

AN ALERT FROM THE BDO INTERNATIONAL TAX PRACTICE

# BDO KNOWS: INTERNATIONAL TAXATION



## SUBJECT

**FOREIGN FINANCIAL ACCOUNT REPORTING  
(FINCEN FORM 114) SHOULD BE SUBMITTED  
ELECTRONICALLY NO LATER THAN JUNE 30, 2015**

## AFFECTING

Any United States persons with a financial interest in or signature authority over foreign bank and financial accounts (“FBARs”) with a total balance exceeding \$10,000 at any time during the calendar year.

## BACKGROUND

United States persons, as defined under applicable banking regulations (and not under federal tax law), are required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (“FBAR”), if they have a financial interest in or signature authority over foreign bank accounts with an aggregate value exceeding \$10,000 at any time during the calendar year. The definitions and rules are found in regulations issued by the Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”) and require that the FBAR filings are received by Treasury no later than June 30<sup>th</sup>.

Beginning July 1, 2013 all United States owners of foreign bank and financial accounts are required to electronically file FinCEN Form 114, if the aggregate maximum values of the foreign financial accounts exceed \$10,000 at any time during the calendar year. FinCEN Form 114 supersedes Treasury Form TD F 90-22.1 and is available online only through the BSA E-Filing System.

## DETAILS

### **FINCEN REGULATIONS**

On February 24, 2011, the Financial Crimes and Enforcement Network (“FinCEN”) issued regulations with respect to filing requirements and definitions for FBAR filings. The regulations issued by FinCEN addressed issues

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that had been the subject of earlier guidance. Specifically, the regulations finalized guidance relating to the persons required to file FBARs, and the types of accounts that were subject to FBAR reporting. These include:

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.

### **EXCEPTION FOR CERTAIN EMPLOYEES AND OFFICERS**

In 2012, FinCEN issued two Notices, Notice 2012-1 and Notice 2012-2, with reference to Notices 2011-1 and 2011-2, which provided for an extension of the filing deadline, for certain individuals with signature authority over, but no financial interest in, one or more foreign financial accounts.

Notice 2012-1 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), as well as 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. Subsequently, Notice 2012-2 extended the FBAR filing due date for individuals whose filing due date for reporting signature authority was previously extended by Notice 2012-1 and again in December 2013. FinCEN Notice 2013-1 extended the due date to June 30, 2015, for the reporting of signature authority held during the 2013 calendar year, as well as all reporting deadlines extended by Notices 2011-1 and 2011-2.

Most recently, on November 24, 2014, FinCEN Notice 2014-01 further extended the due date for the above to June 30, 2016. Specifically, FinCEN Notice 2014-01 extends the reporting of signature authority held during the 2014 calendar year as well as all reporting deadlines extended by previous Notices 2013-1, 2012-1, 2012-2, 2011-1 and 2011-2 until June 30, 2016. Filing due dates remain unchanged for officers and employees who have a financial interest in a reportable account. For all other individuals with an FBAR filing obligation, the filing due date remains unchanged.

### **PENALTIES AND RELIEF**

The FinCEN regulations 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. Penalties for a willful failure to file can be as much as the greater of \$100,000 or 50 percent of the amount in the account at the time of the violation.

However, relief exists for delinquent FBAR filers who properly reported all income related to their foreign financial accounts on their United States income tax return but inadvertently failed to file an FBAR. Provided that these taxpayers have not yet been contacted by the IRS regarding their delinquent FBARs and are not currently under IRS review, delinquent FBARs may now be submitted penalty-free.

### ***E-FILING REQUIREMENT***

The FBAR filing must be received by the Treasury Department by June 30 following the close of the calendar year. This filing **must be done electronically**. Paper filing using prior Form TD F 90-22.1 will no longer be permitted. (Note: Unlike tax returns, the June 30<sup>th</sup> filing deadline for FBARs may not be extended). *For more information regarding FBAR reporting, see the Service's website at <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Report-of-Foreign-Bank-and-Financial-Accounts-FBAR>.*

In addition to Form 114, the taxpayer must complete Form 114a, Record of Authorization to Electronically File FBARs, in order to permit a third-party to sign and submit the FBARs on their behalf electronically. This may be used in the instance of an officer or employee with signature authority, but no financial interest in an account held by its employer, to authorize said employer to file the FBAR on his behalf.

### **HOW BDO CAN HELP**

Due to increased scrutiny and the severe penalty regime with respect to failure to file FBARs, it is important for all individuals and entities to review whether there is any financial interest in or signature authority over accounts subject to FBAR reporting. BDO can help you review these requirements and submit any FBARs electronically.

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