

Captive insurance update



Additional Burdens Surrounding Foreign Bank Account Reporting for the Year Ended December 31, 2008

June 9, 2009

Alert 09-01

Offshore Captive managers should be aware of major changes to the foreign bank account reporting rules ("FBAR") that impact filings due June 30, 2009.

The Internal Revenue Service ("IRS") has made considerable changes to its foreign bank account reporting requirements for the calendar year ending December 31, 2008. Through the issuance of a revised version of Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts, the IRS has significantly expanded its scope and amount of disclosure required in relation to certain foreign financial accounts. Failure to properly file the Form TD F 90-22.1 on a timely basis may result in significant monetary and criminal penalties. As such, those persons (both legal entities and individuals) who may potentially have a Form TD F 90-22-1 filing requirement should begin to assess the impact of the new rules and determine the best course of action.

Of particular interest is the expansion of the definition of foreign financial accounts to specifically include the term "mutual fund" within the FBAR definition of "financial account." The revised instructions do not define the term "mutual fund" or provide any definitive guidance for FBAR purposes; therefore, one could presume that the scope of the term "mutual fund" expands beyond the strictly defined U.S. Regulated Investment Company ("RIC") under IRC §851. As such, a "mutual fund" can potentially be thought of as any entity that pools money from investors and invests money in stocks, bonds, short-term money market instruments, etc. The IRS could thus deem an interest in any foreign investment fund or money market account as a "financial account."

Other relevant changes to the FBAR rules include:

- Persons who file due to signature authority over a foreign account must now also disclose the primary owner of the financial account.
- Expanded concept of "financial interest" through indirect ownership of partnerships and corporations.
- Increased scope of signature authority over a foreign financial account.
- Maximum US\$ amount of each foreign account must be reported versus the historic range reporting.

As such, the following persons should consider the impact of the revised FBAR rules (please note this list is not all-inclusive):

- IRC §953(d) electing Captives, as a U.S. person for U.S. tax purposes, with respect to foreign bank accounts or interests in foreign mutual funds.
- U.S. Shareholders with greater than 50% of value or voting power in a captive due to a 'deemed' indirect ownership in the foreign accounts and investment funds of the Captive.
- Captive managers, directors, and officers who are U.S. citizens or U.S. residents and have signature authority over foreign financial accounts held by the captive.

PwC Observations

Given the ambiguity in the Form TD F 90-22.1 instructions and lack of clear guidance currently available, captive managers, owners, directors and officers should consider the risk of significant penalties and carefully assess their Form TDF 90-22.1 filing obligations.

For additional information please call Richard E. Irvine at (441) 299-7136 or contact your local insurance tax professional.

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