

Internal Revenue Service Extends FBAR Filing Deadline for Certain U.S. Persons Until June 30, 2010

On August 7, 2009, the Internal Revenue Service (the “Service”) issued Notice 2009-62, which extends the deadline for filing Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts, or “FBAR”) from September 23, 2009 to June 30, 2010 for two groups of U.S. persons for 2008 and prior calendar years. The extension for FBAR filing applies to: (1) a U.S. person who has signature authority over, but no financial interest in, a foreign financial account, and (2) a U.S. person with a financial interest in, or signature authority over, a foreign financial account in which the assets are held in a commingled fund (a “foreign commingled fund”).

FBAR Reporting Obligation

In general, any U.S. person who has a financial interest in, or signature authority over, any financial account in a foreign country, if the aggregate value of the account or accounts exceeds \$10,000 at any time during the calendar year, is required to file an FBAR no later than June 30 of the next calendar year. For FBAR purposes, a “financial account” generally includes any bank account, securities account, and commingled fund account (including mutual funds). A financial account is considered “foreign” if the entity or institution where the account is maintained is located in a jurisdiction other than the United States.

The Service has not issued written guidance addressing whether a “financial account” includes an offshore fund such as a hedge fund or other private investment fund. (However, during a teleconference on June 12, a Service representative stated that, for FBAR purposes, the term “foreign financial account” is interpreted broadly to include

offshore funds, regardless of whether such funds have any offshore bank or securities accounts.) Given the substantial penalties for non-compliance with FBAR reporting obligations (*see* discussion of penalties below) and the uncertainty regarding this issue, a U.S. person with financial interests in an offshore fund should, out of an abundance of caution, consider filing an FBAR.

On June 5, 2009, the Service issued Announcement 2009-51, which temporarily suspended the FBAR filing requirement for those persons who are not U.S. citizens, residents or domestic entities. On May 6, 2009 and June 24, 2009, the Service posted questions and answers on its public website that provide relief to certain persons who only recently learned of their obligation to file an FBAR by setting forth conditions and procedures for filing Form TD F 90-22.1 by September 23, 2009.

Civil and Criminal Penalties for Failure to File an FBAR

A U.S. person that fails to comply with the FBAR reporting obligations could incur civil and criminal penalties for non-compliance. The civil penalty for a non-willful violation of the FBAR reporting requirements may not exceed \$10,000 if the aggregate value of all of the foreign accounts is greater than \$10,000 at any time during the year. The civil penalty for willfully failing to file an FBAR can be as high as the greater of \$100,000 or 50 percent of the total balance of the foreign account at the time of the violation. A U.S. person may also face accuracy-related, fraud or other penalties. Criminal penalties may also be imposed simultaneously for each violation.

Voluntary Disclosure Program Deadline is September 23, 2009

A U.S. person who did not report taxable income in the past, has an undisclosed foreign account or entity, or failed to file an FBAR may make a voluntary disclosure by September 23, 2009. A voluntary disclosure enables a U.S. person to become compliant with the FBAR reporting obligations, avoid substantial civil penalties (including the fraud penalty and the foreign information return penalty) and generally eliminate the risk of criminal prosecution. The Service also will not impose a penalty for the failure to file an FBAR if a U.S. person reported and paid tax on all of its taxable income but has only recently learned that it has an FBAR filing obligation, provided the U.S. person

submits the requisite information to the Service by September 23, 2009. Such information includes a copy of each delinquent FBAR, a copy of the U.S. person's tax returns for all of the relevant years, and a statement explaining why the FBARs are filed late. The FBAR extension in Notice 2009-62 supplements the Voluntary Disclosure Program.

Notice 2009-62 does not address several outstanding issues related to a U.S. person's FBAR reporting obligations, including the filing requirements of fund managers and investors in offshore private investment funds. The members of Blank Rome's Business Tax Group are available to provide you additional information and assist you in determining your FBAR and other reporting obligations. ■

Any discussion of federal tax issues contained herein is not intended or written to be used as tax advice. To ensure compliance with IRS Circular 230, you are hereby notified that: (A) any discussion of federal tax issues in this letter is not intended or written to be used, and it cannot be used by any person, for the purpose of avoiding penalties that may be imposed on them under the Internal Revenue Code; (B) such discussion is written to support the promotion or marketing of the transactions or matters addressed herein; and (C) you should seek advice based on your particular circumstances from an independent tax advisor. This disclosure is made in accordance with the rules of Treasury Department Circular 230 governing standards of practice before the Service.

Business Tax Group

Joseph T. Gulant, Practice Chair
212.885.5304 • JGulant@BlankRome.com

Jennifer Lynn Bell
212.885.5402 • JBell@BlankRome.com

Daniel R. Blickman
215.569.5373 • Blickman@BlankRome.com

Megan A. Christensen
202.772.5897 • Christensen@BlankRome.com

Susan A. Cobb
202.772.5859 • Cobb-S@BlankRome.com

R. Todd Faciana
215.569.5638 • Faciana@BlankRome.com

Robert P. Harrill, Jr.
215.569.5743 • Harrill@BlankRome.com

Cory G. Jacobs
215.569.5481 • Jacobs-C@BlankRome.com

David M. Kuchinos
215.569.5729 • Kuchinos@BlankRome.com

Harold N. Pappas
212.885.5370 • HPappas@BlankRome.com

Michael I. Sanders
202.772.5808 • Sanders@BlankRome.com

Michael J. Semes
215.569.5476 • Semes@BlankRome.com

Barry E. Sweet
215.569.5722 • Sweet@BlankRome.com