

June 24, 2009

## Foreign Account Holders and Persons with Authority over Foreign Accounts – BEWARE! The June 30th U.S. Filing Deadline May Apply to You

Pursuant to the Bank Secrecy Act, certain U.S. persons are required to disclose information related to foreign financial accounts in which or over which they maintain an interest or some level of control. This information is disclosed by filing Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts*. (This Treasury Department form is commonly referred to as an “FBAR”). The FBAR, which reports a taxpayer’s foreign financial accounts held or controlled during the 2008 calendar year, must be filed by June 30, 2009 (no extension is available) with the U.S. Department of Treasury.

The purpose of this Alert is to provide a summary of the scope of an FBAR (including the recent revisions to this form) to assist our clients in complying with the stringent reporting requirements and avoid the onerous penalties relating to the failure to timely file this form.

### Who Must File an FBAR?

In general, every U.S. person that has a financial interest in or signature or other authority over one or more foreign financial accounts with an aggregate value exceeding \$10,000 at any time during the previous calendar year must file an FBAR. Also, the list of required filers was recently expanded to include non-U.S. persons that are “in and doing business in the United States.” Although it appears that this change was intended to apply only to non-U.S. persons that have a physical presence in the United States, due to the lack of clear guidance in this area, the IRS has temporarily suspended the 2009 reporting requirements applicable to persons who are not U.S. citizens, residents, or domestic entities.<sup>1</sup>

### Which Financial Accounts Must be Reported on the FBAR?

For purposes of FBAR, a “financial account” includes any bank, securities, or other financial instrument account, as well as any deposit or other account (including debit card and prepaid credit card accounts) maintained with a financial institution. A “financial account” also now includes any account in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund, including mutual funds. However, individual bonds, notes, and stock certificates are not considered a financial account.

### What is Considered “Holding a Financial Interest, Signature or Other Authority over Foreign Accounts”?

As stated above, only U.S. persons that have a financial interest in or signature or other authority over foreign financial accounts are subject to the FBAR reporting requirements. For purposes of these rules, a U.S. person has a financial interest in any account for which such person is the owner of record or has legal title, regardless of whether the account is maintained for his or her benefit. In addition, even a U.S. person that is not the legal owner of a foreign financial account may have a reporting obligation if such person constructively owns a foreign financial account and ultimately benefits from it. A U.S. person is considered to have a financial interest in (through constructive ownership) any foreign account for which the legal owner is (i) another person acting as agent, nominee, attorney, or in some other capacity on behalf of the U.S. person, (ii) a corporation in which the U.S. person owns directly or indirectly more than 50% of the total value or voting power of all shares of stock, (iii) a partnership in which the U.S. person owns an interest in more than 50% of the profits or capital, or (iv) a trust in

<sup>1</sup> IRS Ann. 2009-51, 2009-25 IRB; IR 2009-58.

which the U.S. person either has a direct or indirect present beneficial interest in more than 50% of the assets from which such person receives more than 50% of the current income.

Even if a U.S. person does not have a direct or indirect interest in a foreign financial account, such person may nevertheless have a reporting obligation if he or she has signature or other authority over a foreign account. A person has signature authority over an account if such person can control the disposition of money or other property in the account by delivery of a document containing his or her signature to the bank or other person with whom the account is maintained. Other authority exists when a person can exercise comparable power over an account, either directly or through a third party acting on his or her behalf.

#### **How do the FBAR Rules Apply to Investment Funds?**

Based on the constructive ownership rules referenced above, U.S. persons holding a majority interest in a domestic investment fund with foreign financial accounts may be subject to the FBAR reporting requirements. However, with respect to a foreign investment fund, significant uncertainties exist regarding whether such a foreign fund constitutes a "financial account." Although this issue is unresolved, the IRS recently indicated (in a teleconference) that it believes that a foreign investment fund is a foreign financial account for FBAR purposes. Under this interpretation, every U.S. person in the foreign investment fund would be obligated to file an FBAR, whether or not the fund has any foreign bank or financial accounts. In addition, U.S. investment managers with financial interests in or signature or other authority over such funds would also be obligated to file an FBAR.

#### **What are the Penalties for Failure to File an FBAR?**

The penalties for failing to file an FBAR are severe. Willful non-compliance is a felony, which can result in imprisonment and/or a criminal fine. Moreover, willful non-disclosure may also result in a substantial civil penalty. Even an inadvertent failure to file may result in a civil penalty.

#### **Conclusion**

Given the increased aggressiveness of the Internal Revenue Service to uncover foreign accounts and the severe penalties for non-disclosure, the failure to file an FBAR can be a costly mistake, even if inadvertent. Consequently, U.S. persons should pay special attention to the FBAR reporting requirements to ensure that they fully comply with their reporting obligations. For persons that failed to file an FBAR in previous years, a voluntary disclosure program currently exists that will permit such persons to file amended FBARs (no later than September 23, 2009), in an attempt to minimize potential penalties and lessen the likelihood of criminal prosecution.

You are advised to contact your tax professional immediately if you believe that you have a current or prior reporting obligation. If you have questions concerning or would like to discuss the FBAR reporting requirements, please contact one of the attorneys listed below.

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