

AN ALERT FROM THE BDO INTERNATIONAL TAX PRACTICE

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► **REMINDER:**
**FINANCIAL BANK ACCOUNT
REPORTING GUIDANCE REVISED;
LIMITED RELIEF EXTENDED**

► **AFFECTING:**
Certain taxpayers with foreign financial accounts

► **SUMMARY:**
As a reminder, Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR"), must be received no later than June 30, 2010. The "mailbox rule" does not apply with respect to FBARs and thus should be postmarked earlier than June 30 to ensure receipt by June 30, 2010.

Please see below our amended tax alert, the original version of which was posted on March 10, 2010. This alert sets forth the current rules under recent guidance issued by the Treasury Department and the Internal Revenue Service.

► **DETAILS**
On February 25 and 26, 2010, the Treasury Department and the Internal Revenue Service issued three items of guidance concerning the filing of Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR"). The Service first issued Notice 2010-23 and Announcement 2010-16, which generally extend the relief granted in prior guidance. The other guidance consists of proposed regulations concerning the FBAR filing requirements.

Notice 2010-23

In August 2009, the Service issued Notice 2009-62, which extended until June 30, 2010, the filing date for certain individuals (1) with signature authority over (but not a financial interest in) a foreign financial account, or (2) with

CONTACT:

ROBERT C. PEDERSEN
New York
212-885-8000 - rpedersen@bdo.com

J. SCOTT HENDON
Dallas
214-969-7007 - shendon@bdo.com

WILLIAM F. ROTH, III
Grand Rapids
616-774-7000 - wfroth@bdo.com

DON JONES
San Jose
408-352-1978 - djones@bdo.com

BYRON D. LAMBERT
Atlanta
404-979-7147 - blambert@bdo.com

CHRISTOPHER J. GALUPPO
New York
212-885-8000 - cgaluppo@bdo.com

HOLLY L. CARMICHAEL
San Jose
408-278-0220 - hcarmichael@bdo.com

TODD SIMMENS
Woodbridge
732-491-4170 - tsimmens@bdo.com

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signature authority or a financial interest in a foreign commingled fund. To address public comments received since the issuance of Notice 2009-62 and to provide immediate guidance in answering tax-return specific questions concerning investments in foreign financial accounts, Notice 2010-23 provides the following relief:

1. The filing date for persons with signature authority over (but not a financial interest in) a foreign financial account is extended to June 30, 2011. The extended date applies to reporting for such accounts for the 2010 and prior calendar years. When filing an FBAR under this extension, the FBAR guidance in effect at the time the FBAR is filed must be followed.
2. The filing date for persons with a financial interest in, or signature authority over, a foreign commingled fund is modified. For interests in foreign commingled funds that are mutual funds, such filings for calendar years 2009 and prior are required to be filed on or before June 30, 2010, as provided in Notice 2009-62. The Service will not, however, interpret the term “commingled fund” for purposes of FBAR reporting as applying to other types of commingled funds, including a foreign hedge fund or private equity fund, for calendar year 2009 or prior. We believe the Service reserves the right, however, to modify the requirements for other commingled funds for calendar year 2010 (due June 30, 2011) in later published guidance. Therefore, for the June 30, 2010, filing date, only foreign commingled funds that are mutual funds for calendar year 2009 and prior are required to be filed. For interests in other types of commingled funds (only), FBAR forms are not required to be filed on June 30, 2010.
3. Taxpayers that qualify for relief under Notice 2010-23 who have no other reportable foreign financial accounts for the taxable year in question may check the “no” box in response to FBAR-related questions found on federal income tax forms for 2009 and earlier years that ask about the existence of financial interests in, or signature authority over, a foreign financial account.

Notice 2010-23 is available at www.irs.gov/pub/irs-drop/n-10-23.pdf.

Announcement 2010-16

In June 2009, the Service issued Announcement 2009-51, in which it provided that a “United States person” is defined according to the July 2000 version of the FBAR instructions; effectively, a United States person is (1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust. For purposes of FBAR filing obligations for 2009 or earlier years, a United States person does not include persons who are not United States citizens, United States residents, or domestic entities. Announcement 2010-16 effectively extends the relief provided in Announcement 2009-51 for FBAR forms otherwise due June 30, 2010. The Announcement further suggests that persons not required to file an FBAR under this relief also would not be required to answer “yes” on FBAR-related federal income tax return questions for the 2009 year. Further guidance may be issued, which would address the definition of a United States person.

Announcement 2010-16 is available at www.irs.gov/pub/irs-drop/a-10-16.pdf.

Proposed Regulations

The FBAR reporting rules are contained within Title 31 of the United States Code and the regulations thereunder, which are part of federal banking law. On February 25, 2010, the Treasury Department issued proposed regulations under 31 CFR Part 103 with respect to the reporting of foreign financial accounts. The proposed regulations generally: (1) clarify who is a required filer and which types of accounts are reportable under the FBAR rules, including defining who is a United States person; (2) exempt from filing certain taxpayers with signature authority only over an account; and (3) provide rules intended to prevent United States persons from avoiding the reporting requirements. The proposed regulations would maintain the June 30 annual filing date. A draft of revised changes to the FBAR instructions is included as an attachment to the proposed regulations.

The proposed regulations are available at www.gpo.gov/fdsys/pkg/FR-2010-02-26/pdf/2010-4042.pdf.

The Service periodically updates its frequently asked questions (“FAQs”) regarding the FBAR filing requirements. Please

check www.irs.gov/businesses/small/article/0,,id=210249,00.html for the most recent FAQs regarding reporting of foreign bank and financial accounts.

Quiet Disclosure

At a recent American Bar Association Section of Taxation meeting in Washington during the Offshore Voluntary Compliance Update, IRS officials made clear that quiet disclosure of offshore bank accounts via amended returns would not entitle taxpayers to the favorable terms of the voluntary disclosure program. The question had been raised as to what type of special treatment, if any, the Service would afford taxpayers who declined to enter the government's special voluntary disclosure program and instead filed amended returns revealing previously unreported income from offshore accounts. In response, the IRS representatives stated that quiet disclosures would not place affected taxpayers on terms equivalent to those who reported under the voluntary disclosure program. Thus, quiet disclosure could lead to harsh civil and criminal penalties whereas those under the voluntary disclosure program may have enjoyed the waiver of certain criminal penalties.

Taxpayers and their advisers should review the new guidance to determine what, if any, impact the guidance has on any potential FBAR filing requirements, including any revised due dates for filings related to certain foreign accounts.

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Material discussed in this tax alert is meant to provide general information and should not be acted on without professional advice tailored to your firm's individual needs.