

## *New Guidance on "FBAR" Filing Requirements*

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On February 26, 2010, the Internal Revenue Service ("IRS") issued official guidance (the "IRS Guidance") regarding the Report of Foreign Bank and Financial Accounts (commonly referred to as "FBAR"),<sup>1</sup> applicable for 2009 and prior years, clarifying which U.S. persons are required to file the FBAR form and which accounts are required to be reported, and further extending until June 30, 2011 the FBAR filing deadline for certain persons with signature authority over a foreign financial account.<sup>2</sup> On the same date, the Treasury Department's Financial Crimes Enforcement Network issued proposed rules (the "Proposed FBAR Rules") that, if finalized, would further clarify these issues.<sup>3</sup>

The IRS Guidance and Proposed FBAR Rules are in response to widespread criticism from practitioners and taxpayers regarding the IRS's recent expansion of the FBAR filing requirement.<sup>4</sup> In particular, these recent developments raised significant concerns regarding the applicability of the FBAR filing requirement to U.S. investors in certain foreign commingled funds such as hedge funds and private equity funds, and to officers and employees of registered investment advisors who have signature authority over foreign accounts owned by mutual funds but managed by such registered investment advisors. The IRS Guidance and Proposed FBAR Rules provide welcome relief, as summarized below. We note that this summary is an overview of certain significant issues and does not cover every issue addressed in the recent guidance.

### **IRS Guidance**

The IRS Guidance provides the following FBAR filing relief with respect to 2009 and prior years:

- **Commingled Funds:** The IRS will not interpret the FBAR filing requirement with respect to commingled funds to apply to funds other than mutual funds. Thus, pursuant to the IRS Guidance no FBAR filing is required for 2009 and prior years with respect to a financial interest in, or signature authority over, a foreign hedge fund or private equity fund.
- **Signature Authority:** The filing deadline for persons with signature authority over, but no financial interest in, a foreign financial account has been extended from June 30, 2010 to June 30, 2011. The FBAR guidance in effect at the time of filing will apply to such FBAR form.
- **U.S. Person:** In October 2008, the IRS expanded the definition of U.S. person for purposes of the FBAR filing requirement to include non-U.S. persons in and doing business in the United States, although such definition was subsequently temporarily suspended by the IRS. The IRS Guidance extends the suspension of this definition of U.S. person for 2009, and thus the FBAR filing requirement continues to apply only to a citizen or resident of the United States, a domestic partnership, a domestic corporation, or a domestic estate or trust.

- Federal Tax Returns: If the above relief in the IRS Guidance applies and a taxpayer has no other accounts subject to FBAR reporting, then for 2009 and earlier years such taxpayer should check the “no” box on the question regarding the existence of a financial interest in, or signature authority over, a foreign financial account on the taxpayer’s federal tax return.

### Proposed FBAR Rules

The Proposed FBAR Rules, if finalized, would include the following FBAR filing clarification and relief:

- Commingled Funds: The Proposed FBAR Rules would include mutual funds or similar pooled funds or investment funds in the definition of “financial account,” but would reserve on the treatment of pooled investment companies other than mutual funds (such as private equity funds, venture capital funds and hedge funds). Thus, although the Proposed FBAR Rules would not impose a current FBAR filing requirement on such pooled investment companies, the Proposed FBAR Rules note that Treasury remains concerned about the potential use of such funds to evade taxes and is continuing to study the issue.
- Signature Authority: The Proposed FBAR Rules would extend the current exemption from the FBAR filing requirement for certain officers and employees of regulated banks and large or publicly-traded corporations with signature authority, but no financial interest in, the foreign accounts of the employer to also include employees of entities registered with and examined by the Securities and Exchange Commission that provide services to a registered investment company. The Proposed FBAR Rules note that this exemption is being extended to address the fact that mutual funds generally do not have employees of their own, but rather are managed by individuals who are employed by registered investment advisors.
- Certain Exemptions: The Proposed FBAR Rules would provide certain exemptions from the FBAR filing requirements, including: (i) state pension plans, (ii) state colleges and universities, (iii) participants, beneficiaries, and owners of tax-qualified retirement plans and individual retirement accounts, and (iv) trusts in which the U.S. person has a 50% or more interest in the trust assets or income. Notably, these exemptions do not include private pension plans and other tax-exempt organizations.
- U.S. Person: The Proposed FBAR Rules would not expand the definition of U.S. person to include non-U.S. persons in and doing business in the United States.

### Conclusion

U.S. persons who were previously required to file FBAR forms for 2009 or earlier years by June 30, 2010 should review the IRS Guidance to determine whether an extension or exemption may be applicable. In addition, U.S. persons should continue to monitor developments with respect to the Proposed FBAR Rules to determine whether future FBAR filings will be required.

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

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<sup>1</sup> 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 if the aggregate value of such accounts exceeds \$10,000 during the calendar year. The FBAR form is due on June 30 of the following year, and FBAR filers generally must also disclose such financial interest in or signature authority over such foreign financial accounts on their federal tax return (e.g., Form 1040, Form 1041, Form 1065, or Form 1120).

<sup>2</sup> See Notice 2010-23, 2010-11 I.R.B. 1; see also Announcement 2010-16, 2010-11 I.R.B. 1.

<sup>3</sup> See 75 Fed. Reg. 8844 (Feb. 26, 2010).

<sup>4</sup> For prior coverage of the FBAR developments in the past year, 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; see also Client Alert, "IRS Grants Filing Extension for the Report of Foreign Bank and Financial Accounts ('FBAR')", August 2009. Both Client Alerts are available at <http://www.paulhastings.com/PublicationsList.aspx>.