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ALERT

IRS Enforces Report of Foreign Bank Accounts (FBAR) Rules

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A. Overview

An often overlooked filing deadline – June 30 – is rapidly approaching. The "Report of Foreign Bank and Financial Accounts" – commonly known as "FBAR" – must be filed by all United States persons meeting certain requirements with respect to foreign bank and financial accounts.

The FBAR filing requirement was introduced with the Bank Secrecy Act of 1970. In the wake of the USA PATRIOT Act of 2001, the U.S. Department of Treasury reported to Congress that 2001 compliance with FBAR reporting was less than 20 percent and shortly thereafter FBAR enforcement was delegated to the Internal Revenue Service. Throughout 2008, we saw that FBAR compliance appeared greatly elevated on the IRS radar screen. In early June, the IRS announced clarifications which generally curtailed reporting obligations but which served to remind United States persons of their FBAR filing obligations.

The FBAR filing requirements generally require a United States person having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country to report such status to Treasury if the aggregate value exceeds $10,000 at any time during a calendar year.

The FBAR is not a U.S. tax return and, therefore, its due date differs from the Form 1040 due date. **The due date for the 2008 FBAR is June 30, 2009.** No extensions are available.

B. FBAR Triggers

The FBAR filing requirements apply to any person subject to the jurisdiction of the U.S. having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country.

1. Person Subject to the Jurisdiction of the U.S.

A "U.S. person" is required to file the FBAR. In late 2008, the IRS expanded this definition to reach "a person in and doing business in the United States." However, on June 5, 2009 the IRS "temporarily suspended" this definition due to confusion over the reach of the revised language. Accordingly, until further notice, only the following persons are required to file an FBAR: (i) a U.S. citizen or U.S. resident, (ii) a domestic partnership, (iii) a domestic corporation, or (iv) a domestic estate or trust.

2. Financial Interest

"Financial interest" is an interest held by a U.S. person if the person is the owner of record or has legal title, whether the account is maintained for his or her own benefit or for the benefit of others, including non-U.S. persons. "Financial interest" also includes persons who are acting as agents, nominees, attorneys, or in some other capacity on behalf of a U.S. person. Indirect ownership can also qualify as a "financial interest" if the ownership is indirectly greater than 50% with respect to an entity having the account. For example: John (a U.S. person) owns more than 50% of U.S. Corporation; U.S. Corporation has a wholly owned foreign subsidiary which has a foreign bank account. Both John and U.S. Corporation must file an FBAR.

3. Other Authority

"Other authority" includes power of disposition over money in the account. Essentially, "other authority" is comparable to signature authority if a person can, through communication to the bank or other person with whom the account is maintained, exercise power over the account.

C. Exceptions to FBAR Requirements

There are some exceptions to FBAR reporting. Most notable is the exception to "other authority" for an officer or employee of a domestic corporation (i) whose equity securities are listed on a national securities exchange or (ii) which has assets exceeding $10 million and 500 or more shareholders, but only if the officer or employee has no personal financial interest in the account **and** he or she has been advised in writing by the chief financial officer that the corporation has filed a current FBAR which includes that account.

D. Potential Penalties

Failure to file a correct FBAR can subject a U.S. person to both civil and criminal penalties.

The civil penalty associated with a failure to file a required FBAR is a maximum of $10,000 per negligent violation; this can be increased to a maximum of $50,000 for a pattern of negligent activity. For willful violations, the maximum penalty is the greater of $100,000 or 50% of the amount in the account at the time of the violation. Generally, a willful violation requires the U.S. person to have had knowledge that an FBAR was required to be filed.

The possible criminal penalties include (i) a maximum fine of $250,000, (ii) a maximum term of imprisonment of five (5) years, or both. These penalties can be increased in certain circumstances to (i) a fine of not more than $500,000, (ii) imprisonment of not more than ten (10) years, or both.

The IRS has announced that no penalty will be asserted for late filings if the delinquency was due to "reasonable cause." Because the "reasonable cause" exception applies to numerous penalty provisions under the Internal Revenue Code, there is a well developed body of case law to consider in this context. The IRS has announced that U.S. persons that learn that they have failed to report FBARs for earlier years should file delinquent FBARs and attach an explanatory statement.

E. Client Impact

The due date for the 2008 FBAR is June 30, 2009. No extensions are available.

Failure to file an FBAR can expose a U.S. person to the risk of civil and potentially criminal penalties with respect to foreign bank and financial accounts. The IRS appears ready, willing and able to crack down on noncompliance. Brown Rudnick is able to advise clients on the FBAR requirements and to assist clients that have not complied with FBAR filing requirements for prior years.

Brown Rudnick is an international law firm with offices in the United States and Europe. Our 200 attorneys provide assistance across key areas of the law, including tax law, corporate and securities, finance, bankruptcy and restructuring, government law and strategies, complex litigation and arbitration, cintellectual property, climate and energy and real estate. For further information on this topic, please contact your Brown Rudnick attorney or one of the following attorneys:

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