



MOODY, FAMIGLIETTI & ANDRONICO

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Federal Tax Alert

Subject:

The Latest Word on the Internal Revenue Service's "Report of Foreign Bank and Financial Accounts" (FBAR) Filing Requirements

Important Update

In October 2008, the Internal Revenue Service ("IRS") released a revised version of Form TD F 90 22.1, Report of Foreign Bank and Financial Accounts (the so-called "FBAR" form), for the reporting of foreign banking and financial accounts held by a US citizen or entity.

On June 12, 2009, the IRS provided further clarification on the filing requirements and more specifically on the treatment of offshore hedge funds and other managed offshore accounts including private equity funds for purposes of the definition of a "foreign financial account" for FBAR filing purposes.

Furthermore, although the FBAR Form TD F 90 22.1 is officially due on June 30 for the previous calendar year, the IRS recently announced that it will permit taxpayers who meet certain requirements to file Form TD F 90 22.1 by either a September 23, 2009 extended deadline or a June 30, 2010 deadline without facing penalties. It is presumed that these extensions are being granted as a result of the confusion and alarm caused by the IRS's June 12th announcement that it considers an offshore hedge fund to be a foreign financial account for FBAR purposes. (For details, refer to section entitled, *Specific Guidance Relative to Hedge Funds and Other Offshore Funds*.)

FBAR Filing Requirements – Who It Affects

Subject to certain exceptions, particularly with respect to FBAR forms due on June 30, 2009, the filing requirement applies to any "United States person," i.e., individual, corporation, partnership, trust, or estate, or a person in and doing business, in the United States who has:

Signature authority (or other authority that is comparable to signature authority) or direct or indirect financial interest in financial accounts in a foreign country with an aggregate balance in all accounts exceeding USD \$10,000 at any time during the calendar year.

Should you have any questions regarding this alert, please contact:

Craig A. Eaton, CPA, MST
Partner
(978) 557-5360
ceaton@mfa-cpa.com

MFA - Moody, Famiglietti & Andronico, LLP
1 Highwood Drive. Tewksbury, MA 01876
www.mfa-cpa.com

A person has “signature authority” over an account if such person can control the disposition of money or other property in it 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 in a person who can exercise power that is comparable to signature authority over an account by direct communication to the bank or other person with whom the account is maintained, either orally or by some other means.

Access to FBAR Form TD F 90 22.1

The revised Form TD F 90 22.1 can be found at <http://www.irs.gov/pub/irs-pdf/f90221.pdf>

The newly revised form should be used for all reports filed after December 31, 2008 as well as for filing FBARs for prior years. However, in determining whether a person is required to file for a prior year, the instructions from the previous version of the FBAR form (revised in July 2000) may be relied on for the purpose of determining filing requirements.

Official Due Date and Recent Extensions Being Offered by the IRS

The FBAR form is due June 30 of the year following the calendar year in which the \$10,000 reporting threshold is met.

1. September 23, 2009 Extension

On June 23, 2009, the IRS stated that for those taxpayers who have “only recently learned of” its FBAR filing obligation and who have insufficient time to gather the necessary information to complete the FBAR, the IRS will not impose penalties on the taxpayer if the IRS receives their FBAR form by September 23, 2009 and they comply with the following procedures.

- a. Taxpayers who reported and paid tax on all their 2008 taxable income, but only recently learned of their FBAR filing obligation and have insufficient time to gather the necessary information to complete the FBAR, should file the delinquent FBAR report according to the instructions and attach a statement explaining why the report is filed late. Send it to the address below:

U.S. Department of the Treasury
P.O. Box 32621
Detroit, MI 48232-0621

Additionally, send a copy of the delinquent FBAR, together with a copy of the 2008 tax return, by September 23, 2009, to the Philadelphia Offshore Identification Unit, at the following address:

Internal Revenue Service
11501 Roosevelt Blvd.
South Bldg., Room 2002
Philadelphia, PA 19154
Attn: Charlie Judge, Offshore Unit, DP S-611

- b. Additionally, if all 2008 taxable income with respect to a foreign financial account is timely reported and a United States person “only recently learned” they have a 2008 FBAR obligation and there is insufficient time to gather the necessary information to complete the FBAR, the United States person may follow the procedures set forth above and no penalty will be imposed.

For 2008 tax returns due after September 23, 2009, the tax return does not need to accompany the 2008 FBAR.

2. June 30, 2010 Extension

On August 7, 2009, the IRS issued Notice 2009-62 allowing eligible individuals an extension until June 30, 2010 to comply with filing their TD F 90-22.1 for the 2008, 2009 and up to 6 prior years without penalty. In order to be eligible you must meet one of the following two criteria:

- persons with signature authority over, but no financial interest in, a foreign financial account, and
- persons with a financial interest in, or signature authority over, a foreign commingled

The extension follows the same rules for those who qualify for the September 23rd extension — you must have reported the income and paid all the tax relating to the account if you have a financial interest in it. If you did not report the income of the account, you should immediately pursue voluntary disclosure by September 23rd and will likely incur both tax and FBAR penalties.

