

Client Alert

Corporate Department

June 2009

Foreign Bank and Financial Account Reports Due by June 30, 2009

Under the Bank Secrecy Act, each U.S. person who had a financial interest in or signature or other authority over one or more financial accounts located in a foreign country, including bank, securities, or other types of financial accounts, of which the aggregate value exceeded \$10,000 at any time during 2008, must file a report on Form TD F 90-22.1¹. This Report of Foreign Bank and Financial Accounts (“FBAR”) must be received by the Department of the Treasury by June 30, 2009.

Persons Required to File

The FBAR filing requirement applies to any “U.S. person,” which is defined as any citizen or resident of the United States, domestic corporation, partnership, trust or estate, and any other form of domestic business. The definition of U.S. person was expanded to include “a person in and doing business in the United States.” The IRS announced on June 5, 2009 that this more expansive definition has been suspended. All of the other FBAR definitions still apply.

The following definitions apply in determining whether a U.S. person has “a financial interest in or signature or other authority over” a foreign financial account:

- A “financial interest” is deemed to exist where the account is held:
 - in the U.S. person’s name or for such person’s benefit or for the benefit of others (including non-U.S. persons);
 - by an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person;
 - by a corporation in which the U.S. person owns, directly or indirectly, more than 50% of the total value of shares or of the voting power of all shares;
 - by a partnership in which the U.S. person owns an interest in more than 50% of the profits (distributive share of income, taking into account any special allocation agreement) or more than 50% of the capital of the partnership; or
 - by a trust in which the U.S. person either has a present beneficial interest, directly or indirectly, in more than 50% of the assets or from which such person receives more than 50% of the current income.

A U.S. person also has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is a trust, or a person acting on behalf of a trust, that was established by such U.S. person and for which a trust protector has been appointed.

¹ A copy of the Form TD F 90-22.1 is available at <http://www.irs.gov/pub/irs-pdf/f90221.pdf>.

- “Signature authority” means the ability to control the disposition of money or other property in the account by delivery of a document bearing the U.S. person’s signature (either alone or along with the signature of others) to the bank or other person with whom the account is maintained.
- “Other authority” means control over the disposition of money or other property by communication with the bank or other person with whom the account is maintained, either directly or through an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person, either orally or by some other means.

Types of Financial Accounts Covered

Financial accounts that are covered (“Covered Foreign Accounts”) include any foreign bank, securities, or securities derivatives account and any other account holding financial instruments. Covered Foreign Accounts also include any foreign accounts in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund (including mutual funds). In addition, Covered Foreign Accounts include any foreign savings, demand, checking, deposit, or time deposit account or any other account (including debit card and prepaid credit card accounts) maintained with a financial institution or other person engaged in the business of a financial institution. The holding of (a) individual foreign bonds, notes, or stock certificates, or (b) unsecured loans to a foreign trade or business that is not a financial institution are not Covered Foreign Accounts.

An FBAR is not required to be filed if the aggregate value of the Covered Foreign Accounts did not exceed \$10,000 at any time during 2008.

During a recent conference call held in anticipation of the upcoming FBAR filing deadline, an IRS official expressed his opinion that a foreign hedge fund constitutes a Covered Foreign Account. Some tax professionals are advising their clients who are U.S. persons invested in foreign hedge funds to file FBARs with respect to these investments based on the IRS official’s statement.

Recordkeeping Requirements

Each filer must retain records containing the name in which each Covered Foreign Account is maintained, the number or other designation of each Covered Foreign Account, the name and address of the foreign bank or other person with whom each Covered Foreign Account is maintained, the type of each Covered Foreign Account, and the maximum value of each Covered Foreign Account during the calendar year for which the FBAR was filed. These records must be kept for five years.

Filing Information

There is no provision for obtaining an extension of time for filing the FBAR. The report may be filed by mail to the address provided on the FBAR or hand-delivered to any local IRS office for forwarding to the Department of the Treasury.

Penalties

The penalties for a failure to comply with the FBAR reporting obligations are significant. For example, a penalty of up to \$10,000 may be assessed for each non-willful violation. A willful failure to file or retain records of an account may result in a civil penalty of the greater of \$100,000 or 50% of the amount in the account at the time of the violation. A willful failure to file may result in a criminal penalty of up to \$250,000 or 5 years imprisonment, or both. Further, criminal penalties of up to \$500,000 and/or 10 years imprisonment may result from a willful failure to file while violating certain other laws. In addition, failing to file or filing with materially false information may result in a separate violation of federal law for making false statements to the government.

Please feel free to contact the attorneys listed below or any corporate or tax attorney with whom you work if you have any questions or you desire assistance with respect to the preparation and filing of your Report of Foreign Bank and Financial Accounts.

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