



## FOREIGN PERSONS MAY BE REQUIRED TO REPORT FOREIGN BANK ACCOUNTS TO THE U.S. TREASURY DEPARTMENT BY JUNE 30

Nonresident aliens and foreign entities doing business in the United States will almost certainly have financial interests in or signature or other authority over financial accounts outside the United States. Until recently, these non-U.S. persons were not required to report those foreign accounts to the U.S. Treasury Department (the "Treasury"). However, due to a recent change to the Form TD F 90-22.1, Report of Foreign Bank and Financial Account (commonly known as the "FBAR"), these foreign persons are now required to file the FBAR annually to report those foreign accounts for 2008 and future years during which the aggregate value of the accounts exceeds \$10,000 at any time during the year. The deadline for filing an FBAR is June 30 of the following calendar year, and can not be extended. A civil penalty of up to \$100,000 or 50% of the account balance, as well as criminal penalties and prosecutions, may apply to each violation of the FBAR filing obligation each year.

The FBAR filing obligation resulted from the Bank Secrecy Act of 1970 (the "Act"), which intended to help the U.S. government in carrying out criminal, tax and regulatory investigations. The Act requires the Treasury to impose an obligation on a resident or citizen of the United States, *or a person in and doing business in the United States*, to report transactions or relationships with foreign financial agencies. However, the Treasury's instructions accompanying the FBAR only required "U.S. persons" to file the FBAR. For filings made after 2008, the Treasury now defines "U.S. person" to include any person (i.e., individual or entity) "in and doing business in" the United States. A person subject to the FBAR filing obligation must disclose all relevant foreign accounts whether or not the accounts relate to any trade or business in the United States. In addition, a "U.S. person" can be deemed to have a financial interest in a foreign account indirectly through certain entities owned by that person. As a result, the new definition of "U.S. person" in the instructions could have far-reaching impact.

A person will not be considered to be "in and doing business in" the United States unless, based on all the facts and circumstances, the person conducts business in the United States on a regular and continuous basis. Merely visiting or sporadically conducting business in the United States does not trigger the FBAR filing obligation. Examples provided by the Internal Revenue Service (the "IRS") of persons who are *not* "in and doing business in" the United States include:

- Nonresident aliens who only occasionally visit the United States to meet customers or business associates.
- Nonresident artists, athletes and entertainers who only occasionally come to the United States to participate in exhibits, sporting events or performances.
- Nonresident aliens who visit the United States to manage personal investments, such as rental property, and conduct no other business.

Under the new standard, foreign entities conducting business through a branch in the United States would generally be subject to the FBAR filing obligation. It also appears likely that a foreign person deemed to be engaged in a U.S. trade or business for U.S. federal income tax purposes (such as holding an interest in a partnership or other pass-through entity) would generally be treated as "in and doing business in" the United States for FBAR reporting purposes. In addition, while the IRS examples all involve physical presence in the United States, it may not be always clear whether "in and doing business in" the United States requires any physical presence. We understand that there may be more guidance that may be issued before June 30, 2009. Despite the uncertainty, however, it should be noted that a failure to comply with the FBAR filing obligation would, as discussed above, result in severe penalties.



JUNE 2009

To ensure compliance with requirements imposed by the IRS, we inform you that, unless explicitly provided otherwise, any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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