FBAR RAM YOU: THE MEANING OF RESIDENCE FOR FBAR PURPOSES

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In the case of individuals who are not U.S. citizens, the scope of the requirement to file a Treasury Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts), commonly known as the "FBAR", and the related record keeping requirements, has long been unclear. For FBARs due by June 30, 2011, the position has at last been clarified by the final FBAR regulations issued on February 24, 2011.[2]

For years before 2010, the practitioner continues to be confronted with overlapping and conflicting language in the statute, the applicable Treasury regulations (which are not tax regulations) and the instructions to the current (2008) version of the form, instructions which were further modified by Internal Revenue Service (IRS) notices in 2009 and 2010 temporarily reinstating the instructions in the prior 2000 version of the form.

While the deadline has passed for filing returns for years before 2010, except signature authority returns, the definition of residence remains relevant for individuals with potential exposure for failing to file returns. Some of these individuals may have made a voluntary disclosure under the 2009 IRS program or are contemplating making one in the newly announced 2011 program.[3] Whether they should be regarded as resident for FBAR purposes (as opposed to income tax purposes) in the earlier years covered by these programs can make a significant difference to their liability for FBAR penalties.

This article is an attempt to trace a path through the maze.

1. The Scope of the FBAR Requirement for Non-Citizens

The requirement to file the FBAR derives from the Bank Secrecy Act of 1970, codified at 31 USC section 5311 *et seq.*, and specifically section 5314, which in pertinent part provides:

> (a) . . . [T]he Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or

> person makes a transaction or maintains a relation for any person with a foreign financial agency.[4] [Emphasis added]

The statute provides for the Treasury Secretary to prescribe various rules relevant to this requirement. The Secretary has delegated his authority to the director of the Financial Crimes Enforcement Network (FinCEN). In 1977, regulations were prescribed that were codified at 31 CFR § 103.24.[5] The regulations, prior to the most recent amendment, required that:

> (a) Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship to the Commissioner of the Internal Revenue for each year in which such relationship exists, and shall provide such information as shall be specified in a reporting form prescribed by the Secretary to be filed by such persons. Persons having a financial interest in 25 or more foreign financial accounts need only note that fact on the form. Such persons will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate. [Emphasis added]

The instructions to the prior version of the FBAR, published in July 2000, describe who must file the report:

> Each Unites States person, who has a financial interest in or signature authority, or other authority over any financial accounts, including bank, securities, or other types of financial accounts in a foreign country, if the aggregate value of these financial accounts exceeds $10,000 at any time during the calendar year, must report that relationship each calendar year by filing TD F 90-22.1 with the Department of the Treasury on or before June 30, of the succeeding year.

The instructions to the 2000 form defined a United States person as:

> The term "United States person" means (1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust. [Emphasis added]

The IRS revised the FBAR and its instructions in October 2008.[6] The instructions continued to require the form to be filed by United States persons but changed the definition of a United States person to as follows:

> The term "United States person" means a citizen or resident of the United States, or a person in and doing business in the United States. [Emphasis added]

However, because of uncertainty as to the scope of this definition, and particularly the phrase "a person in and doing business in the United States", the IRS, with which FBARs must be filed each year, issued Announcement 2009-51 on June 22, 2009[7], in which it suspended the

application of this instruction and reinstated, for FBARs due with respect to 2008 and earlier years, the definition contained in the prior version of the FBAR published in July 2000.

This multiplicity of definitions is confusing but we believe that Announcement 2009-51 states the rule as applicable for 2009 and earlier years. A non-citizen of the United States is a "United States person" only if he or she was, in any applicable year, a resident of the United States, a term that was nowhere officially defined.

On February 26, 2010, FinCEN issued proposed regulations that, among other things, proposed to clarify the definition of residence. On February 23, 2011, FinCEN released final regulations (published in the Federal Register a day later), with further clarifications.[8] We discuss the details of these regulations below.

2. Meaning of "Resident of the United States" before 2011

(a) Lack of Formal Guidance. Announcement 2009-51 (and a subsequent Announcement 2010-16[9]) left unresolved the question of who is a resident of the United States for purposes of FBARs due with respect to 2009 and earlier years. There has been no official published guidance on this point. The Bank Secrecy Act, the Treasury regulations under the Act, the instructions to the July 2000 and October 2008 versions of the FBAR and Announcements 2009-51 and 2010-16 are all silent on how to determine whether an alien individual is a resident.[10]

One thing is clear: The definition of "resident alien" set out in section 7701(b) of the Internal Revenue Code of 1986, Title 26 of the United States Code, was inapplicable ("Title 26" or "IRC").[11] Title 26, or Treasury regulations under Title 26, actually contain several definitions of residence for different purposes of Title 26. Section 7701(b) is the definition with the broadest application. But broad as it is, it only applies, by its own terms, "for the purposes of this title [26] (other than subtitle B)".[12] Although the actual address for filing the FBAR is at the IRS Enterprise Computing Center in Detroit and although authority to enforce the FBAR was delegated to the IRS in 2003,[13] the FBAR requirement is part of Title 31, not Title 26, and therefore section 7701(b) by its own terms does not apply. Not indeed do any of the other definitions of residence that apply for other purposes of Title 26.

We did, however, locate two IRS documents that addressed the definition of residence.

