

## FBAR Update: Extended Deadlines, E-Filing Option and New IRS Form 8938

June 15, 2012

Every U.S. person with a financial interest in, or signature or other authority over, any financial account outside the U.S. must file an annual report on Treasury Form TD F 90-22.1 (*Report of Foreign Bank and Financial Accounts*, commonly known as an “FBAR”) if the aggregate value of all such accounts exceeds 10,000 USD at any time during the calendar year. **Unlike tax returns, which may be mailed on the filing deadline and be considered timely, the FBAR for 2011 must be received by Treasury by June 30, 2012.**

As summarized below, over the past year, the Financial Crimes Enforcement Network (“FinCEN”) has issued guidance regarding extended filing FBAR deadlines and new filing options. The Internal Revenue Service has also issued a new form (Form 8938) that requires additional disclosure regarding foreign financial assets.

### Extended deadlines

As noted in a previous alert on June 21, 2011 an officer or employee of certain types of entities (a “Specified Entity”) is not required to file an FBAR to report a foreign financial account owned or maintained by the Specified Entity so long as such officer or employee has no financial interest in the account. However, a United States or foreign entity more than 50 percent owned (directly or indirectly) by a Specified Entity (a “Controlled Person”) is **not** exempt from the FBAR filing requirement and thus persons with signature authority over (but no financial interest in) foreign financial accounts held by such Controlled Persons are subject to the FBAR filing requirement.

Last year, FinCEN extended the FBAR filing deadline to June 30, 2012 for officers and employees of a Specified Entity or a Controlled Person that have signature authority over (but no financial interest in) a foreign financial account owned or maintained by the Controlled Entity. Earlier this year, FinCEN further extended this relief in Notice 2012-1 which provides that these filers have until **June 30, 2013** to file an FBAR for 2011 and 2010 in connection with these accounts.

Also, as noted in a subsequent alert last year on June 22, 2011, FinCEN extended the filing deadline for officers and employees of investment advisers that are registered with the Securities and Exchange Commission, who have signature or other authority over (but no financial interest in) a foreign financial account in connection with FBARs for calendar year 2010 and prior years for which the filing deadline was previously deferred. This year, Notice 2012-1 also provides that these filers have until **June 30, 2013** to file an FBAR for 2011 as well as for prior years covered by previous deferrals in connection with these accounts.

### New E-Filing Option

There is now an online filing option for FBARs that require only one signature. The online form and instructions provide for a more immediate means by which to ensure that the FBAR is received by the June 30 deadline. Since only one signature can be submitted on the electronic form, the e-filing process is not an option for joint filers.

The printable FBAR form may be found at [here](#). For filers not using the e-filing option, this form must be filed with the U.S. Department of Treasury, P.O. Box 32621, Detroit, MI, 48232-0621. The address for commercial delivery is: IRS Enterprise Computing Center, Attn: CTR Operations Mailroom, 4th Floor, 985 Michigan Avenue, Detroit, MI, 48226, contact phone number: 313-234-1062. Note that the contact phone number for courier delivery may not be used to confirm receipt of the FBAR.

### Basic FBAR Terms

As clarified in the final regulations which were issued last year, the following definitions determine those individuals and entities subject to the FBAR filing obligation:

1. “United States person” is defined to mean a United States citizen or resident; an entity, including but not limited to a corporation, partnership, or limited liability company, created or organized in the United States or under the laws of the United States; and a trust or estate formed under the laws of the United States. Non-U.S. persons doing business in the United States are not required to file FBARs.

2. A “financial account” includes a savings deposit, demand deposit, checking, securities, security derivatives, debt card, prepaid credit card and any other financial instrument account, including certain insurance products and foreign pension funds. This includes an account with “a 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.”

An equity interest in a hedge fund or private equity fund is not currently considered to be a “financial account,” though the IRS is considering this question further.

A United States person having a financial interest in 25 or more foreign financial accounts, or signature or other authority over 25 or more foreign financial accounts, need only provide the number of financial accounts and certain other basic information on the FBAR form. If requested in the future, detailed information concerning each account must be provided.

