that their non-U.S. spouses did not want information regarding joint financial accounts to be reported to U.S. government authorities. Another commenter requested that FinCEN exempt regulated financial institutions, such as those that qualify for exempt recipient status for purposes of filing an IRS 1099 series form, to report interest income and dividends.

Finally, FinCEN received several comments requesting a broad exemption for pension plans and welfare benefit plans, or at least for large ERISA plans. These commenters argued that pension plans and welfare benefit plans already are subject to comprehensive regulation and believed that the FBAR filing obligations would be unduly burdensome and duplicative in light of existing reporting requirements, particularly Form

5500, Annual Return/Report of Employee Benefit Plan. Commenters also pointed to the tax-exempt status of certain ERISA plan trusts, and a provision in the customer identification program (CIP) rules which exempts from the CIP rules an account established for the purpose of participating in an ERISA plan as indicating that an exemption from the FBAR rules would be appropriate in the case of ERISA pension and welfare benefit plans.<sup>6</sup> Alternatively, these commenters stated that many of their concerns would be addressed if FinCEN were to clarify the scope of a number of definitions in the NPRM such as signature authority and reportable accounts.

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

FinCEN does not believe it appropriate to expand the exemptions as recommended by the commenters. Although the commenters noted that certain countries may have a robust set of anti-money laundering laws, the FBAR places the obligation of reporting on the United States person, and individuals and businesses can commit financial abuses and other crimes using financial institutions in those countries. By requiring United States persons to identify foreign financial accounts, the FBAR creates a financial trail that assists law enforcement and other agencies to identify accounts outside of the United States.

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

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

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

#### *E. Other Issues*

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

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

Commenters raised a number of issues related to the process of filing the FBAR. Specifically, they requested the option to file the form electronically.<sup>9</sup> As noted in the NPRM, the FBAR form currently available on both the FinCEN and IRS websites allows users to complete the form electronically and print a PDF document that can be mailed to the address on the form. FinCEN is in the process of modernizing its IT system and has plans to include the ability to file FBARs electronically.

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

#### *F. Applicability Date*

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

FinCEN received several comments regarding the applicability date for the final rule. These commenters specifically asked whether filers would be permitted to rely on

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<sup>9</sup> A few commenters raised other issues concerning the filing of the FBAR such as increasing the filing threshold and changing the due date of the FBAR. The threshold and the due date are established under a regulation section, 31 CFR 103.27 that was not proposed to be amended by the NPRM. Thus, changes suggested by those comments are not addressed in this final rulemaking.

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

*G. Coordination with Chapter X*

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

Because the NRPM was published prior to the effective date of the Chapter X reorganization, the NPRM used the 31 CFR Part 103 numbering system. For consistency with the NPRM, references in this final rule generally continue to use the 31 CFR Part 103 numbering system. However, because the effective date of this final rule is [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], the text of

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

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

the regulations finalized today must use the Chapter X numbering system. Thus, instead of being numbered 31 CFR 103.24, today's final rule is numbered 31 CFR 1010.350.

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

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

#### *A. § 103.24(a)—In general*

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

#### *B. § 103.24(b)—United States person*

The NPRM defined a United States person as a citizen or resident of the United States, or an entity, including but not limited to a corporation, partnership, trust or limited liability company, created, organized, or formed under the laws of the United States, any state, the District of Columbia, the Territories, and Insular Possessions of the United States or the Indian Tribes. The NPRM provided that the determination of whether an individual is a resident of the United States would be made under the rules of the Internal Revenue Code, specifically, 26 U.S.C. 7701(b) and the regulations thereunder, except



that the definition of the term United States provided in 31 CFR 103.11(nn) will be used instead of the definition of United States in the rules under the Internal Revenue Code.

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

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

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

FinCEN does not believe it appropriate to define trust under section 7701(a)(30) of the Internal Revenue Code because that definition might allow trusts formed under the law of a state to be excluded from the scope of FBAR obligations. For example, if a trust is formed under New York law and has one trustee who is a United States person and two

trustees who are not United States persons, under section 7701(a)(30) the trust would not be considered a U.S. trust if all substantial trust decisions were not controlled by its U.S. trustee.