(b) Internal Revenue Manual. The first document is a provision of the Internal Revenue Manual. It should be understood that the Manual is an official IRS internal document that sets out the procedures which IRS agents are required to follow. Although the Manual is published, on the IRS website[14] and elsewhere, it is addressed to IRS personnel rather than the public and technically may not be cited or relied upon by third parties.[15]

IRM 4.26.16.3.1.1, as of July 1, 2008, says the following:

> A "resident" of the United States is a permanent resident. "Permanent resident" is not defined in the FBAR instructions, regulations, or statute. The definition of "resident alien" found in IRC § 7701(b) is not applicable for FBAR purposes. The

> plain meaning of the term "resident" (in this context, someone who is living in the U.S. and not planning to permanently leave the U.S.) should be used for FBAR examination purposes. Although IRC § 7701(b) is not applicable, an individual can establish that he is not a resident for FBAR purposes if he can show that none of the following three criteria apply:
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> A. The green-card test - Individuals who at any time during the calendar year have been lawfully granted the privilege of residing permanently in the U.S. under the immigration laws automatically meet the definition of resident alien under the green-card test; or
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> B. Individuals who are not lawful permanent residents are defined as resident aliens under the substantial-presence test if they are physically present in the U.S. for at least 183 days during the current year, or they are physically present in the U.S. for at least 31 days during the current year and meet the specifications contained in IRC § 7701(b) (3); or
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> C. The person files a first year election on his income tax return to be treated as a resident alien under IRC § 7701(b) (4).
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> Therefore, if none of the three criteria listed above apply, then the person is not a resident for FBAR purposes.

Although the Manual acknowledges the inapplicability of section 7701(b), it nevertheless creates a safe harbor for an individual who does not meet any of three tests (holding a green card, meeting the substantial presence test and making a first year tax residence election). The Manual does not state whether there is an exception for individuals to whom one of the first two tests does apply but is treated as a nonresident by virtue of the application of the dual residence provision of an income tax treaty, such as Article 4 of the United States Model Income Tax Treaty, discussed in more detail below. Whether an examiner faced with an individual with lawful permanent resident status who claimed to be nonresident under Article 4 would accept that the individual was also not a resident for FBAR purposes is therefore unknown.

However, if an individual does not fall within the safe harbor, there remains the general interpretation - namely that a resident is someone who lives in the United States and does not plan to leave the United States permanently. By that measure, the fact that an individual holds a green card is irrelevant. What matters is whether or not the individual lives in the United States and, if he does, whether or not he has definite plans to leave.

Although the Manual apparently confers no legal rights on the individual, the provisions of the Manual do explain how we may reasonably expect the IRS to enforce the FBAR requirement. Moreover, in the complete absence of any other form of public guidance from the government, it is likely that a court would reject an attempt to impose criminal or civil penalties based on willful failure to file on an individual who relied on the IRM instruction to examiners.

(c) National Phone Forum Q&A. On June 20, 2007, the IRS sponsored a National Phone Forum to disseminate information to the public regarding the FBAR. As part of the program, the tax community was offered the opportunity to submit questions. In what proved to be a valuable component to the Forum, the IRS disseminated in writing the questions and answers from the Program. The FBAR Questions and Answers indicate that they were approved by the Counsel of the Small Business/Self-Employed (SB/SE) division of the IRS on October 22, 2007.[16]

> Definition of US person for FBAR filing: An individual who is not a US citizen satisfies the substantial presence test for being a resident alien. They however file a 1040NR as a nonresident by using a treaty tie breaker or closer connection exception. Are they subject to the FBAR filing requirements?
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> Although the definition for "resident alien" in section 7701(b) of the Internal Revenue Code is not applicable with respect to the FBAR reporting requirements, individuals can establish that they are not residents for FBAR reporting purposes if they can show that they are not "resident aliens" for income tax purposes. In this case, the taxpayer who files as a nonresident alien does not have to file an FBAR. Please note that the filing instructions will change with the next version of the FBAR [later issued in October 2008] to require persons in, and doing business in the United States to file FBARs.

As noted earlier, Announcement 2009-51 suspended the application of the October 2008 instruction and reinstated, for FBARs due with respect to 2008 and earlier years, the definition contained in the prior version of the FBAR published in July 2000. Therefore, the IRS questions and answers following the National Phone Forum appear to us to have continuing relevance and, indeed, constitute the only guidance ever issued by the government addressed to the public, prior to the issuance of the Final Regulations by FinCEN in 2011.

(d) Definition of Residence following Announcement 2009-51. Announcement 2009-51 provided temporary relief for individuals potentially covered by the vague expression "in and doing business in the United States", since this could have covered almost any foreign person who visited the United States and conducted any business, however minimal. That left the IRS time to try to provide some guidance.

The IRS struggled with this from the beginning. In FAQs published by the IRS on its website concerning the 2008 version of the FBAR, a Q&A concerning "United States persons" stated:

> Q. Who is considered to be doing business in the United States for FBAR reporting purposes?
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> A. Whether a person is considered, for FBAR purposes, to be in, and doing business in the United States is determined based on an analysis of the facts and circumstances of each case. Generally, a person is not considered to be in, and doing business in the United States unless that person is conducting business within the United States on a regular and continuous basis. Persons who are merely visiting the

> United States or who sporadically conduct business in the United States, are not in, and doing business in, the United States for FBAR reporting purposes. For example, a person who is not a citizen or resident of the United States and who is engaged in a business but who only occasionally visits the United States to meet customers or business associates would not be in, and doing business in the United States for FBAR reporting purposes. [Emphasis added] [17]

Anyone reading this would realize that this formulation was still far too vague and the IRS received numerous comments to this effect. Accordingly, in Announcement 2010-16, at the same time that FinCEN was publishing the Proposed Regulations described below, the IRS bought itself some time and further extended the use of the 2000 FBAR definition of residence to apply to FBARs for 2009.[18] But it did not extend the definition to apply to 2010 FBARs. As we shall see, for 2010 FBARs, the 2011 Final Regulations will apply.

