



JONES DAY  
**COMMENTARY**

## IRS EXTENDS FBAR FILING DEADLINE FOR U.S. INVESTORS IN OFFSHORE INVESTMENT FUNDS

As we reported recently,<sup>1</sup> earlier this year representatives of the U.S. Internal Revenue Service (“IRS”) indicated informally that U.S. investors in foreign private equity and hedge funds are required to report annually their fund interests on Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts* (an “FBAR”). The inclusion of such persons among the required class of filers surprised many, and in response to a flood of inquiries, the IRS extended the FBAR filing deadline for calendar 2008 from June 30, 2009, to September 23, 2009, for those taxpayers who reported and paid all of their 2008 taxable income but only recently learned of their FBAR reporting obligation.

On August 7, 2009, the IRS issued Notice 2009-62 in which it extended the due date for 2008 and prior year FBARs to **June 30, 2010**, for persons with (i) signature authority over (but no financial interest in) a foreign financial account, and (ii) either signature

authority over, or a financial interest in, a foreign financial account in which assets are held in a commingled fund (a “Foreign Commingled Fund”). In conversations with the IRS, Jones Day has confirmed that foreign private equity and hedge funds are deemed “Foreign Commingled Funds” for purposes of Notice 2009-62, and that U.S. investors in foreign private equity and hedge funds therefore are eligible for the extended deadline. This latest extension supplements the earlier filing extension and applies to all eligible filers regardless of whether they are compliant with their 2008 federal income tax obligations.

It is important to emphasize that not all holders of foreign financial accounts are eligible for this extended filing deadline. Rather, only those persons who hold a financial interest in or signature over a Foreign Commingled Fund, or possess signature authority over (but not a financial interest in) a foreign financial account, may take advantage of the June 30, 2010, extension. Thus, U.S. persons with financial

<sup>1</sup> *Jones Day Commentary*, “Potential IRS Reporting Requirements for Investors in Offshore Private Equity and Hedge Funds” (July 2009), available at [www.jonesday.com/Potential\\_IRS\\_Reporting](http://www.jonesday.com/Potential_IRS_Reporting).

interests in traditional bank or brokerage accounts in 2008, for instance, are still subject to the June 30, 2009, deadline (extended to September 23, 2009, as noted).

In light of the many questions taxpayers and their advisors have raised about the FBAR, the Department of the Treasury ("Treasury") has invited comments on several FBAR-related issues. The issues for which Treasury desires input are whether or when:

- a person with signature authority over and/or a financial interest in a foreign financial account should be relieved of filing an FBAR;
- the exception currently available to officers and employees of banks and certain publicly traded domestic corporations be extended to officers and employees of other organizations, and whether this exception should apply to officers and employees with signature or other authority over accounts owned by clients of their employer;
- an interest in a foreign entity (such as a corporation, partnership, trust, or estate) should be subject to FBAR reporting;
- the principles underlying the passive foreign investment company ("PFIC") rules should be applied to determine whether an interest in a foreign entity should be subject to FBAR reporting, including whether the 50 percent passive asset test and 75 percent passive income test for establishing PFIC status are appropriate triggers for FBAR reporting and, if so, whether the tests should be applied conjunctively; and
- a U.S. person should be relieved of filing an FBAR with respect to a Foreign Commingled Fund, such as in the case of duplicative tax reporting.

Interested persons should submit comments and suggestions to the IRS by October 6, 2009. Following receipt of comments, Treasury intends to issue regulations clarifying the FBAR filing requirements pertaining to persons with signature authority over, or a financial interest in, foreign financial accounts, including Foreign Commingled Funds. It is expected that at such time definitive guidance will make clear whether U.S. investors in foreign investment funds must file the FBAR.

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