

Hedge fund update



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

June 9, 2009

Alert 09-01

Investment fund managers and administrators 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 a foreign partnership that holds stocks and other securities as a "financial account." Further, a foreign corporation whose only purpose is to invest in an investment partnership (i.e. foreign "feeder" funds) could also be considered 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.

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

- U.S. investors directly invested in foreign funds.
- U.S.-based investment advisors who own greater than 50% of the value or voting power of a foreign 'master' or 'feeder' corporation.
- U.S. tax-exempt entities invested in foreign 'feeder' funds.
- U.S. general partners with an interest in foreign funds.
- U.S. limited partners with a greater than 50% interest in an onshore 'feeder' entity.
- Administrators, Directors, and Officers of funds and management companies who are U.S. citizens or residents and have signature authority over foreign financial accounts held by the managed funds or the funds themselves.

PwC Observations

Given the ambiguity in the Form TD F 90-22.1 instructions and lack of clear guidance currently available, investment partnership managers and investors should consider the risk of significant penalties and carefully assess their filing obligations with respect to foreign fund entities.

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

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