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REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS (FBAR) EMPLOYEE BENEFIT PLANS, RETIREMENT TRUSTS AND INDIVIDUAL RETIREMENT ACCOUNTS IRS EXTENDS AMNESTY DEADLINE

By Cathryn B. Sportsman, J.D. and Jeremy M. Pelphey, J.D.
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Title I, Section 404(b) of the Employee Retirement Income Security Act (ERISA) prohibits a fiduciary of an ERISA plan from maintaining indicia of ownership of plan assets outside the jurisdiction of United States courts. However, it is not a blanket prohibition against investment in foreign assets, and not all plans are governed by Title I of ERISA. Thus, some plan assets and individual retirement accounts may be invested in foreign assets and such investments may trigger reporting requirements that carry with them stiff penalties for non-compliance.

On September 21, 2009 the Internal Revenue Service (IRS) announced an extension of the deadline for special voluntary disclosures by persons, including employee benefit plans and retirement trusts and individual retirement accounts (IRAs), who previously failed to disclose certain investments in foreign assets and to comply with certain foreign bank account reporting rules and requirements. In IR-2009-84, the IRS announced that the deadline, which had been set to expire on September 23, 2009, has been extended to October 15, 2009. The IRS also announced that there will be no further extensions.

The IRS has received several comments and suggestions to exempt employee benefit plans, retirement trusts and IRAs from the FBAR filing requirements. However, to date, the IRS has not responded to these comments and suggestions.

Action Items

Sponsors, administrators, trustees and other fiduciaries of employee benefit plans and IRAs should take advantage of the special voluntary disclosure period to review their plan investments to determine if the FBAR rules apply. In any case where plan or IRA assets include foreign investments, plan sponsors and fiduciaries should seek legal advice to determine the applicability of the FBAR reporting requirements to their plans. Third party administrators, consultants and advisors

should consider sending out questionnaires specifically asking about foreign investments.

Background

The Report of Foreign Bank and Financial Accounts (commonly known as FBAR) had its origins in the Bank Secrecy Act of 1970 which requires certain persons to keep records and file reports with the IRS that serve to detect and prosecute money laundering. The FBAR rules are expansive and apply to U.S. persons that hold a *financial interest* in or have *signature or other authority* over foreign *financial account* investments that, in the aggregate, exceed \$10,000 (similar to the Bank Secrecy Act of 1970). For FBAR purposes, the term "person" includes individuals, all forms of business entities, domestic trusts and estates. There are no exceptions for employee benefit plans, retirement trusts or individual retirement accounts.

Financial Account

A financial account includes any bank accounts (such as savings, checking, and time deposits), securities, securities derivatives, or other financial instruments accounts. Such accounts generally also encompass any accounts in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund (including mutual funds).

Financial Interest

A financial interest includes accounts for which the U.S. person is the owner of record, or has legal title, whether the account is maintained for his benefit or for the benefit of others.

A financial interest also includes accounts where the owner of record or holder of title is a person acting as an agent, nominee, or in some other capacity on behalf of a U.S. person.

The FBAR reporting requirements apply not only to direct interests in foreign investments but also

Attorneys

- Alex M. Brucker
- Linda Russano Morra
- Michael L. Cotter
- Meredith J. Sesser
- Cathryn B. Sportsman
- Jeremy M. Pelphey

T: (310) 475-7540

F: (310) 470-4806

W: www.pensionlawyers.com

to certain investments in U.S. entities with foreign investments. Under the “look-through” rules, an investor with a 50% or greater interest in a U.S. entity is generally considered, for FBAR purposes, as owning any foreign financial accounts owned by the U.S. entity.

Signature Authority

A U.S. person has signature authority if that person can control the *disposition* of money or other property in the account by delivery of a document containing his signature to the bank or other person with whom the account is maintained. For example, a person who has the power to direct how an account is invested but cannot make disbursements or deposits to the account (such as an investment advisor) would not be subject to the FBAR rules because the person has no power of *disposition*; whereas a person who has the power to make disbursements from the account (such as an employee benefit plan sponsor and plan administrator in some instances) would be subject to the FBAR rules.

Application of FBAR Requirements to Retirement Plans

An employee benefit plan that maintains a financial interest in a foreign account (such as a certificate of deposit or an investment in a foreign company) would be subject to the FBAR rules. However, investment by an employee benefit plan in a mutual fund that includes foreign securities in which the employee benefit plan has no equity interest would not be subject to the FBAR rules.

The IRS Q&As on FBAR reporting published on June 24, 2009 do not specifically address the applicability of the FBAR rules to employee benefit plans and retirement trusts; however, as previously indicated, additional guidance has been requested. The Q&As do indicate that the reporting requirements apply to the fiduciary of an IRA with foreign bank accounts. For example, where a U.S. person has control as trustee of an IRA with a foreign account (such as a certificate of deposit from a foreign bank), the trustee, as a fiduciary, is subject to the FBAR rules.

Reporting Requirements

In general, FBAR reporting requirements are met by filing Form TD F 90-22.1. In most instances, each person must file their own Form TD F 90-22.1. The form is available on the IRS website at www.irs.gov. The Form must be filed for any year in which aggregate value of the foreign financial

accounts exceeds \$10,000 during the calendar year. The deadline for filing is June 30 of the following calendar year.

Penalties

A civil penalty of up to \$10,000 applies to a non-willful failure to timely file an FBAR report, but a reasonable cause exception is available. The civil penalty for a willful failure to timely file an FBAR report can be as high as the greater of \$100,000 or 50% of the account balance, with no reasonable cause exception. In the case of both willful and non-willful failures, the civil penalty can be imposed for each year there is an aggregate account balance greater than \$10,000.

Willful failure to file an FBAR report can also subject a person to criminal penalties of up to \$250,000 in fines and a prison term of up to five years. If the FBAR violation occurs while violating another law or as part of illegal activity, the penalties are increased to a fine of up to \$500,000 and a prison term of up to ten years.

Amnesty

On May 6, 2009, the IRS announced that it would not impose a penalty for failure to timely file an FBAR provided an FBAR report was filed by September 23, 2009; the most recent announcement extended this deadline to October 15, 2009. On June 24, 2009 the IRS clarified that the amnesty also applies to 2008 reporting requirements. The amnesty applies to taxpayers who had reported and paid tax on all taxable income but only recently learned of their FBAR filing obligation. (Presumably, in the case of a tax-exempt entity such as a qualified pension trust or an IRA that had no taxable income, the requirement to report and pay all taxable income is automatically met.)

Conclusion

While there has been confusion about the extent to which FBAR reporting requirements apply to employee benefit plans and retirement trusts, sponsors, administrators, trustees and advisors of employee benefit plans should take advantage of the amnesty extension to review their plan investments to determine if FBAR rules apply. The FBAR rules must be carefully considered as soon as possible as the IRS has indicated that there will be no further extensions of the reporting requirements on Form TD F 90-22.1.

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