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HSP Position Paper Issues and confusion surrounding recent communications on the IRS “Report of Foreign Bank and Financial Accounts” (FBAR) Filing Requirements

Background

Since 1970, Section 5314 of the Internal Revenue Code has required an FBAR filing for most overseas bank accounts held by a US person or entity. Specifically, according to the FBAR instructions, a “US person” (defined as a US citizen or resident, or a domestic partnership, corporation, estate, or trust) must file an FBAR, as of June 30th for the previous calendar year, *if* all of the following elements are met: (i) they have / it has a “financial interest in or signature authority over”, (ii) one or more financial accounts, (iii) located in a foreign country, and (iv) the aggregate value of such account(s) exceeded \$10,000 *at any time* during the calendar year.

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In October 2008, the IRS updated the FBAR instructions. While the changes themselves were relatively straightforward, significant concern with this subject recently arose when, in early June, an IRS lawyer on a conference call indicated that the real change compared with the past would be a *significantly* heightened enforcement of the FBAR requirements. Previously, FBAR enforcement had generally been characterized as rather lax. The primary focus of the enhanced enforcement is intended to focus on the hedge-fund and private-equity industry and its investors. However, because of worries related to the indication of much more stringent enforcement overall, in the last 10 days many different types of organizations who believe they *may* have previously had FBAR filing requirements that they were not aware of have been scrambling for information from the IRS. As a result, on June 23rd, the IRS announced an extension to the June 30th 2009 deadline for the FBAR (Treasury Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts) filing, to September 23, 2009 “without penalty for filers who have paid all taxes and reported all income for 2008”.

Impact of a more stringent enforcement of the FBAR requirements

For many HSP clients, and in fact for HSP itself, the FBAR regulations require *multiple* filings for the same overseas accounts in 2008:

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- 1) Where a US Corporation owns a foreign corporation that has one or more foreign bank accounts, the US Corp must file the FBAR for all accounts exceeding the \$10,000 limit during the year, and any individual who owns more than 50% of the US Corp will need to file as well. Note that this limit would quite often be exceeded simply when the account receives funding for a monthly overseas payroll.
- 2) Where a US Corporation owns a foreign corporation that has one or more foreign bank accounts, the US Corp must file *and any individual who has signature of authority over the account must file*, regardless of their ownership interest of the US Corp.

Entities and individuals required to file the FBAR, who do not do so by the applicable deadlines, are subject to penalties. For a non-willful violation that is not corrected and for which there is no reasonable cause, the penalty can be as high as \$10,000, and penalties for a willful violation are much higher. Civil penalties can be assessed anytime up to six years after the date of the violation.

Suggested action

FBAR filing requirements and compliance should be a part of a company's overall adherence with its US Federal tax obligations. Towards that end, we recommend that all HSP clients raise this issue with their US Federal tax advisors as soon as possible, if they have not already done so.

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