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Plan sponsors face a June 30, 2011 filing deadline for 2010 filing of the Report of Foreign Bank and Financial Accounts (FBAR) to the IRS. Final regulations provide some relief but no blanket exemption to plan sponsors.

Final FBAR Regulations Grant Some Relief, but Filing Obligations Remain

by | **Karen A. Simonsen, Todd A. Solomon and James G. Isaac**

On February 24, 2011, a division of the U.S. Treasury Department issued 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 from FBAR filing requirements. Thus, plan sponsors whose plans have foreign financial accounts should be aware of the June 30, 2011 filing deadline for 2010 filings.

Background on FBAR Filing Requirements

Under Treasury rules, each U.S. person is required 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 be imposed 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 their relationship to the account by checking a box on their Form 1040 (Schedule B).

Benefit plan sponsors and related plan filers may be subject to FBAR filing requirements. For example, defined benefit plans often invest in foreign bank accounts or offshore investment vehicles, such as foreign mutual funds, hedge funds and private equity funds. These 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 the authority to dispose of a plan's assets, thus potentially bringing them within the scope of FBAR's use of the phrase *signature or other authority*.

The Treasury Department previously provided limited FBAR relief for plan filers. For example, 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 were authorized to move money from the plan's trust.

Application of Final Regulations to Plan Sponsors and Fiduciaries

Although the final regulations do not exempt plan filers from FBAR filing requirements, they do provide some relief. This relief includes the following items of special interest.

- *Signature or other authority:* The scope of the phrase *signature or other authority* over a foreign financial account was unclear under prior guidance. 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, retire-

ment committee members or investment committee members, for example, 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 an FBAR, assuming no other circumstance triggers reporting obligations.

- *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 before, the 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.
- *Reportable accounts:* 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 U.S. custodial bank need not file an FBAR for those assets. 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 U.S. global custodian that holds the account's assets over-

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seas. Unless the individual can access these custodial accounts directly, without going through the U.S. global custodian or investment manager, such individual would not have a reporting obligation for the account.

- *Continued exemption for plan participants and beneficiaries:* The final regulations specify that participants in, and beneficiaries of, retirement plans under Internal Revenue Code Sections 401(a), 403(a) and 403(b), as well as owners and beneficiaries of individual retirement accounts (IRAs) and 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 final regulations apply to FBAR filings required for 2010 and future calendar years. However, the final regulations also state that plan filers who relied on previous guidance to defer their filing obligations last year (i.e., those filers with signature or other authority over, but no financial interest in, a foreign financial account) may apply favorable rules from the final regulations when deciding whether they need to file by June 30, 2011 for 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 and should monitor future guidance. ⑥

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