

## US Treasury grants another extension of time for reporting signature authority (FBAR, Form 114) over certain foreign financial accounts

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### Executive summary

On 10 December 2018, the Financial Crimes Enforcement Network (FinCEN) issued [Notice 2018-1](#), further extending the filing deadline for certain individuals who previously qualified for an extension of time to file a *Report of Foreign Bank and Financial Accounts* (FBAR) with respect to signature authority under Notice 2017-1 and preceding guidance.

As such, the Notice is only relevant for persons who were previously granted extensions of time to report signature authority under FinCEN Notices 2011-1 and 2011-2, and most recently extended by FinCEN Notice 2017-1. FinCEN Notice 2018-1 grants a further extension of time to file FBARs with respect to signature authority for 2018 and prior years under extension. Please note, as stated in the *Surface Transportation and Veterans Health Care Choice Improvement Act of 2015*, Public Law 114-41 (the Act) changed the due date to 15 April, and directed that a six-month extension of the filing deadline to 15 October be made available. As of the date of Notice 2018-1, all filers are granted an automatic extension of time to file calendar year 2018 FBARs without the need to specifically request the extension.

## Detailed discussion

### Background

In general, and subject to certain exceptions, persons with either financial interest in or signature authority over a foreign bank, brokerage, or other financial account during a calendar year must report it to FinCEN (not the Internal Revenue Service (IRS)) electronically using the BSA E-Filing System on FinCEN Form 114, *Report of Foreign Bank and Financial Accounts*. Questions on federal income tax returns are designed to remind taxpayers of this requirement. Note that this requirement is separate from the requirement to report ownership of foreign financial assets on Form 8938, *Statement of Specified Foreign Financial Assets*, filed with the IRS.

Since inception, FBAR reporting was done on a calendar-year basis. Historically, reports for each year were due on 30 June of the following year, with no provision for extension. The Act made two changes effective for the reports for 2016, due in 2017 and subsequent calendar years. First, the Act changed the due date from 30 June to 15 April. Second, the Act directed that a six-month extension of time to file be made available.

Final regulations issued by FinCEN on 24 February 2011, effective for 2010 and subsequent years, provide various exemptions from the requirement to file reports with respect to signature authority, including signature authority held by officers and employees over accounts owned by publicly traded or certain widely held companies (e.g., reporting companies under the *Securities Exchange Act of 1934*) and signature authority held by employees of SEC-registered investment advisors over accounts owned by regulated investment companies.

Complaints arose that these exemptions were too narrow. First, they did not help officers or employees of publicly traded or widely held companies if an officer or employee of one group company held signature authority over an account owned by another group company. For example, suppose P is a US publicly traded company with US subsidiaries C and D. If individual A is an officer of group member C, but not group member D, then individual A is exempt from reporting signature authority over accounts owned by C, but not D, since individual A is not an officer of D. Furthermore, under the final regulations there was no relief for signature authority over accounts owned by non-US members of the group, such as subsidiaries that are CFCs. Additionally, the final regulations provided no relief for persons with signature

authority over accounts owned by funds other than regulated investment companies, such as hedge funds, venture capital funds and private equity funds.

Notice 2011-1 granted an extension of time to file until 30 June 2012, for FBARs reporting signature authority in 2010 for officers and employees of any US publicly traded company or US or foreign subsidiaries thereof over accounts owned by any US or non-US member of the group. The same applies for groups headed by any widely held US company that was a reporting company under the *Securities Exchange Act of 1934*. Thus, it provided relief where the individual was an officer or employee of a non-US group member, or the individual had signature authority over an account owned by another group member. In addition, Notice 2011-2<sup>1</sup> provided an extension of time to file until 30 June 2012, for reports of signature authority in 2010 for direct employees or officers of SEC-registered investment advisors (but not employees or officers of other group entities) who had signature or other authority over accounts owned by customers other than regulated investment companies, such as hedge funds, venture capital funds and private equity funds. In both cases, relief was not available if the person with signature authority also had financial interest in the account.

