



## Treasury Revisions to Foreign Bank and Financial Accounts Report May Require Nonresidents and Foreign Corporations to Reveal Sensitive Financial Information

A recent change to the instructions to a Treasury financial reporting form may require certain nonresidents and foreign corporations to disclose the existence of foreign financial accounts.

### Introduction

In October 2008, the United States Department of the Treasury (the "Treasury") updated and amended Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR"). In general, the Treasury requires a United States person to file a FBAR to report any financial interest in, or signature or other authority over, foreign financial accounts in which the aggregate value of these financial accounts exceeds US\$10,000 at any time during the calendar year. A FBAR is required to be filed with the Treasury on or before June 30th of each year with respect to interests held in accounts during the prior year. The revised form should be used for all filings made after December 31, 2008. Among the recent changes to the form, the Treasury has expanded the definition of "United States person" to include a "person in and doing business in the United States." This change could substantially increase the number of foreign individuals and entities that are required to report their foreign bank account information to the Treasury. This Alert addresses who may have to file a FBAR for the 2008 calendar year and thereafter.

### Background

The Bank Secrecy Act, passed by Congress in 1970, directs the Secretary of the Treasury to require that United States persons disclose information regarding records and reports on foreign financial agency transactions. Under this Act and the corresponding regulations, the Treasury requires a "United States person" to file a FBAR if that person has a financial interest in, or signature or other authority over, foreign financial accounts in which the aggregate value of these financial accounts exceeds US\$10,000 at any time during the calendar year. Prior to the 2008 updates to the FBAR, a "United States person" was defined as a citizen or resident of the United States, a domestic partnership, a domestic corporation, or a domestic estate or trust.

### Revised Definition of "United States Person"

Recently, the Internal Revenue Service released an updated and amended FBAR, effective as of January 1, 2009. As part of this update, the definition of a "United States person" was broadened, potentially resulting in a substantial increase in the number of foreign persons required to file a FBAR. Under the revised FBAR, a "United States person" continues to include a citizen or resident of the United States, but now also includes a "person in and doing business in the United States." The expansion of the scope of individuals and entities required to file the FBAR contains a two-fold test. One must be both "in" and "doing business" in the United States.

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## Tax Client Alert

The word “in,” although not defined in the revised FBAR, suggests a requirement of some physical presence in the United States. For entities that conduct business through a branch in the United States, the personnel and assets associated with the branch would seem to constitute a sufficient nexus to be considered “in” the United States for FBAR purposes. For individuals, it is unclear whether there is a requirement that the individual be physically present in the United States or if US-based business interests held by the individual would be sufficient to constitute being “in” the United States for FBAR purposes. In the absence of guidance to the contrary, individuals who hold US-based business interests through fiscally transparent entities should anticipate that the Treasury may assert (based on analogy to income tax principles) that the requirement of physical presence in the United States is satisfied by the presence of the US-based business operations.

The term “doing business” is not defined in either the revised FBAR or in the regulations. It is unclear if foreign persons should look to principles of state law, tax law, or some other source of law for the meaning of the term. However, “doing business” would seem to include persons engaged in a trade or business within the United States and persons treated as engaged in a trade or business as a result of holding an equity interest in a fiscally transparent entity (such as a partnership or LLC) that is engaged in business in the United States.

### Recommendations for Compliance with FBAR Reporting Requirements

Because the FBAR reporting requirements do not define “in and doing business in the United States,” there is uncertainty as to who is required to file a FBAR. Without further guidance from the Treasury, foreign persons should have a reasonable basis to rely on the definition of a “trade or business within the United States,” as defined in the Internal Revenue Code of 1986, as amended (hereinafter “US trade or business”), when making the factual determination as to whether they qualify as “persons in and doing business in” the United States for FBAR purposes.

Based on this interpretation, if foreign individuals or entities engage in activities that constitute a US trade or business, they could be “United States persons” and therefore required to file a FBAR. This would include foreign persons treated as engaged in the conduct of a US trade or business as a result of either holding an interest in a fiscally transparent entity that is so engaged in a US trade or business, or holding an interest in US real property. As “United States persons,” foreign individuals or entities that are either engaged in a US trade or business or hold a US real property interest would be required to report any financial interest in, or signature or other authority over, any foreign financial accounts, including bank, securities, or other types of financial accounts, if the aggregate value of these financial accounts exceeds US\$10,000 at any time during the calendar year. These accounts would be required to be disclosed even if they are unrelated to any US trade or business.

### Conclusion

The revisions made to Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts, may result in a substantial increase in the number of foreign individuals and entities that are required to report their foreign bank account information to the Treasury. As always, White & Case would be happy to advise regarding issues that may arise due to these revisions.

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