MONEY MANAGER'S
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Final FBAR Rule Offers Some Relief, But Filing Obligations Remain

Advisers, as well as some advisory clients that are retiree plan sponsors, will enjoy some relief from having to comply with the Report of Foreign Bank and Financial Account (FBAR) regulations. The Treasury Department has issued final regulations concerning the FBAR filings. It did not, however, provide a blanket exemption, and it specifically stated that no exemption is available to advisers when they are providing advisory services to clients that are not registered investment companies.

On Feb. 24, the Financial Crimes Enforcement Network issued final regulations concerning the Report of Foreign Bank and Financial Accounts, IRS Form TD-F 90-22.1, better known as 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. ***Page 2***

Grace Period For Mid-sized Adviser 'Switch' All But Official

Advisers that anticipate no longer making the threshold for registration with the SEC — so-called "mid-sized" advisers — may have until 2012 to switch to state supervision, according to a letter from Robert Plaze, the associate director of the SEC's Division of Investment Management. Plaze sent a letter April 8 to David Massey, president of the North American Securities Administrators Association, saying "[W]e expect that the commission will consider extending the date by which mid-sized advisers must transition to state regulation such that all SEC-registered advisers would be required to report their eligibility for registration with the commission in the first quarter of 2012." ***Page 4***

Wolin Defends Dodd-Frank Act, Pace of Reform

Deputy Treasury Secretary Neal S. Wolin on April 19 took to the podium to respond to both public and private-sector attacks leveled at the SEC for the way in which it has implemented the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Wolin refuted claims — which he said came from the financial sector, lobbyists and some members of Congress — that the fast pace of reform has led to sloppiness and a lack of clarity, and that there is a lack of coordination by regulators; that transparency in derivatives markets will harm liquidity and that margin requirements will unnecessarily tie up capital, among other criticisms. ***Page 5***

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Final FBAR Regulations Offer Some Relief for Plan Sponsors, But Filing Obligations Remain

By James G. Isaac, Karen A. Simonsen and Todd A. Solomon

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Advisers, as well as some advisory clients that are retiree plan sponsors, will enjoy some limited relief from having to comply with the Report of Foreign Bank and Financial Account (FBAR) regulations. The Treasury Department has issued final regulations concerning the FBAR filings. It did not, however, provide a blanket exemption. On Feb. 24, 2011, the Financial Crimes Enforcement Network (FinCEN), a division of the 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 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 (1) a financial interest in or (2) 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.

The Treasury earlier 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

See *FBAR*, p. 3

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FBAR (continued from p. 2)

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.

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, 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.

How Do the Final Regulations Affect Advisers to Retirement Plans?

Although the final regulations do not contain a blanket exemption for plan filers, they do provide certain relief — in addition to the relief described above for hedge funds and private equity funds — including:

Signature or Other Authority

Under proposed regulations published last year (see July newsletter, p. 7), 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.

Financial Interest in a Trust

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 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

See FBAR, p. 4

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SEC Briefs

Grace Period for Mid-sized Advisers and Certain Private Advisers

Advisers that anticipate no longer making the threshold for registration with the SEC — so-called "mid-sized" advisers — may have until 2012 to switch to state supervision, according to a letter from Robert Plaze, the associate director of the SEC's Division of Investment Management. Plaze sent a letter April 8 to David Massey, president of the North American Securities Administrators Association (NASAA), saying "[W]e expect that the commission will consider extending the date by which mid-sized advisers must transition to state regulation such that all SEC-registered advisers would be required to report their eligibility for registration with the commission in the first quarter of 2012."

Private Funds

In the same letter, Plaze wrote that advisers relying on the private adviser exemption in section 203(b)(3) of the Advisers Act of 1940 (Advisers Act), can expect a new exemption rulemaking in advance of July 21. The law provides for an exemption from registration for advisers to venture capital funds and advisers to private funds with less than $150 million in AUM, but it directs the SEC to implement a new rule (see related story, p. 7).

Regarding these advisers, Plaze wrote, "[G]iven the time needed for advisers to register and come fully into compliance with the obligations applicable to them once they are registered, we expect that the commission will consider extending the date by which these advisers must register and come into compliance with the obligations of a registered adviser until the first quarter of 2012."

Asked by Thompson Publishing Group April 27 whether there would be a more "official" communication coming from the SEC, Sara Crovitz, bureau chief in the SEC's Division of Investment Management, said Plaze's letter is most likely the only word advisers will hear for now on the subject of the delay, noting that the letter is a staff communication, not an action by the commission, for which she couldn't speak. Crovitz spoke to a group of attorneys in Washington, D.C. at an event sponsored by the District of Columbia Bar Association. One audience member asked Crovitz if the delay of the compliance date was strictly for filing of the necessary registration forms, or "is it more that the obligation to be fully compliant" that is being delayed. Crovitz said, "I think the expectation is that complying with the rules is going to be delayed, so I don't think that anyone expects on July 21, for advisers that lost their 203(b)(3) [exemption] to have their papers done." Crovitz provided the usual disclaimer that her views are her own and not necessarily those of the commission.

Original Deadlines

The Dodd-Frank Act, which raised the SEC registration threshold from $25 million to $100 million in AUM, requires that advisers that do not meet the new threshold withdraw from SEC registration and register with one or more states as of July 21, 2011 (see April newsletter, p. 3).

The SEC proposed a new rule, 203A-5, which would require each adviser to file an amendment to its Form ADV no later than Aug. 20, 2011, providing information about its AUM, and withdraw by Oct. 19 if they no longer qualify. However, Plaze's letter says the SEC's database for storing adviser information — the Investment Adviser Registration Depository system, or IARD — must be reprogrammed to accept advisers' transition filings. "We understand that the re-programming process will take until the end of the year to complete," Plaze wrote.

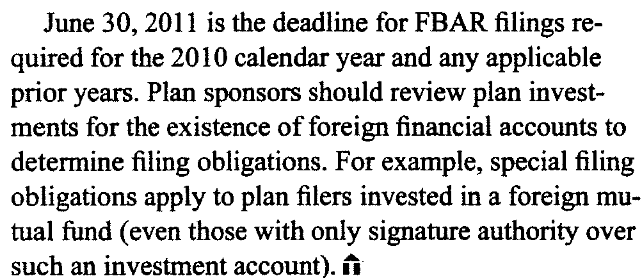
See *SEC Briefs*, p. 5

FBAR (continued from p. 3)

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 (that is, 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).