3. A person has a “financial interest” in an account if he has legal title or is the owner of record, regardless of whether the account is maintained for his benefit. For example, IRS guidance provides that an individual who may access a foreign financial account held on another’s behalf due to a power of attorney and who is the owner of record on the account has a “financial interest” in such account and must file the FBAR.

In some cases, certain direct and indirect stockholders of corporations, partners of partnerships and persons holding voting or equity interests in other entities may be required to file FBARs with respect to foreign financial accounts of these entities. In particular, these rules apply to a United States person who owns, directly or indirectly, more than 50 percent of (a) the voting power or the total value of the shares of a corporation, (b) the interest in profits or capital of a partnership, or (c) the voting power, total value of the equity interest or assets, or interest in profits. For example, if a U.S. corporation owns 100% of a foreign company that has foreign financial accounts, the domestic corporation must file an FBAR, as must any shareholder who owns more than 50% of the voting power or total value of the shares of the U.S. corporation.

A present beneficial interest in more than 50% of the current income or more than 50% of the assets of a trust that holds a foreign financial account triggers an FBAR filing requirement by the trust beneficiary. However, a trust beneficiary does not need to file the FBAR if the trust, trustee or an agent is a United States person and files an FBAR disclosing the trust’s foreign accounts. A person with a remainder interest in a trust is not within the scope of the FBAR. It is also possible that a discretionary beneficiary of a trust may not have an FBAR filing requirement with respect to the trust.

4. “Signature authority” is defined as the power of an individual to control the disposition of assets held in a foreign financial account by direct communication (whether in writing or otherwise) with the financial institution that maintains the financial account. An individual who merely has the power to allocate assets within an account does not have “signature authority” for the purposes of the FBAR filing requirement.

Note that a United States person that causes an entity to be created for the purpose of evading the FBAR requirement shall have a reportable financial interest.

## New Form 8938, “Statement of Specified Foreign Financial Assets”

As noted in a recent alert, in addition to any applicable FBAR filing obligations, certain individual U.S. taxpayers holding specified foreign financial assets with an aggregate value exceeding \$50,000 must report information about those assets on new Form 8938. Unlike the FBAR, which is filed with the Treasury separate from any other tax filings by a June 30 deadline, Form 8938 must be attached to the individual taxpayer’s annual income tax return. Higher asset thresholds apply to U.S. taxpayers who file a joint tax return or who reside abroad (see below).

Form 8938 reporting applies for specified foreign financial assets in which the taxpayer has an interest in taxable years starting after March 18, 2010. For most individual taxpayers, this means they should have started filing Form 8938 with their 2011 income tax return. Individual taxpayers that hold interests in foreign financial accounts may thus need to report such accounts on at least three separate forms: their individual U.S. tax return, the FBAR and Form 8938. Individual taxpayers are encouraged to consult with their tax advisers to determine which of these or other forms may be required.

The IRS and U.S. Treasury have issued proposed regulations that, once finalized, will extend the Form 8938 reporting obligation in later tax years – possibly as early as 2012 – to U.S. entities that meet certain ownership percentage thresholds.

## Penalties

The penalty for failure to file the FBAR, if non-willful, is up to \$10,000. Willful failures to comply with the filing requirement incur penalties of up to \$100,000 or 50% of the foreign financial account balances; criminal penalties may also apply. The IRS says willfulness can be a conscious effort to avoid learning about FBAR reporting. In its internal audit guidance, the IRS says that with hardly any diligence, a taxpayer could have learned of the FBAR filing requirements quite easily. Thus taxpayers with foreign accounts are advised to read the information the government specifies in its tax forms and instructions. A failure to follow-up on this knowledge may provide evidence of “willful blindness.”

The penalty for failure to file Form 8938 is up to \$10,000 for a failure to disclose the foreign financial assets and an additional \$10,000 for each 30-days of non-filing after the IRS issues a notice of failure to disclose, for a maximum potential penalty of \$60,000; criminal penalties may also apply.

## Circular 230

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