3. February 2010 Proposed Regulations

On February 26, 2010, FinCEN published the Proposed Regulations in which it adopted a definition of residence based on a slightly modified version of section 7701(b).[19]

The Proposed Regulations proposed to define a United States person as including, in the case of individuals, a citizen or resident of the United States. The Proposed Regulations dropped the reference to persons in and doing business in the United States (even though that language is contained in the Bank Secrecy Act). The determination of whether an individual is a resident of the United States was to be made under the rules of the Internal Revenue Code, specifically section 7701(b) and the regulations thereunder, except that a broader definition of the term "United States" provided in 31 CFR 103.11(nn) was to be used instead of the definition of "United States" in 26 CFR 301.7701(b)-1(c)(2)(ii).[20]

It generally makes sense to base the definition of a United States person on the tax law concept under section 7701(b). This definition has been in place for over quarter of a century, it is well understood and in most cases (although not always) it is straightforward to apply.[21] Moreover, the use of a tax law definition reflects the key role played, in practice, by tax advisors and tax preparers in promoting compliance with the FBAR reporting requirements. Using tax law definitions and concepts promotes consistency and makes it easier for the public and their advisors to understand their obligations.

However, the proposed regulations did not address the question of how to deal with individuals who are residents of countries with which the United States maintains income tax treaties. Almost all such treaties follow language which has remained virtually unchanged in every version of the U.S. model income tax treaty since 1977 and the very similar language in every version of the influential model published by the Organisation for Economic Cooperation and Development (OECD) since 1963. Article 4 of the most recent version of United States Model Income Tax Convention, dated November 15, 2006, provides as follows:

> 1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason

> of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State.
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> . . .
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> 3. Where, by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows:
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> a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (center of vital interests);
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> b) if the State in which he has his center of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
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> c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
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> d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall endeavor to settle the question by mutual agreement

Article 4 has been largely unchanged through a series of modifications to the U.S. model and appears, with minor variations, in almost all U.S. income tax treaties.[22]

As noted above, the Proposed Regulations cross referred to section 7701(b) and the regulations thereunder. On the subject of treaties, section 7701(b)(6) provides that:

> An individual shall cease to be treated as a lawful permanent resident of the United States if such individual commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country, does not waive the benefits of such treaty applicable to residents of the foreign country, and notifies the Secretary of the commencement of such treatment.

Section 7701(b) does not address the effect of treaties on aliens who meet the substantial presence test. Presumably, those aliens can rely on section 894, which provides that the provisions of Title 26 are to be applied to any taxpayer with due regard to any treaty obligation which applies to the taxpayer.

If we stopped there, it would be clear that a treaty nonresident should be treated as a nonresident for FBAR purposes as well. However, the Treasury is authorized to prescribe such regulations as may be necessary or appropriate to carry out the provisions of section 7701(b) and has exercised this authority in Treas. Reg. § 301.7701-7. In that regulation, the Treasury has provided:

> (a) Consistency Requirement
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> (1) Application. If the alien individual determines that he or she is a resident of the foreign country for treaty purposes, and the alien individual claims a treaty benefit (as a nonresident of the United States) so as to reduce the individual's United States income tax liability with respect to any item of income covered by an applicable tax convention during a taxable year in which the individual was considered a dual resident taxpayer, then that individual shall be treated as a nonresident alien of the United States for purposes of computing that individual's United States income tax liability under the provisions of the Internal Revenue Code and the regulations thereunder (including the withholding provisions of section 1441 and the regulations under that section in cases in which the dual resident taxpayer is the recipient of income subject to withholding) with respect to that portion of the taxable year the individual was considered a dual resident taxpayer.
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> . . .
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> (3) Other Code purposes. Generally, for purposes of the Internal Revenue Code other than the computation of the individual's United States income tax liability, the individual shall be treated as a United States resident. Therefore, for example, the individual shall be treated as a United States resident for purposes of determining whether a foreign corporation is a controlled foreign corporation under section 957 or whether a foreign corporation is a foreign personal holding company under section 552. In addition, the application of paragraph (a)(2) of this section does not affect the determination of the individual's residency time periods under section 301.7701(b)-4. [23]

In effect, the regulation provides that an individual eligible to be treated as a resident of another country under the treaty is a resident of the other country for some purposes of the Code and not for others.

Unfortunately, the Proposed Regulations did not indicate whether an individual who is a resident of a treaty country based on the application of the provisions of a treaty is a resident of that country for purposes of the FBAR filing requirement.

