

FINCEN AND IRS PROVIDE FURTHER GUIDANCE ON REPORTING REQUIREMENTS FOR FOREIGN FINANCIAL ACCOUNTS

On February 26, 2010, two branches of the U.S. Treasury Department addressed aspects of reporting investments in foreign funds.

The Financial Crimes Enforcement Network ("FinCEN") issued proposed regulations addressing the Form TD F 90-22.1 ("FBAR") reporting obligations of U.S. persons who hold interests in certain foreign "financial accounts." Under these proposed rules, a "financial account" would include an interest in a "mutual fund or similar pooled fund which issues shares to the general public that have a regular net asset value determination and regular redemptions." The proposed regulations explicitly reserve decision on the issue of whether hedge funds and private equity funds will be considered "financial accounts" for FBAR filing purposes. The proposed regulations indicate that the Treasury Department remains concerned about the use of foreign investment funds to evade taxes and that FinCEN will continue to study this issue. The proposed regulations also address many other issues, including confirming that a U.S. single-member limited liability company treated as a disregarded entity for U.S. federal income tax purposes is considered a U.S. person who generally must file an FBAR if it has an interest in a foreign financial account. The proposed regulations do not address the effective date of the new regulations if they become final.

Simultaneously, the Internal Revenue Service ("IRS") released Notice 2010-13 (the "Notice") and Announcement 2010-16 (the "Announcement") to provide relief with respect to certain FBAR filing obligations for 2009 and prior years. The Notice provides that the IRS will not require U.S. persons to report any investment in foreign hedge funds or private equity funds for 2009 and earlier years. The Notice also extends the filing deadline to June 30, 2011 for any U.S. person with signature authority over, but no financial interest in, a foreign financial account with respect to years prior to 2010. In the Announcement, the IRS suspended FBAR reporting obligations with respect to 2009 and prior years for any person who is not a U.S. person as defined in the 2000 version of the FBAR form and instructions. Under that definition, a U.S. person is (1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust. However, other than the definition of U.S. persons, all requirements in the 2008 version of the FBAR form and instructions (as modified by the Notice) remain in effect unless changed by future guidance. As reported in our client alert last year, the IRS has stated that investments in foreign funds should be treated as foreign financial accounts subject to FBAR reporting. Thus, unless additional guidance provides otherwise, investments in foreign funds in 2010 and thereafter would presumably have to be reported.

To ensure compliance with requirements imposed by the IRS, we inform you that, unless explicitly provided otherwise, any U.S. federal 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 under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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