

US: FinCEN further extends certain signature authority reporting (FBAR, Form 114) over foreign financial accounts

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Executive summary

On 11 December 2020, the United States (US) Financial Crimes Enforcement Network (FinCEN) released [Notice 2020-1](#) (the Notice), further extending the filing deadline for certain individuals who previously qualified for an extension of time to file the Report of Foreign Bank and Financial Accounts (FBAR) with respect to signature authority under Notice 2019-1 and previous guidance.

The Notice pertains only to individuals who were initially granted extensions of time to report signature authority under FinCEN Notices 2011-1 and 2011-2 (most recently extended by FinCEN Notice 2019-1). Under the Notice, individuals have until 15 April 2022, to file deferred FBARs, subject to any potential further extension. Any persons not covered by the Notice for 2020 will have until 15 April 2021 – automatically extended to 15 October 2021 – to file their FBARs for the 2020 calendar year.

In no case is an extension (beyond the automatic extension to 15 October) available for financial interest filing obligations.

Detailed discussion

Background

Generally, US persons with either a financial interest in, or signature or other authority over, a foreign bank, brokerage, or other financial account must annually report it on Form 114, *Report of Foreign Bank and Financial Accounts*. In many cases, US persons may have both financial interest and signature authority accounts to report. Forms 114 are filed with FinCEN (not the Internal Revenue Service (IRS)) using the BSA E-Filing System. Questions on federal income tax returns are designed to remind taxpayers of this requirement and reinforce their responsibility for compliance. The existence and completion of such questions are often pointed to in examinations involving FBAR failures and whether willful or non-willful penalties ought to apply.

Since inception, FBAR reporting was done on a calendar-year basis. Traditionally that reporting was due on 30 June of the following year, with no provision for extension. Beginning with the *Surface Transportation and Veterans Health Care Choice Improvement Act of 2015*, Public Law 114-41 (the Act), the due date was changed from 30 June to 15 April, and an automatic six-month extension was added to the new due date (until 15 October) for all filers.

Signature authority exemptions versus deferrals

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: (i) 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 (ii) signature authority held by employees of SEC-registered investment advisors over accounts owned by regulated investment companies.

From the beginning there were concerns that these exemptions were too narrow. The exemptions did not provide relief to 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 a US publicly traded company has two US subsidiaries. If an individual is an officer of only one subsidiary (and not the other), then the

individual is only exempt from a filing requirement for the company where the individual holds the position of officer. The individual still has a filing requirement for the other subsidiary.

Further, the final regulations provided no relief for signature authority over accounts owned by non-US members of the group, such as subsidiaries that are controlled foreign corporations (CFCs). The regulations also 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.

The 2011 FinCEN notices addressed these concerns. Notice 2011-1 extended the filing deadline by one year, for officers and employees of a US publicly traded company (or any of its subsidiaries) who were required to report signature or other authority FBARs in 2010 over accounts owned by any US or non-US member of the group. The same applied for groups headed by any widely held US company that was a reporting company under the *Securities Exchange Act of 1934*. Thus, Notice 2011-1 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. Furthermore, under the notice there was no relief for signature authority over accounts owned by non-US members of the group, such as subsidiaries that are CFCs.

In addition, Notice 2011-2¹ provided a one-year extension of time to file 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. Under both notices, relief was not available if the person with signature authority also had a financial interest in the account.

Subsequent FinCEN notices extended the relief available under these two 2011 notices on a yearly basis. The most recent extension of time prior to FinCEN Notice 2020-1 was FinCEN Notice 2019-1, which granted an extension of time until 15 April 2021, to file reports for situations governed by the two notices.

Coordination with informational questions on income tax return

As highlighted above, the Notice further extends the filing deadline to 15 April 2022, for reports of signature authority for 2020 and prior years in the situations governed by Notices 2011-1 and 2011-2. The IRS has not yet confirmed whether persons benefitting from Notice 2020-1 should continue to follow prior informal guidance with respect to FBAR-related questions on their 2020 income tax returns. Based on the prior informal guidance, on the 2020 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 prompt 7b (if you are required to file FinCEN Form 114, enter the name of the foreign country where the financial account is located).

Additional guidance considerations

Although the relief provided by the Notice and prior notices may be beneficial, one should consider the possibility of proposed changes to the reporting rules before deciding whether to avail themselves of the extension. On 10 March 2016, FinCEN issued a Notice of Proposed Rulemaking (NPRM) proposing various changes to the signature authority regulations.² FinCEN has justified the continued extensions of signature authority filings based on the potential burden associated with adjusting to the new rules outlined in the NPRM. It is not known when or whether the proposed regulations will be finalized or adjusted from their originally proposed form, although support was expressed during the public comment period for the reduced duplicative filing the new rules would engender.

Filers who must complete a financial interest FBAR or have a signature authority requirement not extended under the Notice must decide whether to file now under the current regulations or delay for some period in the hope that the proposed regulations will be issued in final form with the ability to file under them for 2020. If the regulations are finalized as proposed, only some categories of filers will benefit.

1. Filers with 25 or more reportable foreign financial accounts

Under the current regulations, US persons with 25 or more reportable accounts must only report the number of such accounts and keep detailed information on file for inspection, if requested. The proposed regulations would require details

of all accounts to be provided, such as financial institution details, bank account numbers, and maximum account balance information, regardless of how many accounts are being reported.

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). Otherwise, US persons, particularly entities with financial interests in 25 or more foreign financial accounts, may face a substantially higher filing burden associated with reporting detailed information for every account.

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. They would 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 when the entity, or another group member, must report its financial interest in the foreign financial account.

The proposed regulations would benefit many signature authority filers, such as employees of US-headquartered groups that are neither publicly traded nor widely held. These changes may also withdraw relief from others, such as employees of regulated investment advisors with signature authority over accounts owned by non-US investment funds, and US persons with a financial interest in 25 or more foreign financial accounts.

Organizations that assist their officers, employees, and agents with their personal FBAR responsibilities as related to the entities' accounts may consider whether to defer the 2020 filing in hopes that FinCEN issues new regulations containing the signature authority exemption. If the regulations, however, are finalized before the 2021 deadline, it is possible they could only apply to 2021 reports due in 2022.

Additional factors affecting whether to defer the 2020 filing include the following:

- ▶ Employees may want to know how to respond to the FBAR-related questions on their federal income tax return.
- ▶ 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).

- ▶ New regulations may not be issued sufficiently in advance of 15 October to allow for timely filing.
- ▶ There is no guarantee that new regulations will apply to 2020 reporting.

Regardless of the approach, US persons should not delay data gathering because the information needed is generally the same under either scenario for determining filing requirements, applying exceptions, and satisfying the record-retention requirement.

Endnotes

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.
2. https://www.fincen.gov/sites/default/files/shared/FBAR_NPRM030116.pdf.

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