Subsequent FinCEN Notices extended the relief available under these two Notices on a yearly basis. The most recent extension of time prior to FinCEN Notice 2018-1 was FinCEN Notice 2017-1, which granted an extension of time until 15 April 2019 (automatically extended to 15 October 2019), to file reports for situations governed by the two Notices.

### Notice 2018-1

Notice 2018-1 further extends the filing deadline to 15 April 2020 (automatically extended to 15 October 2020), for reports of signature authority for 2018 and prior years in the situations governed by Notices 2011-1 and 2011-2. The IRS has not yet confirmed how persons benefitting from Notice 2018-1 should answer FBAR-related questions on their 2018 tax returns, or whether they should continue to follow the prior informal guidance on this issue: if their only FBAR filing requirement is extended by the Notices, answer “yes” to having signature authority over a foreign account and “no” if an FBAR filing requirement does not exist. For example, based on the prior informal guidance, on the 2018 version of Form 1040, Schedule B, one would answer “Yes” to the first part of question 7a (does one have signature authority over a foreign financial account), “No” to the second part of question 7a (is one required to file Form 114), and not answer question 7b (country where the account is located).

## Filing considerations

Although the relief provided by FinCEN Notice 2018-1 and prior notices is beneficial on its face, one must consider the possibility of proposed changes to the reporting rules before deciding whether to file promptly. On 1 March 2016, FinCEN issued a Notice of Proposed Rulemaking (NPRM) proposing various changes to the signature authority rules. Although the public comment period has closed, it is not known whether the proposed regulations will be finalized or whether there will be any changes from the current version. If the proposed regulations are issued in final form in much the same way as they are drafted, some categories of filers will benefit but not others. Although in all events one must file for 2018 by 15 October 2020, filers still face a choice: Should one file now under the current regulations? Or should one delay as much as possible in the hope that the proposed regulations will be issued in final form and one will be able to file under them?

### 1. Filers with 25 or more reportable foreign financial accounts

Under the current regulations, US persons with 25 or more reportable accounts report only the number of such accounts and keep detailed information on file for inspection later, if requested. The proposed regulations, if finalized in their current form, would require details of all accounts to be provided, regardless of how many accounts one is reporting. Thus, US persons who benefit from the current regulations should consider submitting filings while the current regulations are in effect (prior to issuance of new regulations).

### 2. Reporting exemption for certain officers, employees, and agents with signature or other authority

The proposed regulations would replace the exemptions for reporting signature authority contained in FinCEN Notices 2011-1 and 2011-2 with new rules. The proposed

regulations provide a reporting exemption for certain individual officers, employees, and agents with signature or other authority over (but no financial interest in) the foreign financial account of an entity in circumstances where the entity, or another group member, is required to report its financial interest in the foreign financial account. These changes will benefit some filers, such as employees of US-headed groups that are neither publicly traded nor widely held but withdraw relief from others, such as employees of regulated investment advisors with signature authority over accounts owned by non-US investment funds. It is possible that if the new regulations are issued before 15 October 2020, they would only apply to reports filed after the new regulations are issued.

Thus, for example, entities that assist their officers, employees and agents with their personal FBAR responsibilities as related to the entities' accounts may consider whether to defer filing in hopes that FinCEN issues new regulations containing this exemption, that are applicable to calendar year 2018 filings, prior to the 15 October filing deadline for 2018 FBARs. Additional factors impacting this consideration include: (1) employees would presumably like to know how to respond to the FBAR related questions on their federal income tax return; (2) entities with 25 or more reportable accounts might be uncomfortable filing under the current regulations while advising officers, employees or agents to file under new regulations (if any); (3) new regulations may not be issued enough in advance of 15 October to allow time for timely filing; and (4) there is no guarantee that new regulations will apply to 2018 reporting.

Regardless of approach, US persons should not delay data gathering as the information needed is generally the same under either scenario to determine filing requirements, apply exceptions and satisfy the record retention requirement.

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## Endnote

1. Notice 2011-2 applies to calendar year 2010, 2009 and earlier calendar years for which the filing deadline was properly deferred under Notice 2009-62, 2009-35 IRB 260, or Notice 2010-23, 2010-11 IRB 441.

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