

AN ALERT FROM THE BDO FEDERAL TAX PRACTICE

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► SUBJECT

FOREIGN FINANCIAL ACCOUNT REPORTING (FORM TD F 90-22.1) SHOULD BE RECEIVED BY JUNE 29, 2012

► AFFECTING

Any United States persons with a financial interest in or signature authority over foreign bank and financial accounts with a total balance exceeding \$10,000

► BACKGROUND

United States persons, as defined under applicable banking regulations (and not under federal tax law), are required to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (commonly referred to as the "FBAR" form), if they have a financial interest in or signature authority over foreign bank accounts with a total balance exceeding \$10,000 at any time during the calendar year. FBAR forms are required under federal banking law, not federal tax law. The definitions and rules, therefore, are found in regulations issued by the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"). The regulations require the FBAR filing is to be received by Treasury June 30. However since, in 2012, June 30 falls on a weekend, any FBAR filings should be sent so that it is received by Treasury by June 29, 2012.

► DETAILS

United States persons are required to report certain interests in or signature authority over foreign financial accounts on Form TD F 90-22.1. The form was revised in January 2012 and can be found at www.irs.gov/pub/irs-pdf/f90221.pdf. FinCEN issued final regulations on February 24, 2011, with respect to filing requirements and definitions for FBAR filings. The regulations issued by FinCEN address issues that have been the subject of earlier guidance. The regulations finalize guidance relating to the persons required to file and the types of accounts required to be reported. These include:

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1. **Definition of United States Person.** The term “United States person” is defined as a citizen of the United States; a resident of the United States; and 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.
2. **Reportable Accounts.** Reportable accounts include bank accounts, securities accounts, and other financial accounts. The term “other financial account” includes the following assets or accounts:
 - 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. A foreign mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions.

The regulations reserved guidance with respect to other investment funds. No specific guidance was provided with respect to whether the ownership of a passive foreign investment company (“PFIC”) is subject to FBAR reporting. Previously, comments were requested regarding the issue of whether a PFIC is a foreign financial account for FBAR reporting purposes.

The FinCEN also provided in Notices 2011-1 and 2011-2 an extension to June 30, 2012, for certain individuals with signature authority over, but no financial interest in, one or more foreign financial accounts. Notice 2011-1 specifically addressed individuals whose FBAR filing requirements may be affected by the signature authority filing exceptions in 31 CFR § 1010.350(f)(2)(i)-(v). On June 17, 2011, Notice 2011-2 similarly extended the FBAR filing due date to June 30, 2012, for certain employees or officers of investment advisers registered with the Securities and Exchange Commission who have signature authority over, but no financial interest in, certain foreign financial accounts. *Because June 30, 2012, falls on a Saturday and in light of the uncertainty as to how the Department of the Treasury will treat FBAR filings received on a Saturday, we recommend ensuring receipt by the Treasury by Friday, June 29, 2012.*

In FinCEN Notice 2012-1, the filing due date was further extended to June 30, 2013, for individuals whose filing due date for reporting signature authority was previously extended by Notice 2011-1 (as revised) or 2011-2. This extension applies to the reporting of signature authority held during the 2011 calendar year, as well as all years previously extended by Notice 2011-1 and 2011-2. The extensions provided by FinCEN cover a very narrow category of employees with signature authority.

The FBAR filing must be received by June 29, 2012, at the Treasury at the appropriate address provided in the FBAR instructions (depending on whether regular mail or an express delivery service is used). The mailbox rule that applies to tax return filings does not apply with respect to FBAR filings.

The FinCEN regulations also include an anti-avoidance rule that will require FBAR reporting if an entity is created for the purpose of evading FBAR reporting. Failure to file an FBAR report may subject the non-filer to civil and criminal penalties.

In addition to FBAR reporting, a United States person may be required under section 6038D of the Internal Revenue Code to report specified foreign assets over certain thresholds on Form 8938, Statement of Specified Foreign Financial Assets, to the Service. The specific thresholds that apply to various categories of filers are set forth in the instructions to Form 8938. Form 8938 is required to be filed by the due date (including extensions) of the reporting individual’s income tax return. The reporting thresholds and information to be provided on Form 8938 are different from those that may be required on an FBAR filing. Please refer to the Form 8938 instructions at www.irs.gov/pub/irs-pdf/i8938.pdf for more information.

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