We may wonder whether Treas. Reg. § 301.7701(b)-7(a)(3) places a valid limitation on the effect of treaties, for at least two reasons. First, it may be a violation of our treaties, as well as the reasonable expectations of our treaty partners. While a statute can override a treaty, a regulation cannot do so, since a treaty has the same status as a statute.[24] A typical income tax treaty provides a definition "for the purposes of this Convention" and in the taxes covered provision says that the Convention applies to the Federal income taxes imposed by the Internal Revenue Code. The reporting requirements of the Code exist for the purpose of enabling the Service to administer and enforce the Code – they generally do not have some independent significance, in which the Code consists of a series of provisions imposing and defining tax obligations and a somehow completely independent set of obligations that go beyond the purposes of tax administration. Nor, surely, can it be the case that when a treaty speaks of applying to the Federal income taxes imposed by the Code, it does not apply to the

interest, additions to tax and penalties that motivate compliance and deter and punish non-compliance. Our partners generally take the common sense view that an individual who is a resident of the United States under the tiebreaker is a nonresident of the other country for all purposes of their income tax laws and they probably would be surprised to find that their tax residents are potentially subject to a whole range of draconian penalties designed to aid the enforcement of the income tax payable by U.S. citizens and residents.

Second, the language of section 7701(b)(6) states that a lawful permanent resident who claims treaty benefits as a nonresident "shall cease to be treated as a lawful permanent resident of the United States", with no suggestion that this has only a limited effect.

However, in the light of the recent Supreme Court's *Mayo* decision, and the fact that the standard treaty language itself arguably supports a narrow interpretation, it would be a brave, even foolhardy, alien that relied on the regulation's invalidity.[25]

In response to the Proposed Regulations, the American Institute of Certified Public Accountants (AICPA) submitted detailed comments addressing this issue.[26] The AICPA made the following recommendation:

> The definition of resident in the final regulations under the BSA should provide relief from filing the FBAR for a taxpayer who elects to be treated as a nonresident of the U.S. for tax purposes under the Internal Revenue Code (IRC) or the "Residence" article of a U.S. income tax treaty for a tax year. This language should provide that the taxpayer may rely upon the treaty election for current and prior tax years within the BSA statute of limitations. We include some examples below to highlight issues in this area. If the final regulations cannot accommodate the recommendation above, we request that further guidance be provided to address the concerns raised below.[27]

The AICPA's choice of language was unfortunate. Taxpayers do not elect to be treated as nonresident under treaties. They simply are resident of the United States or of the treaty partner based on the applicable tests described above. Section 6114 requires a taxpayer that takes the position that a treaty overrules or otherwise modifies an internal revenue law must disclose such position on a tax return or, if no return of tax is required to be filed, in such form as the Secretary may prescribe. The IRS has prescribed the use of Form 8833 for this purpose in most cases including taking the position that the taxpayer is not resident under a treaty. There is penalty for failing to file the form[28], but the IRS recognizes that the failure to file the form does not deprive a taxpayer of treaty rights.[29]

Despite the poor choice of words, the AICPA's position made sense. The principal purpose of the FBAR requirement as it applies to individuals is to deter tax evasion by the concealment of foreign assets and income, and that certainly appears to be how the FBAR has been used by the government. (There doesn't seem to be much evidence that FBARs can be used to detect tax evasion – an individual who is willing to evade tax is hardly like to file an FBAR that would provide a road map to his or her fraud.) An individual who is treated as a nonresident alien for the purposes of computing tax liability is generally not subject to tax on income from foreign sources, including interest on a foreign bank account or interest

derived from foreign securities. Further, if such an individual is subject to tax on U.S. source income, such as dividends received from U.S. corporations, such income is generally subject to withholding under section 1441.[30]

The AICPA's approach was also consistent with the reasonable expectations of taxpayers and their advisors, bearing in mind that most FBAR compliance is likely to result from the efforts of tax advisors and preparers. Income tax treaties generally apply for the purposes of the Federal income tax. The regulation requiring the individual to be treated as a resident only for the purposes of "computing an individual's United States income liability", as opposed to any other provisions of the Code, represents a questionable and unilateral narrowing of the scope of treaties and a trap for the unwary.[31] But whether or not the regulation could be challenged if the IRS sought to impose penalties on a treaty nonresident for failure to file a Form 5471, for example,[32] it is not desirable to expand FBAR reporting to individuals who are not U.S. persons for purposes of computing tax liabilities the evasion of which FBAR reporting is intended to deter.

Most foreign bank accounts are unlikely to be the vehicle for a nonresident alien to evade U.S. tax. If such accounts are used for such purpose, FinCEN would have done better to require the reporting of foreign accounts by foreign persons where the accounts were associated with a U.S. trade or business of the filer. Such a requirement would be within the scope of the Bank Secrecy Act and, while it might provoke some bleating by foreign taxpayers, seems much more relevant to tax enforcement than a requirement by tax nonresidents to report accounts that have nothing to do with the enforcement of U.S. tax laws.

4. February 2011 Final Regulations

On February 23, 2011, FinCEN released the 2011 Final Regulations.[33] The Final Regulations are quite disappointing overall, in that FinCEN rejected or simply ignored numerous thoughtful comments from a wide variety of responsible organizations and individuals. The tone and approach suggest an organization focused on generating the largest possible amount of information, including a great deal of duplicative effort for filers especially considering the additional burdens added by the HIRE Act, and with inadequate acknowledgment of the burdens on the public or the actual value of the forest loads of paper that will flow in the direction of the IRS's Enterprise Computing Center in Detroit.[34]

The Final Regulations do not change the definition of "resident" in any meaningful way. But they do respond, apparently to the AICPA, as follows:

> 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. [Emphasis added]

In short, if married taxpayers makes an election under section 6013(g) or (h), the alien member(s) of the couple will be treated as resident for the entire year for FBAR purposes; if the taxpayer makes an election under section 7701(b)(4), he or she will have to file an FBAR only for a foreign account held in the stub period covered by the election.

