

June 3, 2008

Memorandum

**Foreign Financial Account Reports Due June 30**

This memorandum is intended to alert you that a U.S. person who had a financial interest or signature authority over a foreign financial account during 2007 is required to disclose the existence of such account to the United States Treasury Department by June 30, 2008. This requirement often applies to private investment funds and/or principals or employees of such funds.

A U.S. person<sup>1</sup> is required to file Form TD F 90-22.1 to report the existence of an offshore bank, securities, securities derivatives or other financial instruments account where such person either (1) had signature authority over such account or (2) had a “financial interest” in such account at any time during the 2007 calendar year.

The filing requirement only applies to a U.S. person if the aggregate value of all such accounts in which a person had a “financial interest” or “signature authority” exceeded \$10,000 during 2007. The deadline for filing Form TD F 90-22.1 for 2007 is June 30, 2008.

**“Financial Interest”**

A person will be treated as having a financial interest in an account if either:

- He is the owner or of record or has legal title to the account, regardless of whether the account is maintained for his own benefit or the benefit of others; or
- He is not the owner of record or legal title but the owner of record or legal title is either:
  - acting on his behalf (e.g., as an agent nominee or attorney);
  - a corporation in which he owns directly or indirectly more than 50 percent of the value of the stock;
  - a partnership in which he owns more than 50 percent of the profits, or
  - a trust in which he either has a present beneficial interest in more than 50 percent of the assets or from which he receives more than 50 percent of the current income.

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<sup>1</sup> A “U.S. person” means (1) a citizen or resident of the United States, (2) a U.S. domestic partnership, (3) a U.S. domestic corporation, or (4) a U.S. domestic estate or trust.

## **“Signature Authority” or “Other Authority”**

A person has “signature authority” over an account if such person can either control the disposition of money or other property in the account (1) by delivering a document containing his signature to the bank or other person with whom the account is maintained or (2) by delivering a document containing his signature and that of one or more other persons to the bank or other person with whom the account is maintained.

A person has “other authority” over an account if the person can exercise power comparable to signature authority over an account by direct communication to the bank or other person with whom the account is maintained, either orally or by some other means.

### **Examples Applicable to Private Investment Funds**

The filing requirements apply in the following cases. In each of the examples, it is assumed that the balance of the account at issue is in excess of \$10,000:

- (1) A fund organized as a Delaware limited partnership has an offshore bank or brokerage account. Reporting is required by the fund.
- (2) A principal or employee of an investment manager has signature authority over an offshore bank or brokerage account maintained by a fund (whether the fund is domestic or offshore). Reporting is required by the principal or employee. This is the case even where more than one signature is required to disburse funds from the account.
- (3) A domestic feeder fund owns more than 50% of a master fund and the master fund has an offshore bank or brokerage account. Reporting is required by the domestic feeder fund.

The filing requirements do not apply to the following circumstances:

- (1) A principal or an employee of an investment manager has the authority to direct an offshore administrator to disburse funds from an account, provided that account is at an institution other than the administrator (e.g., a third party bank or brokerage).
- (2) A fund has a domestic bank or brokerage account. The fund does not have to report. A person with signature authority over such account does not have to report.
- (3) An offshore feeder fund owns more than 50% of a master feeder fund and the master feeder fund has an offshore bank or brokerage account. The offshore feeder fund does not have to report.<sup>2</sup>

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<sup>2</sup> A U.S. person with signature authority over such account would be required to report the account.

- (4) An offshore fund (feeder, master or stand alone) has an offshore bank account. The fund does not have to report.<sup>3</sup>

### **Civil and Criminal Penalties for Failure to File**

The penalties for failing to file Form TD F 90-22.1 were substantially increased in 2004. In addition, as recently reported, the IRS has significantly increased its enforcement efforts regarding these filings. The penalty for an unintentional failure to file Form TD F 90-22.1 is \$10,000. This penalty could apply even where a person did not know about the filing requirement.

The penalty for an intentional failure to file Form TD F 90-22.1 is the greater of \$100,000 or 50 percent of the value of the account. In addition, a person who intentionally fails to file Form TD F 90-22.1 may be subject to criminal prosecution.

### **Form 1040 Reporting Requirement**

In addition to the filing requirements discussed above, a taxpayer with an interest in or signature or other authority over a financial account in a foreign country must disclose such account on Line 7(a) of Schedule B of his Form 1040 and disclose the name of the foreign countries in which the accounts are located on Line 7(b). Schedule B refers a taxpayer to Form TD F 90-22.1 to determine whether or not he has such an account.

If you have any questions regarding reporting of such foreign financial accounts or need assistance completing Form TD F 90-22.1, please call Jim Cofer at (212) 574-1688.

Seward & Kissel LLP

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**To ensure compliance with Treasury regulations regarding practice before the IRS, we inform you that, unless expressly stated otherwise, any federal tax advice contained in this memorandum was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed on the taxpayer under United States federal tax law, or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.**

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<sup>3</sup> A U.S. person with signature authority over such account would be required to report the account.