

## Client Alert.

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June 20, 2011

# FinCEN and IRS Extend Certain FBAR Filing Deadlines

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During the past few weeks, the Financial Crimes Enforcement Network (“FinCEN”) and the Internal Revenue Service (“IRS”) released three notices affecting the filing of Form TD F 90-22.1 “Report of Foreign Bank and Financial Accounts” (“FBAR”), which are discussed below. In general, each U.S. person who has a financial interest in or signature or other authority over any foreign financial account, 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 file an FBAR with the Department of the Treasury on or before June 30<sup>th</sup> of the succeeding year.

### **FINCEN NOTICE 2011-1 EXTENSION FOR CERTAIN FBAR FILERS FOR 2010 FBAR**

On May 31, 2011, FinCEN issued Notice 2011-1 in which it announced a one-year extension of the 2010 FBAR deadline from June 30, 2011 to June 30, 2012 for certain individuals having only signature authority over entity accounts.<sup>1</sup> FinCEN is reviewing the application of certain exceptions set forth in its final FBAR regulations and may also be assessing whether there is any need for additional reporting of foreign financial accounts by such individuals where the direct or indirect owner of the accounts is a company traded on a domestic national exchange or certain regulated entities such as a bank examined by federal regulators or certain institutions registered with the Securities and Exchange Commission (“SEC”).

In the proposed regulations that FinCEN issued in February 2010, it received comments on the issue of whether to retain the signature authority prong for FBAR filers if the person having such authority had no financial interest in the foreign account. As stated in the final regulations published earlier this year, FinCEN ultimately decided to retain this prong because of concerns that it needed to have a second disclosure source in case the account owner did not report the foreign account.<sup>2</sup> In the circumstance of officers and employees of publicly traded or regulated entities, however, FinCEN established certain exceptions to the signature authority prong. The instructions to the FBAR were revised to reflect those exceptions which appear as exceptions (1) and (6). Exceptions (4) and (5) pertain specifically to publicly traded entities and their subsidiaries:

(4) An officer or employee of an entity that has a class of equity securities listed (or American depository receipts listed) on any United States national securities exchange is not required to report signature authority over a foreign financial account of such entity.

(5) An officer or employee of a United States subsidiary is not required to report signature authority over a foreign financial account of the subsidiary if its United States parent has a class of equity securities listed on any United

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<sup>1</sup> The IRS issued a news release, IR-2011-57 on the same date regarding the FinCEN extension.

<sup>2</sup> See our prior Client Alert on the final regulations at <http://www.mofo.com/files/Uploads/Images/110225-FinCEN-IRS-FBAR-Guidance.pdf>

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States national securities exchange and the subsidiary is included in a consolidated FBAR report of the United States parent.

Subsequent to the promulgation of the final regulations and revision of the FBAR instructions, FinCEN received inquiries regarding the application of these exceptions to situations where the individuals of parent or sister entities had signature authority over accounts of other related domestic or foreign entities. In light of the questions, FinCEN issued the notice that grants a one-year extension from FBAR filing for two categories of individuals:

- (1) an employee or officer of an entity under § 1010.350(f)(2)(i)-(v) who has signature or other authority over and no financial interest in a foreign financial account of a controlled person of the entity, and
- (2) an employee or officer of a controlled person of an entity under § 1010.350(f)(2)(i)-(v) who has signature or other authority over and no financial interest in a foreign financial account of the entity, the controlled person, or another controlled person of the entity.

“Controlled person” is defined as “a U.S. or foreign entity more than 50% owned (directly or indirectly) by an entity under § 1010.350(f)(2)(i)-(v) of 31 CFR.”<sup>3</sup> As noted, there are several entities identified in exceptions (i) through (v) of the final regulations. Regarding publicly traded entities, there are two categories.<sup>4</sup> The first is an entity that has a class of equity securities (or ADRs) listed on a U.S. national exchange, and the second is an entity that is a U.S. subsidiary of a U.S. entity that is traded on a U.S. exchange.

Thus, if an officer or employee of a publicly traded entity has signature authority over the foreign account of any U.S. or foreign-controlled person of the entity, that individual is entitled to an extension under the notice presumably where the parent or U.S.-controlled person is filing a report disclosing such account. Furthermore, if an officer or employee of a U.S. subsidiary of a U.S. publicly traded entity has signature authority over the parent company’s foreign account, the subsidiary’s account or any sister entity foreign or domestic, that individual is entitled to an extension under the notice so long as the subsidiary’s accounts are included in the consolidated FBAR report of the parent.

We expect that FinCEN and the IRS will provide clarification regarding the filing obligations of these individuals prior to June 30, 2012.

### IRS NOTICE 2011-54 EXTENSION FOR CERTAIN FBAR FILERS FOR 2009 OR EARLIER FBAR

On June 16, 2011, the IRS issued Notice 2011-54 in which it extended the FBAR deadline from June 30, 2011 to November 1, 2011 for the 2009 FBAR and earlier years. This extension applies to individuals having only signature authority over, but no financial interest in, a foreign financial account in 2009 or previous calendar years for which the deadline was initially extended in Notice 2009-62 and then again in Notice 2010-23. However, the FBAR deadline for 2010 accounts generally remains June 30, 2011.

### FINCEN NOTICE 2011-2 EXTENSION FOR FBAR FILINGS BY OFFICERS OR EMPLOYEES OF REGISTERED INVESTMENT ADVISORS

On June 17, 2011, FinCEN issued Notice 2011-2 in which it announced a one-year extension of the 2010 FBAR deadline from June 30, 2011 to June 30, 2012 for certain individuals having only signature authority over certain foreign financial

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<sup>3</sup> Note 2 of Notice 2011-1.

<sup>4</sup> See 31 C.F.R. § 1010.350(f)(2)(iv).

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accounts. The extension applies to an employee or officer of an investment advisor registered with the SEC who has signature or other authority over, and no financial interest in, a foreign financial account of persons that are not investment companies registered under the Investment Company Act of 1940.

The extension is applicable to FBARs for calendar year 2010 and FBARs for earlier years for which the filing deadline was properly extended under Notice 2009-62 or Notice 2010-23.

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