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

C. § 103.24(c)—*Types of reportable accounts*

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

*D. 103.24(c)(1)—Bank account*

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

*E. §103.24(c)(2)—Securities account*

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

*F. § 103.24(c)(3)—Other financial account*

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

- an account with a person that is in the business of accepting deposits as a financial agency;
- an account that is an insurance policy with a cash value or an annuity policy;
- an account with a person that acts as a broker or dealer for futures or options transactions in any commodity on or subject to the rules of a commodity exchange or association; or
- an account with a mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions.

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

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

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

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

G. § 103.24(c)(4)—*Exceptions for certain accounts*

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

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

A few commenters sought clarification as to the meaning of proposed section 103.24(c)(4)(i). In particular, the commenters asked FinCEN to clarify whether the last sentence of the paragraph concerning the exercise of governmental authority applied to the entire paragraph or only the second sentence of the paragraph. In response, FinCEN clarifies that the last sentence should be read in conjunction with the second sentence of

the paragraph, which contains a specific requirement concerning the exercise of governmental authority. FinCEN is also making a minor editorial change to the second sentence so that it will be clearer that the exercise of governmental authority requirement applies to the entire second sentence.<sup>12</sup>

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

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

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

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

- An account of an international financial institution of which the United States government is a member is not required to be reported.<sup>14</sup>
- An account in an institution known as “United States military banking facility” (or “United States military finance facility”) operated by a United States financial institution designated by the United States Government to serve United States government installations abroad is not required to be reported even though the United States military banking facility is located in a foreign country.
- Correspondent or nostro accounts that are maintained by banks and used solely for bank-to-bank settlements are not required to be reported.

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

*H. §103.24(d)—Foreign country*

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

*I. §103.24(e)—Financial interest*

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

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



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

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

Section 103.24(e)(2) proposed that a United States person also has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is one of the following:

- A person acting on behalf of that United States person such as an attorney, agent, or nominee with respect to the account. (Section 103.24(e)(2)(i)).
- A corporation in which the United States person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares, a partnership in which the United States person owns directly or indirectly more than 50 percent of the interest in profits or capital, or any other entity (other than a trust) in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits. (Section 103.24(e)(2)(ii)).
- A trust, if the United States person is the trust settlor and has an ownership interest in the account for United States federal tax purposes. See 26

U.S.C. 671-679 to determine if a settlor has an ownership interest in a trust's financial account for a year. (Section 103.24(e)(2)(iii)).

- A trust in which the United States person either has a beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the income. (Section 103.24(e)(2)(iv)).
- A trust that was established by the United States person and for which the United States person has appointed a trust protector that is subject to such person's direct or indirect instruction. (Section 103.24(e)(2)(v)).

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

FinCEN received a few comments related to the application of the definition of financial interest in the context of trusts, including trusts for pension plans. With respect to trusts generally, commenters raised concerns about determining whether a person has more than a 50 percent beneficial interest in the trust, when the trust is a discretionary trust. FinCEN recognizes that in the case of trusts, determinations regarding beneficial interest for purposes of filing the FBAR may be difficult if the person is a beneficiary of

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

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

Finally, the NPRM provided that a United States person that causes an entity to be created for a purpose of evading the FBAR reporting requirement would have a financial interest in any bank, securities, or other financial account in a foreign country for which

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

the entity is the owner of record or holder of legal title. The term “evading” as used in the anti-avoidance rule is not intended to apply to persons who make a good faith effort to comply with the final rule.

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

*J. § 103.24(f)--Signature or other authority*

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

*K. Signature Authority Exceptions*

The NPRM proposed to grant relief from the obligation to report signature or other authority over a foreign financial account to the officers and employees of five categories of entities subject to specific types of federal regulation. These exceptions would apply, however, only where the officers or employees have no financial interest in the reportable account. These entities would still be obligated to report their financial interest in these reportable accounts. Officers and employees would be able to avail

themselves of these exceptions without receiving notice that the entities had filed an FBAR with respect to these accounts.

