

FBAR

Several key events have occurred recently regarding reporting by United States persons with interests in foreign financial accounts. On February 26, 2010, the Treasury [the IRS and FinCen] issued several pieces of important guidance relating to the required filing of Form TD 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR) by United States persons with a financial interest in, or signature authority over, financial accounts in a foreign country. In particular, this new guidance relieves persons that held interests in foreign private equity and hedge funds in calendar year 2009 and earlier from the FBAR filing requirement with respect to those years, and if the proposed guidance that was issued is finalized, would relieve governmental entities from FBAR filing requirements with respect to all foreign financial accounts.

Notice 2010-23 extends and expands relief initially granted by Notice 2009-62, which was issued in August of last year, for investors in foreign private equity and hedge funds. The new relief provides that the IRS will not apply its enforcement authority adversely in the case of persons with a financial interest in, or signature authority over, a foreign commingled fund (other than a foreign commingled fund that is a mutual fund) with respect to that account for calendar year 2009 and earlier. Importantly, Notice 2010-23 provides that a financial interest in, or signature authority over, a foreign hedge fund or private equity fund is included in the administrative relief provided in the previous sentence.

In addition to Notice 2010-23, proposed regulations were issued on February 26, 2010, which if finalized, would exclude public pension plans from the FBAR filing requirement. Specifically, proposed regulation Section 103.24(c)(4) provides that an "account of a department or agency of the United States, an Indian Tribe, or any State or any political subdivision of a State, or a wholly-owned entity, agency or instrumentality of any of the foregoing is not required to be reported." The proposed regulations also include proposed revisions to the instructions for the FBAR, which go further to clarify that a governmental entity not required to file a FBAR with respect to its foreign financial accounts includes "an employee retirement or welfare benefit plan of a governmental entity."

In addition, the proposed regulations reserve on the issue of whether private equity funds and

hedge funds fall within the scope of "other financial accounts" for which reporting is required. Therefore, if finalized, there would be no FBAR filing requirement with respect to a financial interest in or signatory authority over a private equity or hedge fund. The preamble to the proposed regulations does point out, however, that part of the reason for the Treasury's reservation on the issue of private equity and hedge funds is because of pending regulatory and legislative reform targeted at those and other privately offered investment funds.

Separately, the version of proposed new Section 6038D included in the Hiring Incentives to Restore Employment Act as passed by the House on March 4, 2010, limits the expanded reporting of information with respect to foreign financial assets to individuals, so governmental plans would not be included in this new requirement.

If you would like to discuss any of the issues addressed in this Client Alert or would simply like to find out more about Chapman, please contact Mike Barrett, Kelley Bender, Steve Frost, Van Holkeboer or visit us at chapman.com.

This document has been prepared by Chapman and Cutler LLP attorneys for informational purposes only. It is general in nature and based on authorities that are subject to change. It is not intended as legal advice. Accordingly, readers should consult with, and seek the advice of, their own counsel with respect to any individual situation that involves the material contained in this document, the application of such material to their specific circumstances, or any questions relating to their own affairs that may be raised by such material. © Chapman and Cutler LLP., 2010. All Rights Reserved. Attorney advertising material.