

AN ALERT FROM THE BDO INTERNATIONAL TAX PRACTICE

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► SUBJECT

FOREIGN FINANCIAL ACCOUNT REPORTING REGULATIONS ISSUED IN FINAL FORM: SIGNATURE AUTHORITY ADDRESSED

► AFFECTING

Any United States persons with control or signature authority over foreign bank and financial accounts

► BACKGROUND

The Treasury Department Financial Crimes Enforcement Network (“FinCen”) last week issued final regulations clarifying which persons are required to file reports of financial accounts under federal banking law. The new rules specifically address the definition of “signature authority” and provide additional clarification to the notice of proposed rulemaking that was released in February 2010.

In summary, the final regulations require reporting of accounts by individuals with signature authority only with respect to the foreign financial account. In addition, the regulations continue to reserve for future guidance the treatment of foreign commingled funds, except for mutual funds (for which reporting is required).

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► DETAILS

Under federal banking law, any United States person with a financial interest in, or signature authority over, any financial account in a foreign country must file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (the so-called “FBAR” form) if the value of the account at any time during the calendar year exceeds \$10,000. The FinCen is responsible for issuing regulations concerning filing requirements of FBAR forms; the Internal Revenue Service is responsible for administering compliance with the FBAR rules.

On February 24, 2011, FinCen released final regulations concerning reporting by United States persons of interests in foreign financial accounts, which are generally effective for FBAR forms due on June 30, 2011, *i.e.*, for the calendar year 2010. The new rules take into account comments received by FinCen since release of a notice of proposed rulemaking issued in February 2010 and cover the filing requirements for those with only signature authority over the account, as well as provide clarification of certain other requirements under the rules. The Service released administrative guidance in 2010, which delayed until June 30, 2011, the due date for those with only signature authority over foreign financial accounts for calendar years 2010 and earlier. The Service’s guidance also suspended until June 2011 the requirement to file FBAR forms for interests in foreign commingled funds, except foreign mutual funds, which were required to be disclosed by June 30, 2010.

Finding that reporting by those persons holding only signature authority over accounts is a valuable tool in investigations by law enforcement agencies, FinCen has determined that the requirement to file FBAR forms by those with only signature authority should be retained. The final regulations also define “signature authority” to include the authority of an individual (alone or in conjunction with another) to control the disposition of the funds in the account by direct communication (in writing or otherwise) to the person with whom the account is maintained.

The regulations provide some additional clarifications based on comments received since publication of the 2010 notice of proposed rulemaking. The regulations clarify that the definition of “signature authority” applies only to individuals. The rules also address how the value of an account is determined, holding that it is possible for account holders to rely on periodic statements that provide the value of an account at the end of the statement period.

The FinCen notice of proposed rulemaking and IRS guidance also deferred indefinitely the requirement to report commingled funds, with an exception for mutual funds, for which filing was required by June 30, 2010. The final regulations continue to defer the requirement to report commingled funds, except mutual funds, by reserving the treatment of these investment companies. Finally, the regulations also include an anti-avoidance rule that will require FBAR reporting if an entity is created for the purpose of evading the FBAR reporting requirements.

The FinCen press release dated February 24, 2011, issued in conjunction with the final regulations, also indicated that the Service will publish revised instructions for the FBAR form that reflect the changes included in the regulations.

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