

IRS Guidance Extends Filing Deadline for Some (but Not All) FBAR Filers

Private Equity Funds may be Required to File by 9/23/09 or 6/30/10

PENpoints

The IRS recently extended the FBAR filing deadline until June 30, 2010, for filings relating to (i) U.S. persons with signature or other authority over, but no financial interest in, foreign financial accounts and (ii) interests in foreign commingled funds.

A prior [KirklandPEN](#) discussed in detail the requirement that each U.S. person (with emphasis on private equity funds and their equity owners) with a financial interest in, or signature or other authority over, one or more foreign bank or financial accounts (including “commingled funds”) exceeding \$10,000 in the aggregate at any time during a calendar year file an FBAR report¹ with the Treasury Department by June 30 of the following year. The IRS has announced two extensions of time in which to file FBARs.

As described in our previous [KirklandPEN](#), **Extension Rule #1** states that penalties will not be asserted for failure to file FBARs for 2008 and prior years so long as the taxpayer (i) only recently learned of its FBAR filing obligation; (ii) in the case of a filing for the 2008 calendar year, had insufficient time to gather the necessary information to complete the FBAR; (iii) correctly reported and paid tax on all its taxable income for the delinquent years and (iv) files delinquent FBARs by September 23, 2009, along with copies of income tax returns for the relevant prior years and a statement explaining why the FBARs were not timely filed. Extension Rule #1 applies to all FBAR filing obligations.

Since the prior [KirklandPEN](#) was circulated, the IRS has recently announced **Extension Rule #2**, which states that the FBAR filing deadline for 2008 and prior years is extended until June 30, 2010, for FBAR filings relating to (i) U.S. persons with signature or other authority over, but no financial interest in, foreign financial accounts and (ii) interests in foreign “commingled funds.” Extension Rule #2 does not impose any conditions on its use or require the filing of copies of tax returns or explanatory statements.

Treasury also announced that it continues to study the FBAR reporting requirements for situations covered by Extension Rule #2, and intends to issue clarifying regulations regarding these situations. Treasury is appar-

ently considering whether to narrow the current FBAR reporting requirements. Until issuance of further guidance, however, U.S. persons with FBAR reporting obligations covered by Extension Rule #2 should maintain necessary records and be prepared to file FBARs for previous years by the extended June 30, 2010, deadline.

As noted in our previous [KirklandPEN](#), under the rules currently in effect, private equity funds, their principals or their investors may be required to file an FBAR with respect to private equity investments in the three situations described below.

1. U.S. Fund Owns Indirect Interest in Foreign Accounts Through Controlled Portfolio Companies. For purposes of the FBAR, a U.S. person (including a private equity fund formed in the U.S.) is treated as having a financial interest in a foreign financial account if (a) such U.S. person owns, directly or indirectly, 50% or more of the vote or value of a corporation or 50% or more of the capital or profits interests in a partnership or LLC and (b) the controlled entity holds a foreign financial account. Therefore, if a U.S. fund owns directly more than 50% of the stock of a portfolio company, or owns indirectly more than 50% of the stock of a portfolio company’s subsidiary, the U.S. fund is required to file an FBAR with respect to each foreign financial account owned by such controlled portfolio company or controlled portfolio company subsidiary.

For example, if U.S. fund owns 100% of the equity interests in U.S. corporation, which in turn owns 80% of German subsidiary’s stock, which in turn owns 90% of Hong Kong subsidiary’s stock, U.S. fund is required

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to file an FBAR with respect to all of the foreign financial accounts owned by U.S. corporation, German subsidiary, and Hong Kong subsidiary.

Extension Rule #2 does not apply to this situation. Therefore, in order to take advantage of IRS penalty relief, any delinquent FBARs must be filed by September 23, 2009, in accordance with Extension Rule #1, along with copies of prior year tax returns and explanatory statements.

2. U.S. Fund's Principal has Signature or Other Authority over Foreign Financial Accounts. A U.S. person who has signature or other authority over a foreign financial account must make an FBAR filing with respect to the account even if such person has no financial interest in the account. For this purpose, a person has signature or other authority over a foreign financial account if such person can control the disposition of money or other property in the account either by delivering a signature or by other direction.

For example, if U.S. or non-U.S. fund owns equity interests in Luxembourg SARL, which maintains a Luxembourg bank account, and a U.S. principal of the fund or of the fund's general partner has signature or other authority over the account, the U.S. principal must make an FBAR filing with respect to the Luxembourg bank account.

The U.S. principal's filing obligation in this case is covered by Extension Rule #2 (provided the U.S. principal does not also have a "financial interest" in the account) and potentially by Extension Rule #1. Extension Rule #2 is more attractive as it has fewer requirements and conditions and also grants a

longer extension allowing a potential filer more time to determine whether future regulations reduce FBAR filing requirements. Of course, the U.S. principal should be prepared to make an FBAR filing by June 30, 2010, either if regulations (a) are not issued by that time or (b) are issued and require an FBAR filing.

3. Interests in Non-U.S. Fund Held by a U.S. Investor or by a U.S. Principal May be Treated as a "Commingled Fund" Subject to FBAR Reporting. As discussed in the previous *KirklandPEN*, in the weeks leading up to the June 30 filing deadline certain IRS representatives stated their view (although we believe the law is far from clear) that non-U.S. hedge funds and even non-U.S. private equity funds are "commingled funds" and therefore interests in such funds must be treated as foreign financial accounts for FBAR reporting. As discussed above, Treasury has announced its intention to issue regulations clarifying whether, and to what extent, interests in non-U.S. funds are covered by FBAR reporting.

