

## *IRS Grants Filing Extension for the Report of Foreign Bank and Financial Accounts ("FBAR")*

BY KRISTEN WINCKLER AND MATT WALDING

On August 7, 2009, the Internal Revenue Service issued Notice 2009-62, extending the filing deadline for Form TD F 90-22.1 (commonly referred to as "FBAR") for calendar year 2008 and prior years, from June 30, 2009 to June 30, 2010, for (i) persons with signature or other authority over, but no financial interest in, a foreign financial account, and (ii) persons with a financial interest in, or signature or other authority over, a foreign commingled fund (such as foreign investment entities) (the "2010 Extension"). According to the notice, the IRS intends to issue formal guidance before June 2010 regarding the scope of the FBAR filing requirement for such persons.

### **Background**

Generally, any U.S. person with a financial interest in or signature or other authority over one or more "foreign financial accounts" is required to file the FBAR Form TD F 90-22.1 if the aggregate value of such accounts exceeds \$10,000 during the calendar year. Foreign financial accounts which must be reported include any offshore accounts in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund. In October 2008, the definition of "financial accounts" in the FBAR instructions was revised to add a reference to mutual funds. The added reference to mutual funds has been broadly, though informally, interpreted by IRS officials to encompass foreign corporations or partnerships that function like a mutual fund, creating confusion as to whether foreign investment vehicles such as hedge funds and private equity funds would be treated as financial accounts subject to reporting.<sup>1</sup>

On June 24, 2009, the IRS provided a filing extension to September 23, 2009 for taxpayers who reported and paid tax on all their 2008 taxable income, along with a statement explaining why the report is late and a copy of the 2008 tax return (if such return is due prior to such date), but only recently learned of their FBAR filing obligation and have insufficient time to gather the necessary information to complete the FBAR. If the delinquent FBAR report is filed by September 23 in accordance with the foregoing conditions and all 2008 taxable income with respect to a foreign financial account is timely reported, the IRS indicated on its website that it will not impose a penalty for the failure to file the FBAR with respect of such account.

### **The 2010 Extension**

The filing extension to June 30, 2010 provides official, welcome relief for many U.S. investors of foreign investment funds, as well as U.S. persons with signature authority over foreign accounts. Notably, the exception for U.S. persons with signature or other authority applies not only to foreign

commingled funds, but also to other "traditional" FBAR accounts such as foreign bank or securities accounts. Furthermore, the filing extension is available for prior taxable years for the identified persons noted above. This is significant in light of recent (albeit informal) indications by the IRS that its interpretation of the scope of "financial accounts," encompassing foreign investment funds, would apply to prior taxable years.

US persons subject to the FBAR requirements should note that on June 30, 2010, FBAR forms for calendar year 2009 would be due under the general filing deadline, as well as the forms for calendar year 2008 and prior years pursuant to the 2010 Extension.



*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

#### Los Angeles

Michael Glazer  
213-683-6207  
michaelglazer@paulhastings.com

Nancy L. Iredale  
213-683-6232  
nancyiredale@paulhastings.com

Stephen J. Turanchik  
213-683-6187  
stephenturanchik@paulhastings.com

Arthur Zwickel  
213-683-6161  
artzwickel@paulhastings.com

#### New York

Joseph Opich  
212-318-6596  
josephopich@paulhastings.com

Domenick Pugliese  
212-318-6295  
domenickpugliese@paulhastings.com

Joshua Sternoff  
212-318-6011  
joshsternoff@paulhastings.com

Thomas Rao  
212-318-6838  
thomasrao@paulhastings.com

Jacqueline May  
212-318-6282  
jacquelinemay@paulhastings.com

Matt Walding  
212-318-6543  
mattwalding@paulhastings.com

Kristen Winckler  
212-318-6047  
kristenwinckler@paulhastings.com

#### San Francisco

Mitchell Nichter  
415-856-7009  
mitchellnichter@paulhastings.com

David Hearth  
415-856-7007  
davidhearth@paulhastings.com

<sup>1</sup> For prior coverage of the FBAR, please see Client Alert, "'FBAR' Filing Requirement May Apply to Interests in Foreign Pooled Investment Funds; IRS Has Issued New Guidance on June 30 Filing Deadline," June 2009.