

Employee Benefits and Executive Compensation

March 5, 2010

Treasury, IRS Issue Proposed Regulations and Guidance Addressing FBAR Reporting Requirements for Retirement Plans

At the end of February, the Financial Crimes Enforcement Network (FinCEN) bureau of the U.S. Department of the Treasury issued proposed amendments to the Bank Secrecy Act regulations governing Reports of Foreign Bank and Financial Accounts, commonly referred to as "FBAR." (Proposed Regulations). The Internal Revenue Service (IRS) also issued Notice 2010-23 (the Notice), providing relief on some plan-related FBAR filing requirements, and Announcement 2010-16 (the Announcement), clarifying that the filing requirement for 2009 and prior years relates only to U.S. citizens, residents and domestic entities.

These reporting requirements relate to foreign financial accounts owned or controlled by U.S. persons and are aimed primarily at money laundering and other evasion of U.S. law. However, the broad scope of the FBAR requirements raised questions about what compliance was necessary by U.S. retirement plans, many of which utilize foreign-based accounts or investment vehicles. The following are important points discussed in the Proposed Regulations and Notice.

- No 2009 or prior year reporting requirement for most private investment funds. The Proposed Regulations describe the types of accounts for which reporting is required. These include foreign bank accounts, securities accounts, accounts with a broker or dealer in futures and commodities, and mutual funds or similar pooled funds available to the general public which have regular valuations and redemptions. FinCEN reserved a determination whether other investment funds, such as private equity, venture capital and hedge funds, will be accounts for which reporting is required. The IRS stated in the Notice that interests in commingled accounts other than foreign mutual funds would not be required for 2009 or prior years. Such reporting might be required for future years, however, as a result of future FinCEN action.
- Plan participants and IRA holders do not have individual FBAR reporting obligations. Under the Proposed Regulations, a participant in a tax-qualified retirement plan, 403(a) or 403(b) annuity plan, or the owner of a traditional or Roth individual retirement account (IRA) is not required to make an FBAR filing with respect to foreign financial accounts held by or on behalf of the retirement plan or IRA. This does not mean there is no FBAR filing requirement, but it is the responsibility of the plan or the IRA trustee, which FinCEN believes will be in a better position to determine the existence of a foreign financial account. Accordingly, a plan participant or IRA holder with no other foreign financial accounts would not check any box on his or her individual tax return indicating ownership or control over such an account.

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- FBAR filing requirements suspended for individual fiduciaries and administrators with no financial interest in a foreign financial account. There has been concern that persons such as plan administrators or members of plan investment committees who have signature authority for, but no financial interest in, a foreign financial account had to make an FBAR filing and disclose the signature authority on their personal tax returns. The FBAR filing deadline for such persons with respect to 2010 and prior calendar years has now been extended until June 30, 2011 (presumably to allow FinCEN more time to determine what filing requirements should apply to such persons). In addition, the Notice explains that an individual who is subject to this relief and who has no other interest or authority in a foreign financial account should answer “no” to questions on federal tax forms for 2009 and prior years that ask about a financial interest in, or signature authority over, a foreign financial account.
- FBAR filing requirements suspended for persons who are not U.S. citizens, U.S. residents or domestic entities. When the IRS changed the definition of “United States person” in October 2008 to encompass anyone in or doing business in the United States, it raised numerous questions regarding the filing requirements for foreign persons and entities who were arguably doing business in the United States. The Announcement suspends the FBAR filing requirement for 2009 and prior years for all persons who are not U.S. citizens, U.S. residents or domestic entities, but filing requirements for persons who are eligible for this relief may be subject to other requirements in future years.

Please note that, subject to the modifications and exceptions discussed here, plans that utilized foreign financial accounts in 2009 and prior years are still subject to the previously announced FBAR reporting deadlines. See <http://www.kattenlaw.com/employee-benefit-plans-must-assess-fbar-filing-requirement-for-offshore-accounts-07-23-2009/> and <http://www.kattenlaw.com/irs-extends-fbar-filing-date-08-12-2009/>.

The Proposed Regulations, Notice and Announcement can be accessed [here](#).

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