But what about a treaty nonresident? As noted above, an individual is a nonresident under a treaty due to the application of the treaty, not because of any election. Leaving aside the unfortunate parroting of the AICPA's misuse of the word "elect", it seems clear enough that FinCEN will treat an individual who holds a green card as a resident for FBAR purposes, even if the individual takes the position that he or she is nonresident for tax purposes under a treaty. But a clear negative inference would be that an individual who is resident under the substantial presence test (that is, even after application of the foreign tax home/closer connection test)[35] and who makes a claim of nonresidence under a treaty should be treated as not being a resident for FBAR purposes.

On this basis, therefore, FinCEN would seem to have split the baby for treaty nonresidents.[36] If so, it might be justifiable on the basis that there is a difference between green card holders, who can only be treated as nonresidents because of a treaty, and individuals who satisfy the substantial presence test. Many of these individuals may satisfy the statutory foreign tax home/closer connection test and only file Form 8833 to claim treaty benefits as a protective measure. Others have been in the United States for more than 183 days in the calendar year but have not become U.S. residents in any meaningful sense, even if they technically meet the substantial presence test, and continue to be treated as residents of their home country under the treaty (this is particularly, but not exclusively, possible when the fiscal year of the taxpayer in the United States and the other country are different).[37]

It would nevertheless be desirable for FinCEN to clarify this point.

5. Revised FBAR Form

On March 25, 2011, the final version of a new FBAR form was released. The data portion of the form remains unchanged from the 2008 edition, but the instructions were extensively modified to track the Final Regulations. The instructions provide that a United States person includes, *inter alia,* a United States resident. According to the instructions

> A United States resident is an alien residing in the United States. To determine if the filer is a resident of the United States apply the residency tests in 26 U.S.C. section 7701(b). When applying the residency tests, use the definition of United States in these instructions [meaning the expanded definition that includes U.S. territories].

These new instructions are a recipe for confusion so far as treaty nonresidents are concerned.

No reference is made to the effect of treaties. Anyone who stopped at section 7701(b), especially paragraph (6), would conclude that a treaty nonresident is also a nonresident for FBAR reporting purposes and might not see the need to look any further. A review of the FBAR regulations, including 31 CFR § 1010.350(b)(2), would shed no additional light. Only a review of the section 7701(b) regulations would bring to light the uncertainty caused by

Treas. Reg. § 301.7701(b)-7(a)(3) and only a review of the preamble to the Final Regulations in the Federal Register of February 24, 2011 would bring to light FinCEN's view on treaty nonresident lawful permanent residents and its ambiguous silence on treaty nonresidents who meet the substantial presence test.

Given the IRS' enthusiastic pursuit of offshore issues and the tremendous penalties for failure to comply – even nonwillful failures can attract civil penalties of up to $10,000 per violation and willful failures can attract civil penalties of $100,000 and more up to 50% of the highest value of the account and criminal penalties of up to $250,000 and five years of imprisonment (or even $500,000 and 10 years if violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period) [38] – the government owes us clarification and instructions that will not lead individuals and non-specialist tax preparers astray.

In the meantime, it seems obvious that treaty nonresidents should strongly consider filing FBARs at least from 2010 on and, while they are at it, continue to file Forms 5471, 8865 and 8858.

Coming soon, Form 8938, the form implementing the HIRE Act's new foreign financial account reporting requirement.[39] We can hope the IRS will avoid repeating the FBAR ambiguities.

6. Effective Date

The Final Regulations are effective for 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. The effective date of the Final Regulations was March 28, 2011. It is not clear whether individuals who already filed FBARs for 2010 would have to re-file but it seems likely that they would if the Final Regulations would require additional information.[40]

All of this leaves the confused and unsettled position of treaty nonresidents in the same state as described in parts 1 and 2 of this article for two large categories of persons:

- Individuals potentially obligated to file overdue FBARs for 2009 and earlier years, who may be doing so in the context of one of the two recent offshore voluntary disclosure programs, under the concessionary provisions of Q&A 9 (2009 program) or Q&A 17 (2011 program) or even outside the context of the program.

- Individuals whose only obligation was to file an FBAR for years prior to 2010 arose because they had signature or other authority over an account but no beneficial ownership interest and whose filing deadline was postponed, ultimately, to June 30, 2011 first by Notices 2009-62[41] and then by Notice 2010-23.[42] The deadline for those individuals is not being further postponed.

With regard to these filers, FinCEN and the IRS continue their deafening silence. The Final Regulations plainly are not stated to apply retroactively and it would be difficult for the

government to expand the application of the FBAR requirement to pre-2010 years based only on the Final Regulations. Many more years of uncertainty therefore loom. For the FBAR flock, the password to certainty remains hidden.

