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## Investments in Private Investment Funds: Subject to FBAR Reporting by June 30, 2009 or Not?

For more than 30 years, US law has required all US persons who have a financial interest in, or signatory or other authority over, an offshore financial account where the amount exceeds \$10,000 to file the US Treasury Department Form 90-22.1 ("FBAR") with its office in Detroit, Michigan.

Recent developments may affect those who have an interest in an offshore hedge fund or private equity fund (each, an "OPF"). The term "US persons" includes individuals, corporations, partnerships, and tax-exempt entities such as pension plans and 401(k) plans. In the past, the term "financial account" has been construed to mean a bank account, securities account, or other account, including interests in offshore mutual funds. More recently, it has been construed to include offshore prepaid credits cards, debit cards and the like.

Historically, the term "financial account" has not been interpreted to include investments in OPFs in its definition. However, IRS representatives recently indicated that their current view is that an equity interest in an OPF should be a financial account, and thus subject to FBAR reporting. Many practitioners view this position as a significant change by the IRS. Industry groups and others have urged the IRS to clarify this position, or to ensure that this position will not apply for the 2008 year, but it is unclear at this point whether the IRS will respond to these criticisms before the filing deadline.

The FBAR is due on or before June 30 of the subsequent year, with no extensions of time for filing the form. <sup>[1]</sup> There are significant civil and criminal penalties for failing to file the FBARs on a timely basis. Civil penalties for non-willful failure to file include fines of up to \$10,000 per unfiled FBAR, while penalties for willful failures to file can include fines of up to the greater of \$100,000 or 50% of the balance in the foreign account.

Note that an investment in a domestic hedge fund or private equity fund, which in turn invests in an OPF, may also give rise to a FBAR reporting obligation. It is unclear whether the filing of an FBAR by the domestic hedge fund or private equity fund itself reporting the investment in the OPF would relieve investors in the domestic fund from having to file additional FBARs. In addition to the Treasury Department FBAR, there are extensive IRS information reporting requirements for investments in OPFs.

Investors in OPFs have less than one week to review their investments, understand the FBAR rules, determine if they apply to such investments and, if so, file the FBARs. Unless the IRS acts quickly, their recently expressed view will constitute their latest guidance in this area and must be taken into account by all investors in OPFs.

If you have any questions, please feel free to contact any member of our [Tax Controversies](#) or [Investment Management](#) practice groups.

<sup>[1]</sup> The IRS recently extended the time for filing a FBAR where the filer just learned of their filing responsibilities to September 23, 2009.

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