Penalties To Be Enforced But IRS Offering Voluntary Disclosure Program

The IRS has announced that it intends to enforce penalties for FBAR noncompliance — as far back as six (6) years. Civil and criminal penalties for noncompliance are significant, can be imposed together and are as follows:

- Civil penalties for non-willful violation can range up to \$10,000 per violation
- Civil penalties for willful violation can range up to \$100,000 or 50% of the amount in the account at the time of the violation (whichever is greater)
- Criminal penalties for violation can range from a \$250,000 to a \$500,000 fine or 5-10 years imprisonment or both

To encourage compliance, the IRS announced in March 2009 a voluntary disclosure program whereby taxpayers can generally eliminate the risk of criminal prosecution and substantially reduce civil penalties. Details of this voluntary disclosure initiative are available on the IRS website at <http://www.irs.gov/pub/irs-news/faqs.pdf>.

Determining FBAR Filing Requirements

On June 5, 2009, the IRS announced a temporary suspension of FBAR filing requirements with respect to the revised definition of “United States person” for persons who are not citizens, residents, or domestic entities for purposes of FBAR reporting due June 30, 2009. The Announcement provides that all persons may rely on the definition of “United States person” found in instructions for the prior version of the FBAR (July 2000 version) in determining whether the person has an obligation to file an FBAR. The guidance indi-

cates that it only applies with respect to FBARs due on June 30, 2009, and that additional guidance will be issued with respect to FBARs due in subsequent years.

In the context of closely held corporations, both the business entity and all persons owning directly or indirectly more than 50% of the total value of the shares of the corporate stock must file an FBAR form.

In general, a United States person has a filing requirement if such taxpayer also files any of the following:

- Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations
- Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships
- Form 8858, Information Return of U.S. Persons With Respect to Foreign Disregarded Entities

Financial Accounts That Must Be Included

A foreign financial account must be included on the form if a United States person owns a financial interest in, or has signature authority (or other comparable authority) over, one or more accounts in a foreign country whose aggregate value exceeds \$10,000 at any time during the calendar year.

A “financial account” includes any bank, securities, securities derivatives or other financial instruments accounts. The term includes any savings, demand, checking, deposit or any other account maintained with a financial institution or other person engaged in the business of a financial institution. Individual bonds, notes or stock certificates held by the filer are not a financial account nor is an unsecured loan to a foreign trade or business that is not a financial institution.

Specific Guidance Relative to Offshore Hedge Funds and Other Offshore Funds

The instructions for the revised FBAR Form TD F 90-22.1 state that financial accounts “generally also encompass any 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*)”.

While the instructions do not specifically define “mutual fund”, the definition of financial accounts in the revised form would appear to apply to private investment funds, thereby suggesting that equity interests in offshore hedge or other offshore funds will be treated as financial accounts. Based on the IRS’s June 12th communication, it would appear that the position of the IRS is that every U.S. investor in an offshore hedge fund should file an FBAR form, whether or not the fund has any offshore bank or securities accounts.

MFA recommends that until further guidance is received from the IRS, offshore hedge funds or other managed offshore funds should be treated as financial accounts and any “U.S. person” that owns an equity interest in an offshore investment fund should file an FBAR form, including the following:

1. Domestic feeder funds that have an investment in an offshore master fund;
2. U.S. persons that invest directly in an offshore feeder fund; and

3. Investment managers and general partners (and their principals) that have an equity interest in an offshore fund (including a profits interest)

The below Q&A from the IRS's website provides further clarification on the IRS's position as it relates to offshore hedge funds.

- Q. If a United States person holds a partnership interest in a hedge fund that is located in the United States but that owns foreign financial accounts, must the United States person report his interest in a hedge fund on an FBAR, assuming the United States person does not hold more than a 50% partnership interest in the hedge fund?*
- A. Generally, no. If the hedge fund is located in the United States, a financial interest in the hedge fund is not an interest in a foreign financial account for FBAR reporting purposes, even though the hedge fund may have foreign operations. If the domestic partnership has a financial interest in a foreign financial account, then it may have to file an FBAR. If a United States person who is an officer, employee, or partner of the partnership has a financial interest in, or signature or other authority over a foreign financial account, then that person may also have to file an FBAR. If a partner owns an interest in more than 50 percent of the profits of the partnership (distributive share of income, taking into account any special allocation agreement) or more than 50 percent of the capital of the partnership, then that partner has a financial interest, for FBAR reporting purposes, in the foreign financial accounts of the partnership and may have to file an FBAR.*

Inquire With Investment Advisors

One should inquire with their investment advisors to confirm whether or not they hold any investment interest that may require a foreign bank filing (FBAR Form.)

Exceptions to the Reporting Requirement

There are exceptions to the reporting requirement. These exceptions include:

1. Accounts in U.S. military banking facilities operated by a United States financial institution to serve U.S. Government installations abroad are not considered to be accounts in a foreign country for purposes of the reporting requirement.
2. An officer or employee of a bank that is subject to the supervision of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, or the Federal Deposit Insurance Corporation, is not required to report having signature or other authority over a foreign account if the officer or employee has no personal interest in the account.
3. An officer or employee of a domestic corporation whose equity securities are listed on a national securities exchange or which has assets exceeding \$10 million and 500 or more shareholders of record, is not required to report having signature or other authority over a foreign account if the person has no personal financial interest in the account, and the officer or employee has been advised in writing by the chief financial officer of the corporation that the corporation has filed a current report that includes the foreign account.

Material Discussed in this Federal Tax Alert is meant to provide general information and should not be acted on without obtaining professional advice tailored to your firm's individual needs. The information in this Federal Tax Alert is for general guidance only and is not a substitute for professional advice.

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