Appendix A. Comparison of Residence Provisions of Model Treaties

OECD As of 7/17/2008	OECD Model 1977 and UN Model 1980	UN Model 2001	U.S. Model 2006	U.S. Model 1996	US Model 1977
Article 4 1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein. 2. Where by reason of the provisions of paragraph 1 an individual is a resident	Article 4 1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. But this term does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein. 2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows: a) he shall be deemed to be a resident of the State in which he has a	Article 4 1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of incorporation, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein. 2. Where by reason of the provisions of paragraph 1 an individual	Article 4 Resident 1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State. . . . 3. Where, by reason of	Article 4 Residence 1. Except as provided in this paragraph, for the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature. a) The term "resident of a Contracting State" does not include any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State. 2. Where by reason of the provisions of	ARTICLE 4 RESIDENT 1. For purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that: a) this term does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein; and b) in the case of income derived or paid by a partnership, estate, or trust, this term applies only to the extent that the income derived by such partnership, estate,

OECD As of 7/17/2008	OECD Model 1977 and UN Model 1980	UN Model 2001	U.S. Model 2006	U.S. Model 1996	US Model 1977
of both Contracting States, then his status shall be determined as follows: *a*) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests); *b*) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode; *c*) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a	permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests); b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode; c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national; d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by	is a resident of both Contracting States, then his status shall be determined as follows: (a) He shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests); (b) If the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode; (c) If he has an habitual abode in both States or	the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows: a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (center of vital interests); b) if the State in which he has his center of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual	paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows: a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (center of vital interests); b) if the State in which he has his center of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode; c) if he has an habitual abode in both States or	or trust is subject to tax as the income of a resident of that State, either in its hands or in the hands of its partners or beneficiaries. 2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his or her status shall be determined as follows: a) The individual shall be deemed to be a resident of the State in which he or she has a permanent home available; if such individual has a permanent home available in both States, or in neither State, he or she shall be deemed to be a resident of the State with which his or her personal and economic relations are closer (center of vital interests);

OECD As of 7/17/2008	OECD Model 1977 and UN Model 1980	UN Model 2001	U.S. Model 2006	U.S. Model 1996	US Model 1977
resident only of the State of which he is a national; *d*) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.	mutual agreement.	in neither of them, he shall be deemed to be a resident only of the State of which he is a national; (d) If he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.	abode; c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national; d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall endeavor to settle the question by mutual agreement.	in neither of them, he shall be deemed to be a resident of the State of which he is a national; d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall endeavor to settle the question by mutual agreement.	b) If the State in which the individual's center of vital interests cannot be determined, he or she shall be deemed to be a resident of the State in which he or she has an habitual abode; c) If the individual has an habitual abode in both States or in neither of them, he or she shall be deemed to be a resident of the State of which he or she is a national; d) If the individual is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

ENDNOTES

[1] Michael Karlin received his BA (Hons) and MA from Trinity College, Cambridge. He qualified as a solicitor in England in 1977 and as a member of the California Bar in 1980. After practicing for many years as an associate and then a partner with Morgan, Lewis & Bockius LLP (1983-1997), he was a principal of KPMG LLP (1997-2001). He is a partner of Karlin & Peebles, LLP, in Beverly Hills, California. He has written and spoken extensively on international tax topics. The author apologizes profusely to Chris Noonan and the makers of the motion picture "Babe" for the title of this article, but in the home town of the Academy of Motion Arts and Sciences, some things are not to be resisted. See www.imdb.com/title/tt0112431/quotes?qt=qt0425600 (viewed 3/3/2011).

[2] Financial Crimes Enforcement Network (FinCEN), Amendment to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts, 76 FR 10234 (2/24/2011) www.regulations.gov/#!documentDetail;D=FINCEN_FRDOC_0001-0005 (viewed 2/24/2011) (hereinafter referred to as the "2011 Final Regulations").

[3] Information on the 2009 program, which ran from March 23 to October 15, 2009, may be found on the IRS website at www.irs.gov/newsroom/article/0,,id=206012,00.html (viewed 3/2/2011); information about the 2011 program, which was announced on February 8, 2011 and runs until August 31, 2011, may be found at www.irs.gov/newsroom/article/0,,id=234900,00.html (viewed 3/2/2011).

[4] The United States Code is available at www.gpoaccess.gov/uscode/ and the Bank Secrecy Act provisions cited in this memorandum are available at http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=BROWSE&TITLE=31USCSIV&PDFS=YES (viewed 3/3/2009).

[5] The United States Code of Federal Regulations are available at www.gpoaccess.gov/CFR/ and the regulations under the Bank Secrecy Act, including the regulations in effect prior to the 2011 Final Regulations, may be found at www.access.gpo.gov/nara/cfr/waisidx_09/31cfr103_09.html (viewed 3/3/2011). There are many histories of the Bank Secrecy Act – one of the most organized was produced by the American Bankers Association, available at www.aba.com/Compliance/CCBSA.htm and specifically Appendix C, www.aba.com/NR/rdonlyres/36FAC700-4CE2-4213.../AppendixC.pdf (both viewed 2/24/2011).

[6] The October 2008 version of the FBAR is reproduced at www.irs.gov/pub/irs-pdf/f90221.pdf (viewed 2/27/2011).

[7] I.R.B. 2009-25, reproduced at www.irs.gov/irb/2009-25_IRB/ar13.html (viewed 3/2/2011).

