

News from our Tax and Venture Capital groups

## Foreign Account Disclosure— Possible June 30 Filing Obligation for Certain Funds and LPs

Recent informal guidance from the IRS suggests that certain venture capital and private equity funds—and certain fund LPs and GPs—may be required to file Treasury Department Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts) with respect to their ownership interests in such funds. Affected funds may wish to notify their U.S. LPs about this potential filing obligation (although funds are not legally obligated to notify LPs). The filing deadline for the 2008 calendar year is June 30, 2009.

### Background

TD F 90-22.1 (commonly referred to as the “FBAR”) is not a tax form, but is instead a disclosure report to be filed with the Treasury Department. The FBAR is not new, but the instructions for the form were revised in late 2008 and only in the last few weeks has the Treasury Department provided informal guidance suggesting that the filing may be applicable to ownership interests in private investment funds.

The FBAR is required to be filed by a *US person* if the person has either an *ownership interest* in OR *signature authority* over a *foreign financial account* with an aggregate value *exceeding \$10,000* at any time during the preceding calendar year.

According to the FBAR instructions, a foreign financial account includes bank accounts, securities accounts, and other types of financial accounts *located* in a foreign country. Thus, even if the account is with a US bank or broker, if the account is

located in a foreign country branch, it is a foreign financial account.

### U.S. limited partners of non-U.S. funds

The FBAR instructions do not indicate whether a *limited partnership interest* in a non-U.S. venture capital or private equity fund (or an offshore investment entity organized by a U.S. fund) constitutes a foreign financial account. The instructions state that stock certificates of a foreign corporation held directly by a U.S. person (as distinguished from holdings in a brokerage account) are not considered financial accounts. However, the instructions state that “foreign financial account” includes “accounts where the assets are held in a commingled fund and the account owner holds an equity interest in the fund (including mutual funds).” Recent informal guidance indicates that the Treasury Department considers an ownership interest in at least one type of private investment fund (a hedge fund, in particular) to be a foreign financial account as well, but there has been no express guidance concerning venture capital or private equity funds.

In light of Treasury’s apparently broad interpretation and the potential for penalties (discussed below), U.S. LPs with an ownership interest in a non-U.S. venture capital or private equity fund (exceeding \$10,000 in value at any time during 2008) should consider filing the FBAR with respect to such interest.

### U.S. general partners

U.S. general partners will need to file (or should consider filing) the FBAR with respect to the following accounts, entities and ownership interests, IF (a) the U.S. GP has signature, investment or similar authority over such account, entity or ownership interest, AND (b) such account, entity or ownership interest had a value exceeding \$10,000 at any time during 2008:

- ▶ A foreign bank or brokerage account of any fund.
- ▶ A foreign bank or brokerage account of an investment vehicle formed by a fund (such as an offshore “alternative investment vehicle”).
- ▶ A general partnership interest in a foreign fund.

### KEY ATTORNEY CONTACTS

*For more information, please call your regular Cooley Fund or Tax Group contact, or feel free to contact:*

Dan Meehan.....720/566-4061  
dmeehan@cooley.com

Bill Morrow.....858/550-6075  
bmorrow@cooley.com

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- ▶ The assets (cash and securities) of any foreign fund or investment vehicle.

### **Deadline and penalties for failure to file and late filings**

The deadline for filing the FBAR for each calendar year is June 30 of the following year. Thus, for calendar year 2008, the filing deadline is June 30, 2009. No extension of the deadline is available.

The FBAR instructions indicate that significant civil and criminal penalties can apply if false information is supplied, or if information is omitted, or if a required filer fails to file.

If a filer fails to file an FBAR by the deadline for a prior calendar year (apparently including 2008), FAQs on the IRS website indicate that no penalties will apply IF:

- ▶ All applicable income taxes (if any) have been paid on the foreign account; AND
- ▶ FBARs for each applicable calendar year are filed by September 23, 2009; AND
- ▶ The late filer includes a statement indicating why the filing is late; AND
- ▶ The late filer includes copies of the filer's federal income tax returns for the applicable tax years with the late filing.

The FAQ and late filing address can be found at: [www.irs.gov/pub/irs-news/faqs.pdf](http://www.irs.gov/pub/irs-news/faqs.pdf).

Given the impending June 30 deadline for calendar year 2008, GPs and LPs filing for 2008 should file as soon as possible.

For calendar years prior to 2008, it is unclear whether Treasury will interpret

the filing obligation broadly to apply to ownership interests in private investment funds. However, the instructions to the prior version of the form contains similar language about "equity interests in commingled funds," so filing for prior years would seem to be the most prudent course. It is clear that the FBAR must be filed for foreign bank and brokerage accounts for prior calendar years.

The FBAR has been in effect for many years. However, there were no penalties for non-willful failures to file before 10/24/2004. Accordingly, the decision about which prior years to file for should be based on each filer's individual circumstances. GPs and LPs who do plan to file the FBAR for prior calendar years should do so by September 23, 2009, under the procedure described above.

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Many questions about the FBAR and how to complete it remain unanswered—particularly as it relates to private investment funds and their partners. For more information on the FBAR, please feel free to call or email your regular Cooley contact. ■

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