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FinCEN Issues Final Rules on FBAR

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On February 24, 2011, the Financial Crimes Enforcement Network ("FinCEN") issued final rules (the "Final Rules") that amend the Bank Secrecy Act implementing regulations regarding the Report of Foreign Bank and Financial Accounts, Form TD-F 90-22.1 ("FBAR") in a manner that may significantly affect reporting with respect to employee benefit plan investments.[1]

Background

As reported in our June 8, 2010 client alert [FBAR Redux: Upcoming Deadline for Pension Plans], a U.S. person that holds a financial interest in, or signature or other authority over, a foreign financial account is required to file an FBAR if the aggregate value of all such U.S. person's foreign financial accounts exceeds $10,000 at any time during the year. (U.S. persons that are required to file the FBAR must also check the appropriate box regarding FBAR-related questions on their federal income tax returns or other applicable returns.) Although FinCEN issued proposed rules on February 26, 2010 (the "Proposed Rules") addressing the FBAR filing requirements, these Proposed Rules left open a number of important questions regarding the scope of reporting. Following its release of the Proposed Rules, FinCEN received a number of comments from the employee benefit plan community requesting various exemptions and clarifications.

Final Rules

The Final Rules largely track the Proposed Rules and rejected calls from plans and practitioners to exempt employee benefit plan investments entirely from the FBAR filing requirements. However, the Final Rules did revise the Proposed Rules in a number of ways that should limit the reporting required with respect to plan investments. This client alert discusses those revisions in further detail.

Definition of foreign financial account. The Final Rules reiterated that a foreign financial account includes a foreign bank account, a foreign securities account, and "other financial accounts" including foreign mutual funds or similar pooled funds and annuity policies. The Final Rules also did the following:

- Clarified that an account is not a foreign account for purposes of the FBAR if it is maintained with a financial institution that is located within the United States.
- Provided that no FBAR is required (either with respect to financial interest or signature or other authority) where a U.S. customer maintains an account within the U.S. merely because the U.S. bank holds assets outside the U.S. in an omnibus account in the name of a global custodian. However, if the custodial arrangement allows the U.S. person direct access to such person's foreign holdings at a foreign institution, the FBAR filing requirement is triggered.
- Confirmed that a foreign financial account includes "mutual funds" only if the definition set forth in the Final Rules is satisfied, meaning that the shares of the fund are offered to the general public and have a regular net asset value determination and a regular redemption feature. A pooled investment fund without these features is not considered a mutual fund for FBAR purposes even if it is considered a mutual fund in the foreign jurisdiction.
- Continued to reserve the treatment of pooled investment funds (such as hedge funds and private equity funds) that are not foreign mutual funds. Therefore, there continues to be no FBAR filing requirement for these interests until further notice, although this matter remains under consideration and there may be such a requirement in the future. (As noted in our previous client alert, any such requirement would not apply to any hedge fund or private equity fund interest held in calendar year 2009 and prior years.)
- Clarified that foreign financial account includes annuity policies only if they have a cash value.

Financial interest. As we discussed in our previous client alert, the term "financial interest" is defined broadly and includes any employee benefit plan that maintains an investment in a foreign financial account, whether through legal title or a beneficial interest. In that regard, the Final Rules also did the following:

- Confirmed that participants and beneficiaries in retirement plans under Sections 401(a), 403(a) or 403(b) of the Internal Revenue Code of 1986, as amended (the "Code"), as well as owners and beneficiaries of IRAs under Code Section 408 or Roth IRAs under Code Section 408A, are exempt from filing an FBAR with respect to a foreign financial account held by or on behalf of the retirement plan or IRA.
- Eliminated the "trust protector" provision, which, on its face, may have obligated plan sponsors to file an FBAR on account of their ability to appoint the named fiduciary and their establishment of the underlying trust.

Signature or other authority. As noted in our previous client alert, the filing requirement for anyone with signature or other authority over (but no financial interest in) a foreign financial account (regardless of the type of account) for years 2009 and earlier was postponed to June 30, 2011. Accordingly, persons who fall into such category will be required to file an FBAR for 2010 and prior years (and, of course, persons with a financial interest and signature or other authority continue to be required to file FBAR). The preamble to the Final Rules clarifies that the definition of signature authority applies only to individuals.

The Final Rules rejected commenters' requests that the exemption from filing for employees of public companies with signature authority over the companies' foreign financial accounts be extended to the companies' plans' foreign financial accounts, leaving the door open to potential filing requirements for a number of corporate officers (and others, such as multiemployer plan employees) who have signature authority as a result of their role with respect to employee benefit plan administration.

The Final Rules, however, did modify the definition of "signature or other authority" in a manner that may substantially limit the reporting requirements for those who do not otherwise have a financial interest in the foreign financial account. Specifically, the Final Rules state that individuals have signature or other authority only where they (either alone or with another person) have the authority to control the disposition of money, funds or other assets held in a financial account through direct communication (in writing or otherwise) to the person with whom the financial account is maintained. According to the preamble to the Final Rules, the test is whether the foreign financial institution will act upon a direct communication from the individual (either alone or with another person) regarding the disposition of the assets in the account. Therefore, under this new test, when a corporate or plan official must communicate with respect to the foreign financial account through a U.S. trustee, U.S. custodian, or U.S. investment manager, there is no signature or other authority and, therefore, no FBAR filing requirement for the corporate or plan official. The fact that the official may make decisions, such as asset allocation decisions, that ultimately result in the movement of assets into or out of the foreign financial account is not relevant unless the communication can be directly with the person maintaining the foreign account.

Finally, the Final Rules provide that officers or employees who, notwithstanding this change, must file on account of holding signature or other authority over the foreign financial accounts of their employers are not required to personally maintain the records of those foreign financial accounts.

Effective Date

The Final Rules apply to all foreign financial accounts maintained in calendar year 2010 for which an FBAR must be filed by June 30, 2011, and all subsequent years.[2]

As noted above, those with signature or other authority (but no financial interest) in a foreign financial account will also be filing FBARs for years prior to 2010 due to an extension of the deadline for those reports. Although the Final Rules are not technically applicable to foreign financial accounts maintained in those years, the preamble to the Final Rules states that filers may rely on the Final Rules to determine their FBAR filing obligations for those years (as long as the filings were properly deferred under earlier guidance).

Next Steps

Employee benefit plan sponsors, administrators and other potential filers should be particularly mindful of the June 30 FBAR filing deadline, as the failure to file an FBAR can result in significant penalties. Accordingly, sponsors, administrators and potential filers will want to review carefully their employee benefit plan investments to determine whether, taking into account the beneficial changes made by the Final Rules, there remain any financial interests or signature authority in foreign financial accounts that must be reported for calendar year 2010 (and prior years, with respect to those with signature authority but no financial interest).

This review should be undertaken well in advance of the June 30, 2011 deadline, particularly because of the FBAR-related questions on other federal tax returns, including personal federal income tax returns due on April 18, 2011.

Please contact a member of the Employee Benefits, Executive Compensation & ERISA Litigation Practice Center with any questions on FBAR filing requirements.

[1] This client alert focuses only on those aspects of the Final Rules that are most likely to affect employee benefit plans. Readers should be aware that there are other changes made by the Final Rules that may affect FBAR filers in other contexts.

[2] Please be reminded that the filing must be received by the U.S. Department of Treasury (not simply mailed) by June 30. The Final Rules refused to address commenter requests to change the due date to address this issue (due to the fact that the due date is contained in a separate regulation that was not the subject of the required rulemaking procedure).

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  Special Pension Investment Counsel
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