FinCEN received a number of comments on the signature authority exceptions. Some commenters sought additional relief in the form of new exceptions. FinCEN received comments requesting relief from the signature authority filing requirement for the officers and employees of entities located in countries that FinCEN would designate as “low-risk,” of entities listed on a foreign securities exchange, of foreign-located banks that have entered into a Qualified Intermediary agreement with the IRS, and of 501(c)(3) private colleges and universities. FinCEN wishes to reiterate that although certain countries may have a robust set of anti-money laundering laws, the FBAR places the obligation of reporting on the United States person, and the purpose of the FBAR is to create a financial trail of foreign accounts. Likewise, the fact that a foreign bank may have entered into a Qualified Intermediary agreement with the IRS for tax purposes or that an entity is exempt from tax under the Internal Revenue Code does not eliminate the need for law enforcement and other agencies to have information about the existence of foreign financial accounts of United States persons.

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

The NPRM provided the following exceptions:

- 31 CFR 103.24(f)(2)(i) An officer or employee of a bank that is examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance

Corporation, the Office of Thrift Supervision, or the National Credit Union Administration need not report that he has signature or other authority over a foreign financial account owned or maintained by the bank if the officer or employee has no financial interest in the account.

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

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

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

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

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

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

Commenters sought clarification on the scope of this exception and specifically asked how this exception relates to the exception provided in the NPRM under section

103.24(f)(2)(ii). FinCEN wishes to reiterate that the exception in 103.24(f)(2)(ii) applies to officers and employees of financial institutions as defined in 31 CFR 103.11(n) that are registered with and examined by the SEC or CFTC. Thus, section 103.24(f)(2)(ii) does not apply to officers and employees of investment advisers. These commenters also sought clarification as to the scope of accounts covered by the exception contained in section 103.24(f)(2)(iii). FinCEN wishes to clarify that officers and employees of an Authorized Service Provider may avail themselves of this exception only with respect to the reportable accounts of those clients which are investment companies registered under the Investment Company Act of 1940 and are managed by the Authorized Service Provider. If FinCEN were to expand the exception as requested beyond clients that are registered investment companies, the exception would apply even in situations where the officer and employee is providing service to individuals. FinCEN does not believe that such a change is appropriate.

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



under the AML rules, the mutual fund remains responsible for AML compliance. Under this exception, however, officers and employees of the Authorized Service Provider would be relieved of the reporting obligations of this rule.

- 31 CFR 103.24(f)(2)(iv) An officer or employee of an entity with a class of equity securities listed on any United States national securities exchange need not report that he has signature or other authority over a foreign financial account of such entity if the officer or employee has no financial interest in the account. An officer or employee of a United States subsidiary of such entity need not file a report concerning signature or other authority over a foreign financial account of the subsidiary if he has no financial interest in the account and the United States subsidiary is named in a consolidated FBAR report of the parent filed under proposed paragraph (g)(3) of 31 CFR103.24.

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

FinCEN received a number of comments on this exception. Most of these comments addressed the interaction between the exception for officers and employees of corporations listed on a United States national securities exchange and the special rule for consolidated FBARs. Some commenters questioned whether the exception contained in section 103.24(f)(2)(iv), which discusses consolidated FBARs filed by a parent, enables a

foreign listed parent to file a consolidated report on behalf of its United States subsidiaries. FinCEN notes that by its terms the special rule for consolidated FBAR reporting only applies to United States persons.

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

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

listed parent.<sup>16</sup> For similar reasons, FinCEN has decided not to extend the exception to U.S. subsidiaries of foreign parents listed on foreign exchanges. Furthermore, because the FBAR rules apply only to United States persons, FinCEN will not permit voluntary filing by the foreign parent to satisfy the filing obligations of the officers and employees of U.S. subsidiaries.<sup>17</sup>

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

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

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<sup>16</sup> To make the application of the exception clearer in the context of the special rule for consolidated FBARs, the final rule revises the second sentence of the exception by deleting the words "such entity" and adding the words "a United States entity with a class of equity securities listed on a United States security exchange." FinCEN believes that this change will clarify that the second sentence of the exception does not apply in the case of parent companies that are not U.S. entities.

