

FBAR Update:
Temporary Relief from Reporting Interests in Offshore Investment Funds

On February 26, 2010, the U.S. Department of the Treasury (the "Treasury") published [proposed rules](#) designed to clarify filing requirements with respect to Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts* ("FBAR"). Although the proposed rules must be finalized before they can take effect, the Internal Revenue Service ("IRS") on the same date issued both an [announcement](#) and a [notice](#) to provide immediate administrative relief to certain persons potentially subject to FBAR filing requirements. Together, this FBAR-related guidance provides much needed clarity and relief, if in some cases only temporary, for potential filers.

Temporary Relief

United States persons are required to file the FBAR with respect to any calendar year in which they have a financial interest in, or signature or other authority over, one or more foreign financial accounts having an aggregate value in excess of \$10,000. During 2008, the IRS indicated that an offshore investment fund could be a foreign "financial account" for this purpose, thereby creating concern and confusion as to whether the FBAR must be filed with respect to the interests of certain U.S. persons (including investors, managers and general partners) in foreign private equity funds and hedge funds. After a series of filing extensions to provide sufficient time to address these and related issues, the IRS has provided current guidance pending the finalization of the proposed rules:

- For 2009 and prior calendar years, the FBAR need not be filed for persons with a financial interest in, or signature authority over, any foreign "commingled fund," including a foreign hedge fund or private equity fund, unless it is a mutual fund which has shares or units that are readily redeemable or tradeable.
- For persons with signature authority over, but no financial interest in, a foreign financial account, the filing deadline with respect to 2009 and prior calendar year FBARs relating to such accounts has been further extended from June 30, 2010 to June 30, 2011, with the deferred filing to be subject to the FBAR guidance in effect at that time. In addition, the 2010 FBAR normally due on that date will also be due as scheduled.
- For taxpayers that qualify for the relief provided above and have no other reportable foreign financial accounts for the year in question, the "no" box should be checked in response to FBAR-related questions found on federal tax forms for 2009 and earlier years that ask about the existence of a financial interest in, or signature authority over, a foreign financial account.
- For persons who are neither U.S. citizens or residents nor domestic partnerships, corporations, estates or trusts, the requirement to file the FBAR for 2009 and prior calendar years has been suspended.

Proposed Rules

The Treasury's proposed rules, primarily through changes to defined terms and the FBAR instructions, seek to clearly delineate both the scope of persons required to file the FBAR and the types of accounts for which such reports should be made. The Treasury has

requested written comments to the proposed rules by April 27, 2010. As proposed, the rules would expand available filing exceptions to include, among others, (i) participants and beneficiaries in certain qualified retirement plans and owners and beneficiaries of certain individual retirement accounts ("IRAs"), where a foreign financial account is held by or on behalf of such retirement plan or IRA, and (ii) officers and employees of the following entities who have signature or other authority over, but no financial interest in, reportable foreign financial accounts of the entity:

- Financial institutions that are registered with and examined by the Securities and Exchange Commission ("SEC") or the Commodity Futures Trading Commission, including registered securities broker-dealers and futures commissions merchants;
- SEC-registered investment advisers and other service providers to registered investment companies; and
- Entities with a class of equity securities listed on a U.S. national securities exchange or registered under Section 12(g) of the Securities Exchange Act of 1934.

Importantly, however, the Treasury's proposed rules reserve treatment of whether an account with an investment company other than a mutual fund or similar pooled fund, such as a private equity fund, venture capital fund or hedge fund, is a type of "other financial account" for which FBAR reports should be filed. In opting to reserve regulation of these investment funds, the Treasury cited pending legislative proposals that would apply additional regulation and oversight over them if enacted. For example, last week the United States Senate passed a version of the Hiring Incentives to Restore Employment Act that would require U.S. individuals to submit with their tax returns certain information regarding their interests in foreign financial assets, including interests in offshore investment funds, having an aggregate value in excess of \$50,000.

Therefore, although it is clear that U.S. persons with a financial interest in, or signature authority over, foreign private equity funds, venture capital funds and hedge funds will not be subject to FBAR reporting requirements with respect to such interests for 2009 and all prior years, it remains to be seen whether this relief will extend to 2010 and future years.

For further background regarding this subject, see our alerts entitled:

- [FBAR Surprise: Reporting Interests in Offshore Investment Funds](#); and
- [FBAR Update: Filing Deadline Extended to June 30, 2010 for Certain Persons](#).

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We will provide further updates as additional guidance becomes available. Should you have any questions regarding your FBAR obligations, please contact any of the following Miller & Martin attorneys: [Scott McGinness](#), [Ansley Moses](#), [Jim Tramonte](#), [Chris Crevasse](#) or [Paul Jullienne](#), or any other member of the [Private Equity](#) or [Tax Matters](#) Practice Groups at Miller & Martin PLLC.

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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