

Two More Extensions: IRS and FinCEN Issue Extensions for Certain FBAR Filers in IRS Notice 2011-54 and FinCEN Notice 2011-2

June 20, 2011

On June 16, the Internal Revenue Service (IRS) issued **Notice 2011-54**, which provides that U.S. persons having signature authority over, but no financial interest in, foreign financial accounts in 2009 or earlier calendar years for which the reporting deadline was extended by Notice 2009-62 or Notice 2010-23 will now have until **November 1, 2011** to file Foreign Bank and Financial Accounts (FBARs) with respect to those accounts. The deadline for reporting signature authority over, or a financial interest in, foreign financial accounts for the 2010 calendar year remains June 30, 2011.

The Financial Crimes Enforcement Network (FinCEN) of the U.S. Treasury Department issued **Notice 2011-2** on June 17, providing a filing extension until **June 30, 2012** for certain U.S. persons who are employees or officers of investment advisors registered with the Securities and Exchange Commission (SEC) and who have signature or other authority over and no financial interest in foreign financial accounts of persons that are not investment companies registered under the Investment Company Act of 1940 (the 1940 Act).

Background

Generally, any U.S. person or entity that at any time during a calendar year has a financial interest in, or signature or other authority over, financial accounts located in a foreign country with an aggregate value in excess of \$10,000 is required to file. The filing deadline for FBARs for each year is June 30 of the following year. Accordingly, FBARs for 2010 are due June 30, 2011.

FinCEN issued final rules (RIN 1506-AB08) on February 24, 2011 regarding FBAR filing requirements (the Final Regulations). These rules reflected only minor changes to the proposed rules issued February 23, 2010 (the Proposed Regulations).

On February 26, 2010, the IRS issued Notice 2010-23, which provided a delayed filing date for certain FBARs until June 30, 2011 for some persons with only signature authority over foreign financial accounts but no financial interest in such accounts and for persons owning certain commingled funds. The FBARs affected by the delayed filing date in Notice 2010-23 concern accounts for 2009 and prior calendar years.

IRS Notice 2011-54

The IRS became aware that individuals with signature authority over, but no financial interest in, foreign financial accounts are having difficulty compiling the information needed to file complete and accurate FBARs with respect to 2009 or earlier calendar years by the June 30, 2011 deadline, as previously extended by Notice 2009-62 or Notice 2010-23. Accordingly, the IRS and FinCEN provided the extension for such persons to file their past FBARs until **November 1, 2011**. All 2010 FBARs are still due on June 30, 2011.

FinCEN Notice 2011-2

On June 17, 2011, FinCEN provided an extension to file FBARs until **June 30, 2012** to certain individuals who are employees or officers of investment advisors registered with the SEC and who have signature or other authority over and no financial interest in foreign financial accounts of persons that are not investment companies registered under the 1940 Act. The current exemption set forth in the Final Regulations only covers employees of “Authorized Service Providers” (ASPs) with respect to accounts of mutual funds that are registered under the 1940 Act.

A number of formal and informal comments were made by industry participants that this definition was too narrow and made distinctions that were not necessary to carry out the goals sought to be achieved by the FBAR program. It is hoped that the extra time for a broader range of employees of SEC-registered advisers will give FinCEN more time to craft rules and exemptions for some, or all, of these individuals. FinCEN and the IRS have confirmed that an individual with mere investment authority over an account does not require an FBAR filing where such individual does not have the ability to remove assets from the account. Questions about this rule, however, arise under a number of different factual circumstances. For example, an employee of an investment advisor who, in addition to providing investment advice, has the ability to satisfy an invoice from an account of a client will have an FBAR requirement under informal FinCEN advice; whereas only having investment authority over such account as described above would not give rise to an FBAR filing requirement. The extension is a welcome development to permit more time to explore the various duties of these types of individuals with FinCEN to determine which individuals, if any, would be required to file FBARs as a result of signature authority.

The Ultimate FBAR Due Date Chart

Given the number of extensions that have been provided to potential FBAR filers, we have created the Ultimate FBAR Due Date Chart. The chart is available online at http://www.morganlewis.com/pubs/IRS_FinCENGuidanceChart_20june11.pdf. If recent history is a guide, we will be updating this chart on a regular basis.

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