A U.S. investor's or a U.S. principal's filing obligation with respect to its interest in a non-U.S. fund in this case is covered by Extension Rule #2 and potentially by Extension Rule #1. Extension Rule #2 is more attractive as it has fewer requirements and conditions and involves a longer extension allowing a potential filer more time to determine whether future regulations reduce FBAR filing requirements. Of course, U.S. investors and U.S. principals should be prepared to make an FBAR filing by June 30, 2010, either if regulations (a) are not issued by that time or (b) are issued and require an FBAR filing.

¹ Form TD F 90 22.1, Report of Foreign Bank and Financial Accounts

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PENnotes

The Third Annual Hedge Fund Activism and Shareholder Value Summit
San Diego, California
September 22 - 23, 2009

The Investment Management Network's Hedge Fund Activism and Shareholder Value Summit focuses on current trends and the future outlook for hedge fund activism. The summit informs institutional investors on innovations and opportunities in this alternative strategy, while providing insight on being an active shareholder. Kirkland partner Stephen Fraidin will participate in a panel discussion on the proxy battle between Target Corp. and Pershing Square Capital Management.

The Fourth Annual Kirkland & Ellis LLP Real Estate Private Equity Symposium
New York, New York
September 24, 2009

Kirkland's Fourth Annual Real Estate Private Equity Symposium features keynote speaker Sam Zell, chairman of Equity Group Investments LLC. Panels of industry participants will focus on: the current real estate private equity model, whether it needs fixing, and what those fixes might be, and the impact of distress on real estate funds, their managers and investors. Kirkland partner Stephen G. Tomlinson, P.C., will moderate. Other panelists will include Kirkland partners Paul M. Basta, Jennifer M. Morgan and Andrew Wright; Steven Hason, the managing director of APG Asset Management US Inc.; David R. Hodes, the founder and managing partner of Hodes Weill & Associates; Matthew J. Lustig, the managing director of Lazard Freres & Co. LLC and Lazard Alternative Investments LLC; Charles R. Purse, the co-founder of Park Hill Real Estate Group; David Sweig, partner of the Bain Corporate Renewal Group, and Joseph D. Stecher, the chief investment officer of Morgan Stanley's AIP Real Estate fund of funds group.

The Practising Law Institute's "Mergers and Acquisitions 2009: What You Need to Know Now"
Chicago, Illinois
September 24 - 25, 2009

This seminar will focus on the continuing effects of uncertainty in the credit and equity markets, the impact of government intervention in financial markets, how contract terms are changing in light of cur-

rent risks and uncertainties and trends and tactics in hostile bids and takeover battles. Kirkland partner R. Scott Falk, P.C., is a co-chair of this event and will participate in a panel discussion on "The Current M&A Landscape" and partner Marc Kieselstein, P.C., will participate in a panel discussion on "Acquisitions of Distressed Businesses."

Private Equity International's Infrastructure Investor
New York, New York
September 29 - 30, 2009

This seminar, targeted to infrastructure investors, fund managers, government officials and other stakeholders, will focus on the proliferating opportunities in infrastructure, developing viable fund structures and securing capital amidst current financial conditions. Kirkland partner Sean Patrick Maloney, former First Deputy Secretary to the Governor of New York and architect of the Governor's multi-billion dollar proposal to monetize the New York State Lottery and the New York State Commission on State Asset Maximization, will discuss "The Future of PPPs in the US." Partner Bruce Gelman will lead a "Fund Terms & Conditions" workshop.

Turnaround Management Association's 2009 Annual Convention
Phoenix, Arizona
October 7 - 9, 2009

On Friday, October 9, at TMA's Annual Convention, Kirkland partner Stephen G. Tomlinson will participate in a panel discussion on "The Gathering Storm: Crisis in the CMBS/Real Estate Industry." The panel will review the implications of the CMBS market shut down, the next capital adequacy crisis facing lenders, what borrowers should do about refinancing risk and practical means of negotiating with special servicers.

Kirkland & Ellis LLP Private Equity Seminars: "Buyouts in a Troubled Economy"
San Francisco, California - October 16, 2009
New York, New York - October 28, 2009
Chicago, Illinois - November 6, 2009

These Kirkland seminars, chaired by partner Jack S. Levin, P.C., will review the legal, tax, structuring and practical negotiating aspects of complex private equity deals in the current economic climate.

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Private Equity Practice at Kirkland & Ellis

Kirkland & Ellis LLP's nearly 400 private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 200 private equity firms around the world.

Kirkland has been widely recognized for its preeminent private equity practice. In 2009, Kirkland received the awards for Best Law Firm (Private Equity Deals) and Best Law Firm (Fund Formation) in North America from *Private Equity International*. Mergermarket has ranked Kirkland first by volume for Global and North American Buyouts in its "Global M&A Round-up for Year End 2008," and Pitchbook named Kirkland the most active law firm representing private equity firms in its "Private Equity Breakdown" for Q2 2009.

For the second year in a row, *The Lawyer* magazine recently recognized Kirkland as one of the "The Transatlantic Elite," noting that the firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent." In addition, Kirkland's London office was recently named the 2008 "Banking Team of the Year" at the Dow Jones Private Equity News Awards for Excellence in Advisory Services.

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