Final FBAR Regulations Offer Some Relief For Plan Sponsors, but Filing Obligations Remain

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The Treasury Department has issued final regulations concerning the FBAR filings. Some relief is provided for employee benefit plans and plan sponsors, but a blanket exemption is not provided.

On February 24, 2011, a division of the United States Treasury Department issued final regulations (Final Regulations) concerning the Report of Foreign Bank and Financial Accounts, IRS Form TD-F 90-22.1 (FBAR). Although the Final Regulations provide some relief for employee benefit plans and plan sponsors, they do not provide a blanket exemption for benefit plans. Thus, plan sponsors whose plans have foreign financial accounts should be aware of the upcoming June 30, 2011 filing deadline for 2010 filings.

The following discussion is intended to describe the most significant aspects of the Final Regulations for plan sponsors.

Background on FBAR Filing Requirements and Application to Pension Plan Sponsors

Treasury rules require each U.S. person to file an FBAR by June 30 if the person has either a financial interest in or signature or other authority over foreign financial accounts that have an aggregate value exceeding $10,000 at any time during the prior calendar year. Civil and criminal penalties can apply for the failure to file. In addition, certain individuals with a financial interest in, or signature or other authority over, a foreign financial account could be required to indicate the relationship to the foreign account by checking a box on his or her Form 1040 (Schedule B).

FBAR filing requirements can apply to plan sponsors and related individuals (plan filers). For example, pension plans often invest in foreign bank accounts or offshore investment vehicles, such as foreign mutual funds, hedge funds, and private equity funds. These foreign investments may come within FBAR's use of the term foreign financial accounts. In addition, certain directors, officers, investment committee members, and other employees of a pension plan sponsor may possess authority to dispose of a plan's assets.

As we reported last year, the Treasury previously provided limited FBAR relief for plan filers. Plan filers with signature authority over, but no financial interest in, a foreign financial account received a one-year extension of their filing deadline until June 30, 2011. This relief applied, for example, to a plan's investment committee members and in-house investment officers if they are authorized to move money from the plan's trust. In addition, the Treasury

ruled that plan filers with either a financial interest in, or signature or other authority over, a foreign commingled account other than a foreign mutual fund are not required to file FBAR for 2009 and prior years.

What Do the Final Regulations Tell Plan Sponsors and Fiduciaries?

Although the Final Regulations do not contain a blanket exemption for plan filers, the Final Regulations do provide certain relief for plan filers. This relief includes:

- ***Signature or Other Authority***:Under proposed regulations published lat year (Proposed Regulations), the scope of the phrase "signature or other authority" over a foreign financial account was unclear. The Final Regulations clarify that unless the foreign financial institution maintaining the foreign financial account will act upon a direct communication from an individual to dispose of the assets in the account, that individual does not have the necessary signature or other authority over the account to trigger FBAR filing requirements. Thus, plan filers such as retirement committee members or investment committee members who do not have such direct authority over the foreign financial account are not required to indicate on their personal tax returns that they have a relationship to a foreign financial account and need not file FBAR, assuming no other circumstance triggers reporting obligations. However, this relief does not extend to a committee member who has authority to instruct the custodian or holder of the foreign financial account. Similarly, as explained in more detail below, the Final Regulations make clear that U.S. persons with investments in a custodial (or "omnibus") account that is maintained in the name of the custodial bank need not file FBAR for those assets.

- ***Reportable Accounts***: The Final Regulations contain a broad definition of the types of foreign financial accounts that would trigger filing obligations for an individual, such as omnibus accounts maintained in the name of the global custodian that holds the account's assets overseas. The preamble to the Final Regulations clarifies that, unless the individual can access these custodial accounts directly, without going through the global custodian or investment manager, such individual would not have a reporting obligation for the account.
- ***Foreign Hedge Funds and Private Equity Funds.*** The Final Regulations do not address whether foreign hedge fund and private equity investments need to be reported. As in the Proposed Regulations, Final Regulations reserve the treatment of these types of investments. An FBAR is required for interests in commingled investment vehicles that are "mutual funds or similar pooled funds" if such funds are available to the general public and have regular net asset value determinations and redemptions. Thus, the Final Regulations do not currently require FBAR filings for most foreign hedge funds and private equity funds because such funds are available only in private offerings.
- ***Financial Interest***: Under the Proposed Regulations, an individual would have had a "financial interest" in a trust that the individual established and for which the individual appointed a so-called "trust protector" who is subject to the individual's direct or indirect instruction. It was unclear whether this condition

would apply to a pension plan sponsor who (in its corporate capacity) established a trust to hold the plan's assets or appointed, for example, a committee or individual to monitor the trustee or relay instructions to the trustee. The Final Regulations have eliminated the "trust protector" rule. Thus, there is no filing obligation for plan sponsors on this point.

- ***Continued Exemption for Plan Participants and Beneficiaries***. Like the Proposed Regulations, the Final Regulations specify that participants in, and beneficiaries of, retirement plans under Internal Revenue Code (Code) Sections 401(a), 403(a), and 403(b), as well as owners and beneficiaries of IRAs or Roth IRAs under Code Sections 408 and 408A, are not required to file an FBAR with respect to a foreign financial account held by or on behalf of the plan or IRA.

Upcoming Filing Obligations

The rules contained in the Final Regulations apply to FBAR filings required for the 2010 and future calendar years. However, the Final Regulations also state that plan filers who relied on previous Treasury guidance to defer their filing obligations last year (i.e., those plan filers with signature or other authority over, but no financial interest in, a foreign financial account) may apply favorable rules contained in the Final Regulations when determining whether they need to file by June 30, 2011 with respect to accounts maintained in calendar years before 2010.

June 30, 2011 is the deadline for FBAR filings required for the 2010 calendar year and any applicable prior years. Plan sponsors should review plan investments for the existence of foreign financial accounts to determine filing obligations. For example, special filing obligations apply to plan filers invested in a foreign mutual fund (even those with only signature authority over such an investment account).