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

employees of the subsidiary have signature authority over the accounts of the listed parent.

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

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

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

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

FinCEN also received comments seeking an amendment to the proposed exceptions contained in sections 103.24(f)(2)(iv) and 103.24(f)(2)(v) to include listed American Depositary Receipts (ADRs), unlisted ADRs that are traded over-the-counter if they are listed on the Designated Offshore Securities Market, ADRs with unlisted trading privileges on a national securities exchange, ADRs registered under section 12(g) or ADRs with unlisted trading privileges under section 12(f) of the Securities Exchange Act. After considering these comments, FinCEN believes that listed ADRs would be covered by the first sentence of the exception in section 103.24(f)(2)(iv). In addition, if a foreign issuer has registered under section 12(g) a class of equity securities underlying ADRs, FinCEN believes it should be covered by the exception under section 103.24(f)(2)(v). The final rule makes appropriate changes to reflect this coverage. FinCEN does not believe that other ADRs are subject to the same requirements as listed entities on a U.S. national securities exchange or entities registered under section 12(g), and, therefore, we have not adopted the recommendations to include other types of ADRs.

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

Accordingly, the final rule adopts these exceptions as revised.

*L. 103.24(g)—Special rules*

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

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

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

interest in the accounts. FinCEN notes that where filers have only signature authority, the FBAR requires identifying information about the persons with a financial interest to ensure that law enforcement receives meaningful information about these accounts.

- Consolidated reports. An entity that is a United States person and owns directly or indirectly more than a 50 percent interest in an entity required to report under this section will be permitted to file a consolidated report on behalf of itself and such other entity.<sup>19</sup>

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

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

FinCEN received one comment proposing an across-the-board exemption for all pension plan participants and beneficiaries. The commenter was concerned about the

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

filing obligations of participants and beneficiaries of other types of plans not covered by the exemption. In proposing this exemption, FinCEN considered that participants and beneficiaries of these plans were less likely to be aware of the existence of foreign financial accounts because they were unlikely to exceed the 50 percent ownership threshold. Participants and beneficiaries that are not covered by this exemption should look to the 50 percent ownership indicia to determine whether a filing obligation exists.

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

This provision is intended to provide relief to beneficiaries of trusts if the trust, trustee of the trust, or agent of the trust is a United States person and has filed the FBAR as required. FinCEN is adopting this provision without change.

#### **IV. Regulatory Flexibility Act**

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



individuals and entities subject to reporting and recordkeeping requirements, the final rule will reduce regulatory obligations overall.

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

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

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

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

## **V. Executive Order 12866**

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

## **VI. Paperwork Reduction Act Notices**

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

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

Estimate Average Annual Burden Hours Per Affected Filer: The estimated average burden associated with the recordkeeping requirement in this rule will vary depending on the number of reportable accounts. We estimate that the recordkeeping burden will range from five minutes to sixty minutes, and that the average burden will be thirty minutes. The estimated average burden associated with the reporting requirement (FBAR form completion) will also vary depending on the number of reportable accounts and whether the filer will be able to take advantage of the exceptions provided in this rule. We estimate that the average reporting burden will range from approximately twenty minutes to one hour and that the average reporting burden will be approximately 45 minutes. The

reporting burden is reflected in the burden listed for completing TD-F 90-22.1 (See OMB Control Number 1506-0009/1545-2038). The burden associated with reporting a financial interest in or signature or other authority over a foreign financial account to the Commissioner of Internal Revenue is reflected in the burden for the appropriate income tax return or schedule.

Estimated Total Annual Burden: 500,000 hours.

