

Client Advisory - Special Procedure for Filing Delinquent Foreign Bank and Financial Account Reporting Requirements Due September 23, 2009

September 2009

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September 23rd is the filing deadline for certain delinquent Report of Foreign Bank and Financial Accounts ("FBARs"), Treasury Form TD F 90-22.1. Under recent IRS guidance, taxpayers who reported and paid tax on all taxable income for calendar years prior to 2008, but did not file FBARs for such years, may file late FBARs by September 23, 2009 without any civil penalty.

In addition, taxpayers who reported and paid tax on all taxable income for 2008, but did not file an FBAR for calendar year 2008 by the June 30, 2009 deadline because they had insufficient time to gather the information necessary to complete the FBAR, may file the late 2008 FBAR by September 23, 2009 without any civil penalty. See our earlier "[Client Advisory – Foreign Bank and Financial Account Reporting Requirements for June 30, 2009](#)," dated June 2009, for an initial discussion on this topic.

To qualify for the penalty relief, these taxpayers must follow the special voluntary disclosure procedure. Under this procedure, the delinquent FBARs may be filed without any civil penalty as long as (i) the delinquent FBAR is filed by September 23, 2009, (ii) the delinquent FBAR includes a statement explaining why it is being filed late and (iii) copies of tax returns for applicable years are included with the FBAR filing. The FBAR and statement must be filed with the Department of Treasury in accordance with the FBAR instructions. The copies of the tax returns, along with a copy of the delinquent FBAR, must be filed with IRS's Philadelphia Offshore Identification Unit.

The IRS recently issued additional administrative relief for (i) persons with signature authority over, but no financial interest in, a foreign financial account, and (ii) persons with a financial interest in, or signature authority over, a foreign commingled fund. For these persons, the filing deadline for FBARs for 2008 and prior calendar years is extended until June 30, 2010. The Department of Treasury intends to issue additional guidance regarding the application of the FBAR rules to these persons. The filing extension allows certain taxpayers to wait and rely on the future guidance.

In general, an FBAR must be filed by any U.S. person who had either a financial interest in or signatory authority (or other authority) over one or more "financial accounts" in a foreign country if the aggregate value of all such accounts exceeded \$10,000 at any time during the year. "Financial accounts" generally include (i) bank, securities or other financial accounts, (ii) accounts maintained at a foreign financial institution and (iii) any account in which assets are held in a commingled fund and the account owner owns an equity interest in such fund (including mutual funds). Failure to file the FBAR can result in significant civil or criminal penalties.

The FBAR instructions have been revised for the filings in respect of the 2008 calendar year. The revised instructions include a slightly modified definition of “financial accounts”, which includes a reference to foreign mutual funds. This inclusion of “mutual funds” as a “financial account” has raised concerns regarding the scope of FBAR reporting for equity holders and authorized signatories of foreign hedge funds and private equity funds. In addition, the IRS has made recent unofficial statements that a U.S. person’s equity interest in a foreign fund (such as a hedge fund or private equity fund) should be treated as an interest in a “foreign financial account” for purposes of the FBAR filing, similar to the treatment of mutual funds. The IRS perspective is that the FBAR requirements have not changed and that the new reference to “mutual funds” in the instructions and the recent IRS statements simply clarifies the IRS position. Further guidance on this issue is expected.

This summary does not address all issues relating to the FBAR filings. We recommend that you consult with your tax return preparer or tax advisor as to whether you are obligated to file an FBAR for current or prior tax periods.

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