

Tax | June 25, 2009

## FBAR Filings for Offshore Fund Investors

A U.S. person with either a financial interest in, or signature or other authority over, a financial account in a foreign country generally is required to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), for any calendar year in which the aggregate value of that account exceeded \$10,000. For the 2008 calendar year, the form is due on June 30, 2009, but the IRS released guidance yesterday that provides some taxpayers with an extended deadline of September 23, 2009 if those taxpayers file additional information along with the FBAR.

### “Foreign Financial Account” May Include Offshore Funds

A “financial account” is defined to include “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).”<sup>1</sup> Practitioners had recently asked for clarification regarding whether this definition would include offshore funds. The IRS has not issued guidance on this point but, during a teleconference on June 12, IRS representatives stated that, for FBAR purposes, they interpret the term “foreign financial account” to include offshore funds, regardless of whether such funds have any offshore bank or securities accounts.

### Protective Reporting of Offshore Fund Interests

While neither the IRS nor the Treasury Department has published guidance on whether the term “foreign financial account” includes offshore funds—and there are substantial arguments it should not—in view of the public statement of IRS representatives combined with the potential penalties for FBAR violations, we recommend

that, as a protective matter, U.S. persons that own interests in offshore funds should file the FBAR form. The penalties for failure to file an FBAR form are severe: Each violation without reasonable cause carries a \$10,000 civil penalty; a willful violation carries a civil penalty of up to the greater of \$100,000 or 50% of the amount in the account at the time of the violation and potential criminal penalties.<sup>2</sup>

Based on the IRS representatives’ statements with respect to offshore funds, we recommend that, in addition to those persons and entities clearly required to file FBARs under the instructions to the FBAR, the following persons or entities should file FBARs (at least as a protective matter):

- U.S. persons (including tax-exempt entities) invested in “stand alone” offshore funds or directly invested in offshore master funds;
- U.S. feeder funds invested in offshore master funds;
- U.S. persons (including tax-exempt entities) invested in offshore feeder funds; and

<sup>1</sup> General Instructions to Form TD F 90-22.1.

<sup>2</sup> See 31 U.S.C. §§ 5321-22 (civil) and 31 C.F.R. § 103.59 (criminal).

- Investment managers with financial interests (including carried interests) in offshore funds.

Please contact us if you have questions about whether you should file an FBAR.

## Eligibility for Alternative September Due Date

The IRS released guidance yesterday that, for certain taxpayers, extends the filing date for the 2008 FBAR from

June 30, 2009 to September 23, 2009. This extension is available to taxpayers who (1) reported and paid tax on all of their 2008 taxable income, (2) have only recently learned of their FBAR filing obligation, and (3) have insufficient time to gather the information they need to complete the FBAR. A taxpayer using this extended deadline must attach to its FBAR filing its 2008 tax return (unless the return is due after September 23, 2009) and a statement explaining why it is filing late.

### IRS Circular 230 Disclosure

Any tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of avoiding tax penalties and is not intended to be used or referred to in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this memorandum, you may contact your regular Shearman & Sterling contact person or any of the following:

Roger J. Baneman  
New York  
+1.212.848.4894  
rbaneman@shearman.com

Peter H. Blessing  
New York  
+1.212.848.4106  
pblessing@shearman.com

Michael B. Shulman  
Washington, D.C.  
+1.202.508.8075  
mshulman@shearman.com

C. Jones Perry Jr.  
New York  
+1.212.848.8854  
jperry@shearman.com