



**GOLENBOCK
EISEMAN
ASSOR
BELL &
PESKOE LLP**

CLIENT ALERT

IRS Issues Further Guidance on who is required to File FBAR Information Returns

On February 26, 2010, the Internal Revenue Service (“IRS”) and the U.S. Treasury Department published important guidance on a number of issues concerning the requirement to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (commonly referred to as “FBARs”). First, the IRS announced that U.S. investors in offshore private investment funds, such as hedge funds and private equity funds, would not be required to file FBARs for 2009 and earlier years, although the issue of whether they would have to file for future years remains unresolved. In addition, the IRS indicated that for 2009 and earlier years, the requirement to file FBARs would be suspended for persons who are not U.S. citizens, U.S. residents, or domestic entities. Finally, the IRS announced that persons with signature authority over, but no financial interest in, a foreign financial account would have until June 30, 2011 to file FBARs for 2010 and earlier tax years.

As described in our June, 2009 Client Alert¹, each U.S. person who has a financial interest in or signature or other authority over any foreign financial account, where the aggregate value exceeds \$10,000 at any time during the calendar year, must report the financial account by filing an FBAR with the Department of Treasury by June 30 of the following year. The instructions to the FBAR specify which persons are required to file the form and the types of accounts that must be reported.

Private Investment Funds

The most recent version of the FBAR, published in October, 2008, provides that the term “financial account” generally includes “any accounts in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund (including mutual funds).” Our June, 2009 Client Alert reported that certain IRS officials were indicating, informally, that the IRS would treat offshore hedge funds as foreign financial accounts for which FBAR reporting was required. Based on those statements, we recommended that U.S. persons with interests in offshore hedge and private equity funds file FBARs.

On February 26, 2010, the IRS announced that it will *not* interpret the term “commingled fund” as applying to funds other than mutual funds with respect to FBAR’s for calendar year 2009 and prior years.² Proposed regulations issued in connection with this announcement state that a mutual fund or other similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions is reportable.³ The proposed regulations reserve on the issue of what other investment funds might be reportable and, accordingly, it is possible that certain private equity, venture capital or hedge funds might be subject to FBAR reporting in the future.

¹ <http://www.golenbock.com/section.cfm?ID=8>

² See IRS Notice 2010-23 at <http://www.irs.gov/pub/irs-drop/n-10-23.pdf>

³ <http://edocket.access.gpo.gov/2010/pdf/2010-4042.pdf>

Provided that a taxpayer has no other reportable foreign financial accounts for the year in question, a U.S. investor in a foreign hedge or private equity fund should check the “no” box 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.

United States Person Definition

Under the July, 2000 FBAR instructions, the term " United States person" is defined as (1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust. The FBAR was updated in October, 2008 and the new instructions contained a more expansive definition of “United States person.” The new instructions state that “the term ‘United States person’ means a citizen or resident of the United States, *or a person in and doing business in the United States*” (emphasis added). However, the instructions did not define a “person doing business in the United States. In mid-2009 the IRS temporarily suspended the FBAR filing requirement for persons doing business in the United States until the IRS could issue further clarification as to who was within this potentially wide class of persons.⁴

On February 26, 2010, the IRS further suspended the requirement to file FBARs due on June 30, 2010 for persons who are not United States citizens, United States residents, or domestic entities.⁵ Additionally, all persons may rely on the definition of “United States person” found in the July, 2000 version of the FBAR instructions to determine if they have an FBAR filing obligation for the 2009 and earlier calendar years.

Persons with Signature Authority but No Financial Interest

Under the February 26, 2010 guidance, persons with signature authority over, but no financial interest in, a foreign financial account for which an FBAR would otherwise have been due on June 30, 2010, now have until June 30, 2011, to report those foreign financial accounts.⁶

If you would like more information about the reporting of foreign bank and financial account or would like to discuss any particular set of facts, please contact:

Jeffery S. Berger
212-907-7393
jberger@golenbock.com

Ian Shane
212-907-7331
ishane@golenbock.com

Date: March 4, 2010

IRS Circular 230 Disclosure: To comply with IRS requirements, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code, or (ii) promoting, marketing or recommending to one or more taxpayers any transaction or matter that is addressed herein.

⁴ See IRS Announcement 2009-51 at http://www.irs.gov/irb/2009-25_IRB/ar13.html

⁵ See IRS Announcement 2010-16 at <http://www.irs.gov/pub/irs-drop/a-10-16.pdf>

⁶ See IRS Notice 2010-23 at <http://www.irs.gov/pub/irs-drop/n-10-23.pdf>