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## Investors in Offshore Funds May Have to File FBARs by June 30, 2009

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Recent unofficial statements by Internal Revenue Service ("IRS") personnel have confirmed concerns that US persons may be required to file a Report of Foreign Bank and Financial Accounts ("FBAR") with respect to interests in private investment funds located outside the United States ("Non-US Funds"). For interests held during calendar year 2008, the FBAR filing must be received by the US Treasury Department on or before June 30, 2009.<sup>1</sup> Private investment funds have requested that the IRS issue official guidance on the application of the FBAR filing requirements to Non-US Funds. Unofficial reports suggest that the IRS may soon announce that it is postponing until September 23, 2009 the deadline for filing the 2008 FBAR with respect to such Non-US Funds.

Generally, an FBAR must be filed by each US person that has a financial interest in, or signature or other authority over, "foreign financial account(s)" if the aggregate value of the account(s) exceeds \$10,000 at any time during the prior calendar year. Financial accounts include bank accounts, securities accounts, accounts in which the assets are held in a commingled fund, and any other account maintained at a foreign financial institution. For FBAR purposes, a financial account is considered "foreign" if the entity or institution where the account is maintained is located in a jurisdiction other than the United States.

The IRS recently revised the FBAR instructions to indicate that mutual funds are "financial accounts" by reason of being commingled funds.<sup>2</sup> On June 12, 2009, IRS officials participating in a teleconference on FBAR filings took the position that, like mutual funds, Non-US Funds constitute "financial accounts" and US persons with *interests in* or *signature authority over* Non-US Funds are required to report such Non-US Funds on an FBAR. A Non-US Fund could include a master fund, a feeder fund or a stand-alone investment fund. Prior to this unofficial announcement, there was no clear guidance on how Non-US Funds should be treated for purposes of the FBAR rules.

Based on the current guidance from the IRS, it would appear that each (i) US investor (including tax-exempt entities) in a Non-US Fund, (ii) US feeder fund and fund-of-funds that invests in a Non-US Fund, and (iii) US investment manager or general partner (and its employees) that has a financial interest (including a carried interest) in or signature authority over any Non-US Fund would be

required to file an FBAR. Any US person that owns more than 50% of the shares, capital, voting power, or beneficial interest of any entity is also required to file an FBAR with respect to any Non-US Funds or other financial accounts held by the entity outside the United States.

Depending upon the scope of any upcoming IRS announcement, US persons with a financial interest in or signature authority over a Non-US Fund may also need to file late or amended FBARs for the six years prior to 2008. US persons who failed to file the FBAR for prior years (or filed an FBAR that did not include the Non-US Fund), but reported and paid tax on all taxable income, may file late FBARs for the prior six years by September 23, 2009. To do so, such US persons must file the FBARs for such years along with (i) an explanation of why the FBARs were filed late and (ii) copies of their tax returns for such years. The IRS will not impose penalties with respect to FBARs that are filed in accordance with these procedures.

The deadline for US persons to file FBARs for 2008 with the US Treasury Department is June 30, 2009 and no extensions are currently available (absent a possible IRS announcement as mentioned above). Failure to file an FBAR could result in civil penalties of at least \$10,000 and possibly as much as 50% of the total value of all foreign financial accounts (including the Non-US Funds) held by a US person. Criminal penalties may also be imposed in certain circumstances.

For more information on FBAR requirements generally and their impact on US persons with interests in or signatory authority over Non-US Funds, please contact your WilmerHale lawyer.

<sup>1</sup>Note, this deadline, unlike deadlines for the filing of most IRS forms, is the date by which the FBAR must be received, not the date by which it must be mailed.

<sup>2</sup>See [www.wilmerhale.com/publications/periodicals/investment\\_management/blog.aspx?entry=189](http://www.wilmerhale.com/publications/periodicals/investment_management/blog.aspx?entry=189)

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