

**TREASURY DEPARTMENT ANNOUNCES DELAY OF CERTAIN FBAR
REQUIREMENTS AND PROPOSES NEW FBAR REGULATIONS**

The U.S. Department of Treasury has provided temporary relief and proposed new regulations regarding the filing of the Report of Foreign Bank and Financial Accounts (“FBAR”) on Form TD F 90-22.1.

Certain U.S. anti-money laundering laws require any person (including an individual, trust or business entity) subject to the jurisdiction of the United States with a financial interest in or signature or other authority over a foreign financial account to report the existence of the account annually to the Internal Revenue Service. Previous IRS guidance has been issued regarding various details of the filing requirement.¹

On February 26, 2010, the IRS released Notice 2010-23 and Announcement 2010-16. Notice 2010-23 announces that the IRS will not enforce FBAR filing requirements with respect to interests in foreign investment funds other than mutual funds, such as hedge funds and private equity funds, held during 2009 or earlier years. Notice 2010-23 also delays the 2010 FBAR filing deadline by one year for U.S. persons with signature authority over, but no financial interest in, a foreign financial account. Announcement 2010-16 suspends the obligation of certain non-U.S. persons with substantial interests in the United States to file FBAR reports in 2010 for 2009 and earlier years.

Also on February 26, 2010, the Financial Crimes Enforcement Network (“FinCEN”), a bureau of the Treasury which shares FBAR jurisdiction with the IRS, issued proposed regulations, an accompanying explanation, and a draft of revised instructions for the FBAR report. Public comments on the proposed regulations and instructions are requested by April 27, 2010.

The FinCEN explanation indicates that “account” is intended to mean “a formal relationship . . . to provide regular services, dealings and other financial transactions.” The proposed reporting requirements would apply to bank accounts, securities accounts and “other financial accounts.” “Other financial accounts” would include (i) accounts with an entity in the business of accepting deposits as a “financial agency,” (ii) insurance policies with cash value, (iii) annuity policies, (iv) commodity futures and options accounts, and (v) interests in mutual funds and similar pooled funds that issue shares to the general public, determine a regular net asset value, and regularly redeem their shares. The FinCEN release indicates that the definition of “pooled fund” could include hedge funds and other privately offered investment vehicles but proposes for the time being to exclude interests in hedge funds, private equity funds, venture capital funds, and similar investment funds. The release indicates that the treatment of investment funds other than

¹ See Willkie Farr & Gallagher Client Memoranda of June 11, 19, 25, and August 14, 2009.

mutual funds has been postponed at this time as (i) pending financial regulatory reform legislation would apply additional regulation and oversight to some of these investment companies and (ii) “the lack of [current] formal regulation over these kinds of funds makes it difficult to define and distinguish certain types of these funds from others.”

The proposed regulations would also address situations in which employees have signature or other authority over, but not a financial interest in, an employer’s foreign accounts. Such authority is defined as “authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by delivery of instructions . . . directly to the person with whom the financial account is maintained.” The proposed regulations would extend the exemptions that apply to officers and employees of banks and public corporations to officers and employees of financial institutions registered with the Securities and Exchange Commission or Commodity Futures Trading Commission. Officers and employees of certain large corporations and of entities that are registered with and examined by the Securities and Exchange Commission and that provide services to mutual funds and other registered investment companies would also be exempt. However, the employees of unregistered advisors would remain subject to the FBAR reporting requirements.

The proposed regulations and instructions also include rules that would address who must report; simplified or modified reporting requirements for persons with interests in more than 25 foreign financial accounts; and revised reporting requirements for certain trust beneficiaries and participants in retirement plans.

Further, additional FBAR legislation has been proposed. One current version would fold the FBAR report into the U.S. federal income tax return, rather than retaining its current status as a separate filing, and would authorize other measures to deter tax evasion with respect to foreign financial accounts.

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