[8] 75 Fed Reg. 8844 (Feb. 26, 2010) at 8845 and 8850, proposing to modify 31 CFR ¶103.24, available at www.fincen.gov/statutes_regs/frn/pdf/2010-4042.pdf (viewed 2/17/2011) (hereinafter referred to as the "Proposed Regulations".

[9] 2010-11 I.R.B. 450 (Feb. 26, 2010) discussed at footnote 18 and accompanying text below.

[10] We are not concerned with the residence of U.S. citizens, since U.S. citizens are subject to the FBAR requirement irrespective of where they reside.

[11] Any unprefixed reference to a section in this article is a reference to a section of the IRC, as amended to date.

[12] Subtitle B relates to the estate tax, the gift tax and the tax on generation skipping transfers. As we discuss below, the definition of residence for these purposes is actually quite close to the meaning given by the IRS in the Internal Revenue Manual.

[13] See 31 C.F.R. § 103.56(g) (effective April 23, 2003).

[14] The web version is at www.irs.gov/irm/ (viewed 3/2/2011).

[15] See generally Note, "Taxpayers' Bill of Rights Act: Taxpayers' Remedy or Political Placebo?", 86 Mich. L. Rev. 1787, 1799-1801 (1988) (discussing legal status of the Internal Revenue Manual). This article has been cited by the United States Supreme Court as recently as 2004 in *Central Laborers' Pension Fund v. Heinz, et al.*, 541 U.S. 739, in which Justice Souter criticized "an unreasoned statement in the manual". The Supreme Court also has cited the Manual, apparently without disagreeing, on what constitutes reasonable cause for late filing of an estate tax return (*United States v. Estate of Boyle*, 469 U.S. 241 (1985) and in a couple of other cases, but in no case has it placed any reliance on the Manual nor compelled the Service to apply its provisions. Federal courts of appeal have made it clear that "Procedures in the Internal Revenue Manual are intended to aid in the internal administration of the IRS; they do not confer rights on taxpayers." *E.g., IRS v. Pransky*, 318 F.3d 536 (3rd Cir. 2003); *United States v. Tenzer*, 127 F.3d 222 (2d Cir. 1997); *Valen Mfg. Co. v. United States*, 90 F.3d 1190, 1194 (6th Cir. 1996); *Groder v. United States*, 816 F.2d 139, 142 (4th Cir. 1987).

[16] The history and full text of the Q&A is set out in an article by Steve Toscher and Michel R. Stein of Hochman, Salkin, Rettig, Toscher & Perez, "FBAR Enforcement – Five Years Later", Journal of Tax Practice & Procedure (June–July 2008). The IRS posted the Q&A on its website but later replaced them with a different set of Q&A which were silent on the question of residence.

[17] See www.irs.gov/businesses/small/article/0,,id=148845,00.html for a link to three sets of FAQs on FBARs. The Q&A cited in the text is no longer available on the IRS site.

[18] 2010-11 I.R.B. 450 (Feb. 26, 2010).

[19] Endnote 8, *supra*.

[20] The effect of this is that it expands the definition of the "United States" to include its territories and insular possessions.

[21] Section 7701(b) was enacted by the Deficit Reduction Act of 1984, P.L. 98-369, section 138(a), and became effective for tax years beginning after December 31, 1984. The General Accounting Office has observed:

> [I]t can be challenging to answer the basic question of whether or not a foreign person is a nonresident or resident alien. Beyond the green card and substantial presence tests, noncitizen taxpayers or their practitioners need to consider various scenarios in making residency determinations. . . Although no single rule may be difficult to apply, that numerous rules need to be considered can make the residency determination a difficult and time consuming one, according to representatives from groups that work with employers and nonresidents to assist them in fulfilling their tax obligations."

Government Accountability Office (GAO) Report, "IRS May Be Able to Improve Compliance for Nonresident Aliens and Updating Requirements Could Reduce Their Compliance Burden", GAO-10-429 (April 2010) at pages 13-14, available at www.gao.gov/new.items/d10429.pdf (viewed February 17, 2011)

[22] Attach as Appendix A are the residence provisions of the officially published U.S. Models (1977, 1996 and 2006), the OECD (1977 and 2008) and the United Nations (1980 and 2001). Only one significant treaty with the People's Republic of China, signed on April 30, 1984 and effective on January 1, 1987, departs from this language in a significant way. Apparently, at the request of the Chinese government, Article 4(2) of the Tax Treaty reads:

> 2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then the competent authorities of the Contracting States shall determine through consultations the Contracting State of which that individual shall be deemed to be a resident for the purposes of this Agreement.

The treaty follows the OECD model, where, all other tests having failed, the competent authorities "shall" determine the question, where as in the U.S. Model, the competent authorities need only "endeavor" to settle the question. There is no indication within the Tax Treaty itself as to what criteria the competent authorities of the United States and China are to use in making the required determination. However, in Article 5 of a protocol signed contemporaneously with the Tax Treaty, the United States and China agreed that:

> "In applying paragraph 2 of Article 4 of this Agreement, the competent authorities of both Contracting States shall be guided by the rules contained in paragraph 2 of Article 4 of the United Nations Model Double Taxation Convention between Developed and Developing Countries." Article 4(2) of the U.N. Model of 1980 is identical to Article 4(2) of the OECD Model of 1977 and both are reproduced in Appendix A.