FinCEN received one comment on the estimated number of filers. The commenter believed that the number of filers should be higher. The commenter stated that estimates of Americans living abroad may be as high as 5 million, and that approximately 2 million of those Americans might be affected by the FBAR rules. The commenter did not provide a verifiable source or methodology for arriving at those estimates. As stated above, the rule contained in this document addresses the FBAR rules that have been in existence since 1972. FinCEN's estimate of the number of affected filing individuals and entities (400,000) is based on the number of FBARs annually filed in recent previous years.

One commenter noted that several of its clients had spent considerably more time than the NPRM estimated for complying with the FBAR requirement. FinCEN believes that changes made by the NPRM and incorporated in this document, such as addressing the scope of persons that are required to file reports of foreign financial accounts, specifying the types of reportable accounts, and providing relief in the form of exemptions for certain persons with signature or other authority over foreign financial accounts from filing reports, will assist filers in complying with the rule. Further, clarifications in this document regarding the scope of terms in the NPRM, such as

reportable accounts and financial interest, as well as revisions to the definition of signature authority and the provision of truncated filing, will assist filers in complying with the rule. Accordingly, FinCEN has not increased the average estimated burden.

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

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

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

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

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

## **Amendment**

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

### **PART 1010—GENERAL PROVISIONS**

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

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

2. Section 1010.350 is revised to read as follows:

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

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

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

(1) A citizen of the United States;

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

(3) An entity, including but not limited to, a corporation, partnership, trust, or limited liability company created, organized, or formed under the laws of the United States, any State, the District of Columbia, the Territories and Insular Possessions of the United States, or the Indian Tribes.

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

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

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

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

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

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

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

(iv) An account with—

(A) Mutual fund or similar pooled fund. A mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions; or

(B) Other investment fund. [Reserved]

(4) Exceptions for certain accounts.

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

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

(iii) An account in an institution known as a “United States military banking facility” (or “United States military finance facility”) operated by a United States financial institution designated by the United States Government to serve United States

government installations abroad is not required to be reported even though the United States military banking facility is located in a foreign country.

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

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

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

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

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

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

(ii) A corporation in which the United States person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares, a partnership in which the United States person owns directly or indirectly more than 50 percent of the interest in profits or capital, or any other entity (other than an entity in paragraphs



(e)(2)(iii) through(iv) of this section) in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits;

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

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

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

(f) Signature or other authority—(1) In general. Signature or other authority means the authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained.

(2) Exceptions—(i) An officer or employee of a bank that is examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift

Supervision, or the National Credit Union Administration need not report that he has signature or other authority over a foreign financial account owned or maintained by the bank if the officer or employee has no financial interest in the account.

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

(iii) An officer or employee of an Authorized Service Provider need not report that he has signature or other authority over a foreign financial account owned or maintained by an investment company that is registered with the Securities and Exchange Commission if the officer or employee has no financial interest in the account.

“Authorized Service Provider” means an entity that is registered with and examined by the Securities and Exchange Commission and that provides services to an investment company registered under the Investment Company Act of 1940.

(iv) An officer or employee of an entity with a class of equity securities listed (or American depository receipts listed) on any United States national securities exchange need not report that he has signature or other authority over a foreign financial account of such entity if the officer or employee has no financial interest in the account. An officer or employee of a United States subsidiary of a United States entity with a class of equity securities listed on a United States national securities exchange need not file a report concerning signature or other authority over a foreign financial account of the subsidiary

if he has no financial interest in the account and the United States subsidiary is included in a consolidated report of the parent filed under this section.

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

(g) Special rules—(1) Financial interest in 25 or more foreign financial accounts.

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

(2) Signature or other authority over 25 or more foreign financial accounts. A

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

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

(4) Participants and beneficiaries in certain retirement plans. Participants and beneficiaries in retirement plans under sections 401(a), 403(a) or 403(b) of the Internal

Revenue Code as well as owners and beneficiaries of individual retirement accounts under section 408 of the Internal Revenue Code or Roth IRAs under section 408A of the Internal Revenue Code are not required to file an FBAR with respect to a foreign financial account held by or on behalf of the retirement plan or IRA.

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

Dated: \_February 16, 2011\_\_\_\_\_

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