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Broad Definition of U.S. Persons in Effect for FBAR Filing due June 30, 2010

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We previously reported on the suspension of the new definition of “United States person” for the 2008 FBARs which were due June 30, 2009. See <http://www.mofo.com/news/updates/files/15668.html>. That suspension was published through Announcement 2009-51, which also provided that “the substitution of the definition of “United States person” from the instructions for the prior version of the FBAR applies *only* with respect to FBARs due on June 30, 2009.” Thus, for FBARs due on June 30, 2010 and subsequent years, the new definition presumably applies. Announcement 2009-51 also represented that “[a]dditional guidance will be issued with respect to FBARs due in subsequent years.” Over the past several months, the IRS has received numerous comments regarding the scope of the FBAR filing requirement, including comments regarding the expanded definition of U.S. person. To date, there has been no indication from the IRS of any forthcoming guidance.

The most dramatic increase in the scope of U.S. persons relates to the inclusion, beyond citizens and residents of the U.S., of persons “in and doing business in the United States.” Thus, noncitizens and nonresidents are now “U.S. persons” who are required to disclose their ownership of, or signature authority over, foreign financial accounts. The definition makes it clear that a branch of a foreign entity that is doing business in the U.S. is required to file the FBAR even if the branch is not separately incorporated under U.S. law. “Doing business” is not defined, but a series of FAQs give some additional insight.

<http://www.irs.gov/businesses/small/article/0..id=210252.00.html>. Generally, doing business in the United States “is determined based on an analysis of the facts and circumstances of each case” and requires “regular and continuous” business activity within the United States. The FAQs give an example of a foreign person who only occasionally visits to meet customers and who would not be treated as a U.S. person for FBAR purposes. Of course, there are a wide variety of foreign persons carrying out business activities in the U.S. and some may choose to file protective FBARs in order to avoid any questions of liability.

The new definition also expands the types of entities which are considered “persons.” It references the definition in 31 C.F.R. 103.11(z) (with respect to the definition of “person”):

[a]n individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, an Indian Tribe (as that term is defined in the Indian Gaming Regulatory Act), and all entities cognizable as legal personalities.

The prior definition did not reference Title 31 and set forth the following definition: “(1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust.” Thus, the new definition includes joint ventures, joint stock companies, and certain Indian Tribes as additional types of “persons.” Moreover, the new definition contains a catch-all including “all entities cognizable as legal personalities” within the definition of a “Person” potentially subject to the new FBAR requirements. The specific reference to “joint stock companies” is likely because a number of key jurisdictions authorize such a type of entity, which is generally an entity in which stock is issued but in which there is some form of liability for the

shareholders for the debts of the entity.

IRS also published Notice 2009-62 which solicited comments on several FBAR issues including (i) whether the disclosure by an owner of a financial account should be sufficient without the additional filing by persons with signature authority over such account, (ii) in what circumstances the exception from FBAR filing currently available for officers and employees of banks and certain publicly traded domestic companies might be expanded, (iii) how PFIC rules should apply in the context of indirect account ownership through a foreign entity, and (iv) whether reporting of foreign commingled fund accounts should be modified to avoid duplicative filings. The IRS has received numerous comments on these points and it is likely some guidance will be issued prior to the June 30, 2010 deadline.