About a year ago, the author contacted the U.S. competent authority and the office of the Chief Counsel (International) about the China treaty. So far as these officials were aware, there has in fact never been a competent authority proceeding with China on *any* subject. The thought that such a proceeding might be necessary every year for an individual claiming nonresidence of one country or the other is therefore not very practical. The completely informal advice in the case of a Chinese resident claiming nonresidence of the United States under the treaty was to file Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) and give the same types of explanations as a claimant would give under any other treaty with an OECD-style article 4.

[23] Thus, while the alien may not be taxed on Subpart F income, section 956 inclusions or deemed dividends under section 1248, the alien's U.S. resident status may turn the corporation into a CFC for other U.S. persons – and in a manner where they may have no warning at all.

[24] Treaties are agreements between sovereign governments and while, under the Supremacy Clause of the United States Constitution, article VI, paragraph 2, a treaty has the same status as an Act of Congress, a treaty

generally confers no rights on private persons either in the United States or in the other country. The rules in tax treaties confer rights on U.S. taxpayers under U.S. law only because section 894(a)(1) says so; whether the same is true in other countries depends on the constitutions and laws (and administrative practice) of those countries.

[25] *Mayo Foundation for Medical Education And Research v. United States*, Docket No. 09-837 (January 11, 2011), reinforcing the high level of deference to government regulations announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We may wonder whether an alien wishing to avoid penalties should file Form 8275-R (Regulation Disclosure Statement) Form 8275-R to disclose positions taken on a tax return that are contrary to Treasury regulations.

[26] AICPA, "Comments on Notice of Proposed Rulemaking (RIN-1506-AB08) regarding Amendment to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts", available at www.aicpa.org/InterestAreas/Tax/Resources/International/Pages/AICPAFBARAdvocacyEfforts.aspx and www.regulations.gov/#!documentDetail;D=FINCEN-2009-0008-0039 (both viewed 2/24/2011).

[27] AICPA, endnote 26 above, at pages 11-15.

[28] Section 6712 ($1,000 penalty; $10,000 for C corporations).

[29] See "Service Explains Use of Treaty-Based Return Position Disclosure Form", 2009 TNT 67-58 (April 10, 2009; released August 3, 2007) (program manager technical assistance held that treaty benefits cannot be denied if the taxpayer is entitled to them; the examiner was entitled to impose a penalty of $1,000 under section 6712).

[30] A taxpayer may, in some cases where documentation in the form of a Form W-8BEN or W-9 has not been provided, also be subject to backup withholding under section 3406.

[31] Even an obviously well-informed academic, Professor Richard Westin of the University of Kentucky College of Law, missed this point in a very recent and comprehensive survey, U.S. Tax Compliance Requirements for Nonresident Aliens and Their Entities, 40 TM International Journal 144 (3/11/2011). The regulation may operate not only in an unexpected way for taxpayers but also in an unintended manner from the Service's point of view. For example, taking the regulation at face value, it would seem that an individual who is a treaty nonresident would nevertheless be a U.S. person for purposes of section 6039F (notice of large gifts received from foreign persons), on the grounds that section 6039F is not concerned with the computation of his income tax liability. The recipient of a gift from such a person could therefore take the position that no Form 3520 would be required to report the gift.

[32] See Treas. Reg. § 1.6038-2(j).

[33] See endnote 2. Effective March 1, 2011, FinCEN reorganized the Bank Secrecy Act rules, creating a new Chapter X in title 31 of the Code of Federal Regulations for Bank Secrecy Act regulations. The Proposed Regulations and the preamble to the 2011 Final Regulations use the old 31CFR part 103 numbering system. However, the text of the final rule itself is renumbered using the Chapter X numbering system. Therefore, the main FBAR rule is now 31 CFR 1010.350, instead of 31 CFR 103.24.

[34] FBARs can still not be filed electronically. A vague promise that such filing will be possible in fure is contained in the preamble to the 2011 Final Regulations.

[35] Section 7701(b)(3)(B).

[36] 1 Kings 3:16-28.

[37] For most individuals, the fiscal year pretty much has to be the calendar year for U.S. individual taxpayers. However, for individuals residing in treaty countries, their home country fiscal year may well be different, e.g., Japan, March 31; Australia, June 30; the United Kingdom, April 5.

[38] 31 USC 5321 and 5322. Moreover, it is still not certain if this is $10,000 per account or $10,000 per FBAR.

[39] Section 6038D

[40] On March 31, 2011, the IRS issued Notice 2011-31, 2011-17 I.R.B. 1, in which it stated that for tax returns filed before March 28, 2011, the first date on which the Final Regulations became effective, the existing FBAR regulations (last amended April 1987) remained effective and could be referenced, along with other then-existing FBAR guidance, when answering questions about foreign financial accounts on 2010 tax and information returns. However, persons filing a return before March 28, 2011 were permitted to refer to the Final Regulations and revised FBAR instructions (including the instructions, titled DRAFT Final Instructions, posted on www.irs.gov on March 21, 2011) when answering the questions on 2010 returns. The IRS said it would take into account the recently published final FBAR regulations and the revised FBAR instructions when evaluating the reasonableness of a person's response to the questions on 2010 tax and information returns. For

returns filed on or after March 28, 2011, taxpayers may only refer to the Final Regulations and instructions to the 2011 edition of the FBAR.

[41] 2009-35 I.R.B. 260, modified and superseded by Notice 2010-23, 2010-11 I.R.B. 441.

[42] Notice 2010-23, note 41 above.