

IRS Expands FBAR Filing Requirements

As you are likely aware, U.S. persons with an interest in or authority over “foreign financial accounts” are required to make an annual filing with the Internal Revenue Service (IRS) on Treasury Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts (FBAR)) by June 30 of the year following the year in which the U.S. person maintained the interest or authority. Principals of investment managers of offshore hedge funds commonly are required to file the FBAR because they act as directors of the offshore funds their firms manage (which creates the filing obligation).

Recent informal comments by IRS staff members, however, indicate that the IRS may consider an interest in a hedge fund organized under the jurisdiction of a country other than the United States a foreign financial account subject to the FBAR filing requirement. While we are not convinced that the positions these IRS staff members have taken are supported by either the Internal Revenue Code or the regulations thereunder, the risks of not making the FBAR filing when it is required are significant, and the time necessary for making the FBAR filing is minimal. Given the simplicity of filing and the potential downside of failing to do so, we think it would be prudent that anyone who is affected by the expanded interpretation of a foreign financial account make a protective FBAR filing.

Based on the comments by the IRS staff members, the persons who are now included under the expanded FBAR filing requirements would be:

- > U.S. persons (individuals and entities) that directly own an equity interest in an offshore fund – including tax-exempt U.S. investors,
- > U.S. investors who own more than 50 percent of the equity or are entitled to more than 50 percent of the profits from a U.S. partnership that has to make an FBAR filing,
- > U.S. feeder funds that feed into an offshore master fund,
- > U.S. funds that invest in offshore funds, or
- > U.S. investment managers who have deferred fee accounts in an offshore fund.

In addition, we believe that the IRS will be issuing additional guidance in the next several days that will extend the filing deadline for U.S. persons who were previously unaware of the FBAR filing requirement to September 23, 2009, under the condition that any federal

income taxes that may have been due in connection with a foreign financial account were timely paid by the U.S. person.

You should contact your accountant or other tax preparer for assistance in completing any necessary FBAR filings, but if you have specific questions or concerns regarding these filing requirements, please call any of the lawyers in our Investment Management Group – we would be happy to assist you in any way that we can.

Investment Management Group

Partners and Counsel

Gary D. Ammon
(215) 988-2981
Gary.Ammon@dbr.com

Jeffrey Blumberg
(312) 569-1106
Jeff.Blumberg@dbr.com

Stephen T. Burdumy
(215) 988-2880
Stephen.Burdumy@dbr.com

Joshua B. Deringer
(215) 988-2959
Joshua.Deringer@dbr.com

Glenn E. Ferencz
(312) 569-1246
Glenn.Ferencz@dbr.com

Stephen D.D. Hamilton
(215) 988-1990
Stephen.Hamilton@dbr.com

Veena K. Jain
(312) 569-1167
Veena.Jain@dbr.com

Morgan R. Jones
(215) 988-2792
Morgan.Jones@dbr.com

Michelle M. Lombardo
(215) 988-2867
Michelle.Lombardo@dbr.com

Michael P. Malloy
(215) 988-2978
Michael.Malloy@dbr.com

David M. Matteson
(312) 569-1145
David.Matteson@dbr.com

Diana E. McCarthy
(215) 988-1146
Diana.McCarthy@dbr.com

Nancy P. O'Hara
(215) 988-2699
Nancy.OHara@dbr.com

Mary Jo Reilly
(215) 988-1137
MaryJo.Reilly@dbr.com

Audrey C. Talley
(215) 988-2719
Audrey.Talley@dbr.com