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IRS Announcement Permits Use of Old Definition of 'U.S. Person' for June 30, 2009 FBAR Filing

June 2009

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IRS Announcement 2009-51, issued on June 5, 2009, suspended the new definition of "U.S. Persons" for purposes of the FBAR filing due at the end of this month with respect to accounts reportable for the 2008 calendar year. This announcement provides good news to certain "persons" who may have fallen within the definition of "U.S. Persons" under the new Report of Foreign Bank and Financial Accounts, Form TD F 90.22-1 (commonly referred to as the Foreign Bank Account Report or "FBAR"). Most significantly, branches of foreign entities doing business in the United States will not be required to file the FBAR due June 30, 2009.

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The FBAR is filed at a different time than Federal income tax returns (June 30 of the year following the year for which the report is made) and is sent to a different address than the income tax return. Over the past few years, the IRS has made compliance with the FBAR a priority, and has increased publicity regarding the filing requirement.

This June 30 would have been the first time that a new definition of "U.S. Persons" applied. The IRS revised the FBAR in October 2008 (the "New FBAR"). While there was no announcement or other publicity preceding the revision of the FBAR, this revision was one of the recommendations made in The Report to Congress under the Patriot Act. As part of this revision, the New FBAR adopted a different definition of "U.S. Person" from the prior version of the FBAR (the "Old FBAR"). In addition, the New FBAR provides guidance as to the meaning of "financial accounts," including whether certain mutual funds, prepaid credit cards, and certain other accounts are within the definition of "financial accounts" for purposes of determining whether the U.S. Person has an FBAR filing obligation.

The New FBAR defines "U.S. Person" by reference to definitions in 31 C.F.R. 103.11(z) (with respect to the definition of "Person") and 31 C.F.R. 103.11(nn) (with respect to the definition of "United States"). This definition is broader than the definition under the Old FBAR.

The definition of "Person" under 31 C.F.R. 103.11(z) is:

[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 definition of "U.S Person" in the instructions to the Old FBAR was:

(1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust.

The New FBAR definition encompasses not only U.S. citizen or resident individuals, U.S. partnerships, U.S. corporations and U.S. estates or trusts, but also joint ventures, joint stock companies, and certain Indian Tribes. In addition, the New FBAR 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.

Under the New FBAR, the filing requirement would be extended to foreign persons who are engaged in a U.S. trade or business. The New FBAR instructions provide that "[a] branch of a foreign entity that is doing business in the United States is required to file this report even if not separately incorporated under U.S. law." This requirement could be intended to impose the same reporting requirements on a branch of a foreign entity conducting a U.S. trade or business as the requirements imposed on a U.S. subsidiary of a foreign entity, but its purposes are not clear.

Another puzzling aspect of this definition of "Person" for purposes of the New FBAR is the inclusion of an Indian Tribe within this definition. Under Section 7871 of the Code, a federally-recognized Indian Tribe is generally treated as a "state" for purposes of Federal income tax. As such, a federally-recognized Indian Tribe is generally not subject to Federal income tax. While the definition of "Person" for purposes of the New FBAR is under Title 31 rather than Title 26 (*i.e.*, the Internal Revenue Code), it is unclear what inclusion of an Indian Tribe within this definition accomplishes, if the Tribe is not subject to Federal income tax.

Because of the numerous questions and comments from practitioners regarding the definition of "U.S. Person" under the New FBAR, the IRS has announced that the more limited definition of "U.S. Person" in the Old FBAR can be used for FBARs for 2008, due on or before June 30, 2009. Announcement 2009-51 cautions that, "[t]he substitution of the definition of "United States Person" from the instructions for the prior version of the FBAR applies only to FBARs due on June 30, 2009." Announcement 2009-51 also promises, "[a]dditional guidance will be issued with respect to FBARs due in subsequent years."

The October 2008 revision of the FBAR form must be used in filing FBARs due on June 30, 2009. Announcement 2009-51 provides that "[a]ll other requirements [except for the definition of "U.S. Person"] of the current version of the FBAR form and instructions (revised in October 2008) are still in effect. The current version of the form must be used when filing an FBAR." Therefore, the definition of "Financial Account" in the New FBAR will apply and filers will need to provide an amount for the maximum value of the foreign financial account during the calendar year, rather than a range, as was required under the Old FBAR.