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U.S. Department of the Treasury Provides Foreign Account Filing Relief For Certain Taxpayers

U.S. individuals and entities involved with foreign financial accounts in excess of \$10,000 generally are required to file a Treasury Department Form 90-22.1 (the Foreign Bank Account Report or FBAR) each year by June 30. Prior to last year's filing deadline, the Internal Revenue Service (IRS) expressed its position that the definition of a financial account (which includes mutual funds and "commingled funds") could also apply to certain hedge funds and private equity funds. The IRS' statements created significant controversy because many practitioners believed that this position constituted a change in the reporting rules.

In response to the widespread public criticism of the federal government's approach to the matter and to provide relief to certain parties affected by the uncertainty in the area, the following three documents were released on February 25 and 26 by the U.S. Department of the Treasury through its Financial Crimes Enforcement Network (FinCEN) and the IRS:

1. Announcement 2010-16 - the IRS suspended the FBAR filing requirement for persons who are not U.S. citizens, residents or entities (which includes corporations, partnerships, trusts and estates).

2. Notice 2010-23 - the IRS provided administrative relief to parties involved in the following two areas:

(a) signature authority only - for persons who only have signature authority with respect to a foreign financial account (but have no financial interest) and who would have otherwise been required to file an FBAR for calendar year 2009 and prior years by June 30, 2010, (i) the filing deadline has been extended to June 30, 2011 and (ii) they have been instructed to check the "no" box in response to FBAR-related questions contained on any applicable U.S. federal tax forms for 2009 and earlier years that "ask about the existence of a financial interest in, or signature authority over, a foreign financial account"; and

(b) foreign commingled funds - for purposes of 2009 and prior years, the definition of a commingled fund will not apply to funds other than mutual funds. The IRS specifically identified foreign hedge funds and private equity funds as the types of funds that would be eligible for relief pursuant to the Notice. As a result, persons with a financial interest in, or signature authority over, a foreign commingled fund other than a mutual fund will not be required to file an FBAR for 2009 and prior years.

3. Proposed Rules Relating to the Bank Secrecy Act (BSA) - FinCEN issued proposed BSA regulations (identified as RIN 1506-AB08) that would include the following revisions:

(a) definition of U.S. person - the definition of a U.S. person would be expanded to include, for example, entities that have elected to be disregarded for U.S. federal tax purposes and the geographic area of the U.S. would include certain U.S. territories and possessions;

(b) financial account - this term would be expanded to include, for example, “an account that is an insurance policy with a cash value or an annuity policy.” It is interesting to note that hedge funds were not specifically identified and the definition of “other investment fund” was reserved. Consequently, it is unclear whether the definition of a financial account and a commingled fund could be expanded for purposes of future periods.

(c) exceptions - participants and beneficiaries involved in certain retirement accounts and plans (e.g., individual retirement accounts or IRAs) and certain beneficiaries of trusts of which the assets have otherwise been reported (e.g., by the applicable trustee) would not be required to file an FBAR.

The public has 60 days to submit comments regarding the proposed rules.

As you know, we have discussed the FBAR in the context of captive insurance arrangements, which often have foreign accounts. Further, we are also aware that companies and individuals affiliated with captives frequently are involved in other foreign transactions that could be implicated by the FBAR rules. Due to the complexity inherent in this area, we would recommend that any organization with international investments consult with its tax advisors regarding its potential FBAR obligations.

Please contact Michael Domanski at 313-465-7352 or at mdomanski@honigman.com, if you would like more information, including copies of the recent IRS and FinCEN releases.

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