

## IRS Issues FBAR Filing Relief, but Certain Filing Obligations Remain

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The Internal Revenue Service (IRS) has recently issued several pieces of guidance related to the filing of the Report of Foreign Bank and Financial Accounts, IRS Form TD F 90-22.1 (FBAR), by pension plan sponsors.<sup>1</sup>ii While the IRS has relieved some of the filing obligations, most notably the requirement for plans to file for foreign hedge fund investments for 2009 and prior years, certain filing obligations remain. Plan sponsors with foreign financial accounts should be aware of their FBAR filing obligations and should be gearing up to make filings before June 30, 2011 (and, in some cases, June 30, 2010). The following discussion is intended to provide plan sponsors and related individuals with a better understanding of the IRS's position on FBAR requirements and how this position may affect their filing obligations.

### *Who is generally required to file an FBAR?*

Under IRS rules, U.S. persons with a financial interest in, or signature or other authority over, financial accounts in a foreign country that have an aggregate value exceeding \$10,000 at any time during the calendar year are required to file the FBAR by June 30 of the following year (subject to limited exceptions). Although this filing requirement is not new, the IRS has recently made clear that its scope is much broader than previously understood.

### *Are there consequences for not filing an FBAR?*

Yes. Criminal penalties for the willful violation of FBAR requirements can, if connected with the violation of another law or if part of a pattern of illegal activity, reach \$500,000 and imprisonment for 10 years.

### *Are plan sponsors and related individuals subject to the FBAR filing requirements?*

In short, the answer may be "yes." The IRS has indicated that the FBAR filing requirements may extend to employee benefit pension plans and trusts, plan sponsors, plan trustees, investment managers and plan service providers (collectively, plan filers). This is because a pension plan, for example, will often invest in offshore investment vehicles. These foreign investments may fall within FBAR's use of the term "foreign financial accounts." Most defined contribution plans do not hold foreign financial accounts (*e.g.*, most "international" mutual funds are U.S.-based funds that hold international securities and thus do not constitute foreign financial accounts). However, many defined benefit plans hold foreign mutual funds or offshore hedge funds and private equity funds, both of which would qualify as a foreign financial account.

ERISA requires every plan to have a "named fiduciary" responsible for the management and administration of the plan. Named fiduciaries have

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the power to dispose of a plan's assets. Under FBAR's instructions, such persons will generally have "signature or other authority" over the assets invested in the offshore investment vehicles mentioned above and would need to file. Depending on the identity of a plan's "named fiduciary," the plan sponsor's directors, officers, investment committee members and a number of other employees may have the authority to engage in transactions on behalf of the plan. Arguably, this power could fall within the definition of "signature or other authority" over the plan's foreign accounts, and thus require each of these individuals—whose normal job duties may be only tenuously related to a plan—to file an FBAR as well.

If covered, plan filers face burdensome reporting obligations. For example, a plan filer with signature authority over a foreign financial account is required to list the maximum value of the foreign financial account during the calendar year reported, the account number and the name of the financial institution holding the account for each foreign financial account over which the filer has such signature authority.

*Does recent IRS guidance clarify plan filer FBAR obligations?*

Although several issues remain unresolved, recent guidance has clarified some important points. For example:

- Plan filers with signature authority over, but no financial interest in, a foreign financial account have received a one-year extension of their filing deadline until June 30, 2011. Examples of this type of plan filer might include investment committee members and in-house investment officers who are authorized to move money for the plan's trust.
- However, plan filers invested in a foreign account, such as a foreign mutual fund, were still required to file an FBAR for 2009 by June 30, 2010. Examples of this type of plan filer might include the plan or the plan's trustee(s).

- In addition, 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 an FBAR for 2009 and prior years.
- The recent FBAR guidance specifically does not exempt pension plans from filing requirements, which means the FBAR requirements for foreign accounts, including commingled accounts such as foreign hedge funds, are likely here to stay.

*What key issues remain unresolved?*

As mentioned previously, 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 an FBAR for 2009 and prior years. Notably, however, the recent guidance does not resolve the important issue of whether foreign hedge fund and private equity investments must be reported in the future. Thus, as of today, this means that plan filers who have only signature authority over, but no financial interest in, a foreign hedge fund or foreign private equity fund (such as pension plan investment committee members and plan sponsor employees) have a filing obligation beginning June 30, 2011.

Any additional guidance on FBAR will be forthcoming as the IRS makes it available.

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<sup>1</sup> IRS Notice 2009-62, available at: <http://www.irs.gov/pub/irs-drop/n-09-62.pdf>; IRS Notice 2010-23, available at: <http://www.irs.gov/pub/irs-drop/n-10-23.pdf>; IRS Announcement 2010-6, available at: [http://www.irs.gov/irb/2010-06\\_IRB/ar14.html](http://www.irs.gov/irb/2010-06_IRB/ar14.html); Notice of Proposed Rulemaking, *Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations - Reports of Foreign Financial Accounts*, 75 Fed. Reg. 8,844 (Feb. 26, 2010).