

Annual Information Report on Foreign Financial Accounts Now Includes Investments in Offshore Hedge Funds, Private Equity Funds and Mutual Funds

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June 30, 2009 Deadline

Every U.S. person with a financial interest in, or signature or other authority over, any financial account outside the U.S. must file an annual report on Treasury Form TD F 90-22.1 (*Report of Foreign Bank and Financial Accounts*, commonly known as an "FBAR") if the aggregate value of all such accounts exceeds 10,000 USD at any time during the calendar year.

The FBAR for 2008 must be received by Treasury by June 30, 2009.

The Internal Revenue Service has announced that, for FBARs due June 30, 2009, a "financial account" includes an investment in an offshore hedge fund, private equity fund, or mutual fund. This expanded filing requirement is not clear from the instructions to the FBAR; nonetheless, based on the statements of IRS officials and the severity of possible penalties for failure to file, we strongly recommend following this requirement.

The following examples describe some common situations in which an FBAR must be filed:

1. A U.S. investor in an offshore investment fund must report the investment;
2. A U.S. investment fund (such as a Delaware limited partnership) must report any ownership interest in an offshore investment fund (either an offshore master of which the U.S. fund is a feeder, or merely an unrelated offshore fund in which the U.S. fund invests);
3. A U.S. investment fund that maintains an offshore bank or brokerage account must report the account;
4. A U.S. feeder fund with a more-than-50-percent interest in an offshore master fund must report any offshore bank or brokerage account maintained by the offshore master fund; and
5. Any U.S. person who, by virtue of holding a position with a management company, has signature authority over any offshore bank or brokerage account (whether owned by the management company or by a fund or investor), must report the account. If the management company is based in the U.S., the management company itself should also report the account.

United States Person. Only a “U.S. person” is required to file an FBAR. For FBARs due June 30, 2009, a “U.S. person” is a U.S. citizen or tax resident, a corporation or partnership formed in the United States, and a trust or estate treated as a U.S. taxpayer. The IRS has announced that the expanded definition included in the FBAR instructions, which would define a U.S. person to include “a person in or doing business in the United States,” will not apply to FBARs due June 30, 2009.

Financial Interest in an Account. A U.S. person has a financial interest in every account for which such person is the owner of record or has legal title, whether the account is for such person’s benefit or for the benefit of another.

Financial Account. A “financial account” includes a bank account, securities account, securities derivative account, an account in which assets are held in a commingled fund (including an interest in a private investment fund), and other financial accounts or accounts maintained with any financial institution.

“*Signature or other authority over*” a financial account generally includes the ability to control the distribution or disbursement of money or other property in or from the account, whether by delivery of a document containing a signature (or in conjunction with one or more other persons signing the document) or otherwise by direct communication with or to the financial institution with which the account is maintained. Individuals with authority to make investment decisions but not disbursements from the account are not required to file the form.

Financial Account Outside the U.S. No FBAR is required for financial accounts based in the U.S., even if the accountholder is a foreign fund and even if the account is opened at a U.S. branch of a foreign financial institution. For example, the U.S. manager or director of a foreign fund with a financial account at the New York branch of Credit Suisse does not have to file an FBAR. Conversely, the U.S. manager or director of a U.S. fund with a financial account at the London branch of Citibank is required to file.

Penalties. In recent years, the penalties for noncompliance with this reporting requirement have increased. In response, Treasury has stepped up its enforcement of these rules. A violation does not need to be willful in order for penalties to be imposed. Civil penalties for a non-willful failure to timely file the FBAR range up to 10,000 USD per violation. Civil penalties for a willful violation range up to the greater of 100,000 USD or 50 percent of the amount in the foreign account at the time of the violation. Criminal penalties and imprisonment may also apply for failure to file or supply information, and for filing false or fraudulent reports. Civil and criminal penalties may be imposed together.

Where to File. The FBAR must be filed with the U.S. Department of Treasury, P.O. Box 32621, Detroit, MI, 48232-0621. The address for commercial delivery is: IRS Enterprise Computing Center, Attn: FBAR Mail Room, 4th Floor, 985 Michigan Avenue, Detroit, MI, 48226, contact phone number: 313-234-1062. Note that the contact phone number for courier delivery may not be used to confirm receipt of the FBAR. The form may be found at: <http://www.irs.gov/pub/irs-pdf/f90221.pdf>.