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ALERT
KPMG LLP (U.S.)

Update Regarding FBAR Filing Requirements for Foreign Securities Accounts

Generally, FBAR reporting (FinCEN Form 114) applies to each “United States person” (U.S. person) who has a financial interest in, or signature or other authority over, foreign financial accounts (which includes foreign securities accounts) that have an aggregate value exceeding $10,000 at any time during the calendar year. A U.S. person is considered to have a financial interest in an account when a person is a named owner of record or named holder of legal title.

In making a determination as to whether a U.S. person, which includes a U.S. domiciled investment partnership or LLC (U.S. Investment Fund), holds a foreign securities account, it is important to understand whether the U.S. Investment Fund invests in foreign securities. If the U.S. Investment Fund invests in foreign securities, the fact that the U.S. Investment Fund utilizes a U.S. custodian does not necessarily mean that the U.S. Investment Fund does not have an interest in a foreign securities account that would require an FBAR filing.

Based on the countries associated with the foreign investing of the U.S. Investment Fund, a custodian would typically set up sub-accounts or in some instances sub-custodial accounts for each country the U.S. Investment Fund held investments. In certain instances, the custodian may hold the investments via an omnibus account and in other instances the investments may be held in the name of the beneficial owner (the U.S. Investment Fund). In some cases, foreign countries require that the securities be held in the name of the beneficial owner. Furthermore, in some cases even though the custodian may be allowed to hold the securities in an omnibus account, the securities might be held in the name of the beneficial owner. No FBAR filing is required when the securities are held through a U.S. custodian in an omnibus account where the beneficial owner does not have any legal rights in the omnibus

account and can only access its holdings through the custodian. **FBAR filings would be required when securities are held in the name of a U.S. person as beneficial owner.**

The difference in treatment based on a U.S. custodian having omnibus accounts versus sub accounts held in the name of the beneficial owner, necessitates a U.S. person getting an answer from their custodian for each country in which they held securities as to whether the custodian held the account as an omnibus account or not.

As you evaluate the issue of whether foreign securities accounts create FBAR filing requirements, the following additional points are worth keeping in mind:

- The custodial accounts described above held in the name of the beneficial owner usually do not grant signature or other authority over the account to the GP or members of the GP as these individuals generally cannot gain access to funds in the account other than to make investment decisions, such as buying or selling securities.
- In the case of a domestic feeder directly or indirectly holding a greater than 50% interest in a foreign master, the domestic feeder may have an FBAR filing requirement for foreign securities accounts of the foreign master.
- U.S. persons directly or indirectly holding a greater than 50% interest of a domestic fund that has FBAR filings for foreign securities accounts may also have FBAR filing requirements.

U.S. persons required to file an FBAR—whether a U.S. corporation or partnership reporting its financial interest in foreign financial accounts or individuals reporting their authority over such accounts—should not forget that civil penalties can be imposed for non-willful reporting failures. A filer can be assessed a penalty as high as $10,000 per year. Harsher penalties can be imposed for *willful* reporting failures. If willfulness is found, the penalty can reach 100 percent of the highest aggregate balance of all unreported accounts during the years under examination.

How to File FBARs

The deadline for filing FBARs for calendar year 2014 is June 30, 2015. Beginning last year, paper filings are no longer permitted as all FBARs (including amended and late FBARs for prior years) are now required to be e-filed (generally using the BSA E-Filing System).

U.S. persons that inadvertently failed to file FBARs but properly reported all income related to their foreign financial accounts on their U.S. tax returns and paid all tax can take advantage of a penalty-free option currently being offered by the IRS. Delinquent FBARs can be e-filed on a penalty-free basis if the U.S. person is not under IRS exam, and the U.S. person has not been contacted by the IRS about missing FBARs. Because there is a six-year statute of limitations for FBAR penalties (regardless of whether an FBAR is filed), the relevant years for missing FBARs are

currently calendar years 2008–2013 (although calendar year 2008 will close on June 30, 2015).

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