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## Treasury and IRS Issue Guidance on FBAR Filings

2010-03-01

On February 26, 2010, the Internal Revenue Service issued guidance relating to filing requirements for Reports of Foreign Bank and Financial Accounts ("FBARs") due on June 30, 2010 (including 2008 FBARs for which the due date was deferred from June 30, 2009 to June 30, 2010). The IRS guidance relates to (i) persons with signature authority over, but no financial interest in, foreign financial accounts; (ii) the treatment of "commingled funds," including hedge funds and private equity funds; and (iii) foreign persons and entities present in the United States.

In addition, the Treasury Department published a [Notice of Proposed Rulemaking](#) ("Proposed Rules") in response to comments requested in [Notice 2009-62](#). The Proposed Rules would expand current reporting exceptions, although not to the extent requested in comments. For example, employees of registered broker-dealers and financial advisors would be eligible for an exemption with respect to foreign financial accounts of mutual funds. The Treasury has requested comments on the Proposed Rules by April 27, 2010.

Although the IRS and Treasury guidance may provide some relief from the FBAR filing requirement for certain persons, the United States Senate recently passed a bill that would impose separate information reporting requirements for U.S. individuals who own interests in, among other things, foreign hedge funds and foreign private equity funds if the aggregate value of such interests totals at least \$50,000. Although the bill (which can be found [here](#)) has not yet been enacted, its status should be monitored by persons who may be affected by the new filing requirements.

For additional information regarding the IRS and Treasury guidance, please see below. Our prior Email Alerts on the FBAR are listed below:

- [Investors in Offshore Funds May Have to File FBARs by June 30, 2009](#) (June 22, 2009)
- [Investors in Offshore Funds May File Late FBARs by September 23, 2009](#) (June 25, 2009)
- [IRS Postpones Deadline for Certain Filers of FBARs until June 30, 2010](#) (August 7, 2009)
- [IRS Extends September 23 FBAR Deadline for Taxpayers](#) (September 21, 2009)

[IRS Notice 2010-23](#) ("Notice").

- **Persons with Signature Authority:** For persons with signature authority over, but no

financial interest in a foreign financial account, the Notice postpones until June 30, 2011 the filing date for FBARs that would have otherwise been due on June 30, 2010. For calendar years 2008 and prior, this provision further extends the deadline extension provided in Notice 2009-62. The Notice also clarifies that these deferred FBARs will be required to be completed following the FBAR guidance in effect at the time they are filed in the future.

- **Foreign Commingled Funds:** Previous statements by IRS and Treasury officials suggested that private investment funds would be considered "commingled funds" subject to reporting on an FBAR. The Notice provides that the term "commingled funds" shall be interpreted to apply only to mutual funds for calendar year 2009 and prior years. Under the Proposed Rules, mutual funds include only those which issue shares available to the general public that have a regular net asset value determination and regular redemptions. Accordingly, a financial interest in or signature authority over a foreign hedge fund or private equity fund will not require an FBAR filing for calendar year 2009 or prior years. Thus, any reporting of interests in or signature authority over foreign hedge funds and foreign private equity funds will apply, if at all, only prospectively for 2010 or future years. The treatment of such funds for 2010 and later years is yet to be determined and is reserved in the Proposed Rules.
- **FBAR Questions on Federal Tax Forms:** Certain IRS Forms (e.g., Schedule B of IRS Form 1040) require a taxpayer to disclose any foreign financial accounts in which the taxpayer has a financial interest or over which the taxpayer has signature authority. The Notice states that for tax years 2009 and prior, provided the taxpayer has no other reportable financial accounts, any persons that qualify for relief under the provisions discussed in the two bullet points above should check "no" in response to such questions on IRS Forms.

[IRS Announcement 2010-16](#) ("Announcement").

- **Foreign Person Reporting:** The Announcement clarifies that foreign persons (persons who are not U.S. citizens or residents, U.S. partnerships, U.S. corporations, or U.S. estates or trusts) are not required to file an FBAR for 2009 or earlier years, even if they have been present in, or doing business in, the United States. The Proposed Rules include a similar clarification.

Treasury Notice of Proposed Rulemaking ("Proposed Rules"). The Proposed Rules are not effective currently. Thus, to the extent the Proposed Rules provide an exemption or clarification that would be relevant for the 2009 FBAR due on June 30, 2010, there is no express indication that the Proposed Rules may be relied upon.

The Proposed Rules include guidance on the following issues, among others:

- FBAR reporting is required only of "United States persons" as defined in the Internal Revenue Code (with minor adjustments).

- U.S. persons working outside the United States who have signature authority over foreign financial accounts of foreign entities must report such signature authority on an FBAR, although simplified reporting rules are provided. Previously, such employees could be exempted from withholding if a U.S. parent corporation included foreign subsidiary accounts on a consolidated FBAR.
- The situations in which signature authority arises appear to be limited to delivery of instructions directly to the financial institution (or person performing the services of a financial institution) with whom the financial account is maintained.
- The filing exemption for employees solely with signature authority over foreign financial accounts has been expanded to include employees of registered broker-dealers and investment advisors in respect of their services to mutual funds.
- Expanding consolidated FBAR reporting to non-corporate subsidiaries such as LLCs.
- Exempting public universities and state pension, retirement and welfare funds and their employees from FBAR reporting. However, private universities and retirement plans are not exempt.
- Exempting participants in certain retirement plans and IRAs and beneficiaries of trusts that file an FBAR from duplicative FBAR reporting obligations.

The Proposed Rules do not address many of the comments submitted to Treasury over the last several months. Specifically, we note the following:

- A significant impetus for the Proposed Rules was a Treasury statement that interests in foreign hedge funds and private equity funds were considered foreign financial accounts subject to FBAR reporting. The Proposed Rules do not address the treatment and reserve on this issue, although no filings will be required for 2009 and prior years in accordance with the Notice. As noted above, there is a bill currently pending in Congress that would impose a reporting requirement, although not through an FBAR.
- No clarity is provided regarding whether a U.S. person must look through multi-tiered foreign structures to report foreign financial accounts of foreign entities below the first foreign entity in the chain.
- No broad-based exemption is provided for educational institutions and other exempt organizations and their employees.
- Duplicative reporting of accounts has been addressed only to a limited extent.

The Treasury noted that it had reviewed the comments previously submitted, but did not provide any analysis of its reasoning for not providing the relief requested.

For more information on FBAR requirements, please contact your WilmerHale lawyer or [William C. Benjamin](#), [J. Barclay Collins](#) or [AJ Picchione](#).

#### **IRS CIRCULAR 230 DISCLOSURE:**

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## ***Authors***

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**William C. Benjamin**

RETIRED PARTNER