Proskauer

FBAR Redux: Upcoming Deadline for Pension Plans

June 8, 2010

We wanted to remind you of the upcoming June 30, 2010 deadline for filing the Report of Foreign Bank and Financial Accounts (FBAR) (Form TDF 90-22.1) by U.S. persons that held a financial interest in a foreign financial account for calendar year 2009 if the aggregate value of all the U.S. person's foreign financial accounts exceeded $10,000 at any time during the year. This filing must be received by the U.S. Department of Treasury on June 30, 2010 (not merely postmarked by such date). There are no extensions of time to file the FBAR. You should be particularly mindful of this requirement because the failure to file an FBAR can result in significant penalties.

For purposes of these filing requirements, the term “financial interest” is defined very broadly. It would include any employee benefit plan that maintains an investment in a “foreign financial account” and the institutional trustees or board of trustees of such plan. It may also include the individual members of the board of trustees of a plan if such members are deemed to hold legal title to the plan’s assets, or a plan sponsor (if the plan sponsor has appointed a "trust protector" that is subject to the plan sponsor’s direct or indirect instructions). Accordingly, some individual trustees and plan sponsors are filing the FBAR on a protective basis and reporting the existence of such financial interests on their individual income tax returns or other applicable returns.

A foreign financial account would include, for example, a foreign bank account, a foreign custodial account (which may be in place for separate accounts investing in foreign securities), and an interest in a foreign mutual fund. Although foreign hedge funds and private equity funds may fall within the definition of foreign financial accounts, the Internal Revenue Service (IRS) has announced that there is currently 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). Please be aware that a plan may have other tax filing requirements in connection with an interest in a foreign hedge fund or private equity fund (for example, Forms 926, 5471 and 8865), but any such filings would be made with the plan’s Form 5500 filing.

The upcoming June 30, 2010 deadline relates to any foreign financial account maintained in calendar year 2009, but you should also consider whether there was a filing obligation for a prior calendar year that may not have been satisfied. To determine whether the plan, the plan sponsor and the trustees have an FBAR filing requirement, we suggest the following steps be taken:

1. Have the plan's investment consultant or investment committee advise as to whether the plan has invested in any foreign entities.
2. Have the plan's investment consultant or investment committee advise as to whether any of the separate account managers has invested in foreign securities and has established a foreign custodial or other foreign financial account in connection with those investments.
3. Have the plan's accountant or other tax preparer review the results of the investment consultant's or the investment committee's inquiry and assist in completing the relevant forms, if required.

Please note that the requirement for anyone with signatory authority over (but no financial interest in) a foreign financial account (regardless of the type of account) to file an FBAR has been postponed to June 30, 2011. Thus, there is no requirement for individuals or other U.S. persons with only signatory authority to file at this time. In addition, these individuals or other U.S. persons do not need to report the existence of such accounts on their income tax returns.

* * *

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this document is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any transaction or matter that is contained in this document.

Related Professionals

- **Pamela A. Onufer**
  Special Pension Investment Counsel

- **Robert M. Projansky**
  Partner
- **Steven D. Weinstein**
  Partner
- **Amanda H. Nussbaum**
  Partner