

Final FBAR Reporting Rules Provide Relief, But No Exemption, for Pension Plans Investing in Foreign Accounts

by Susan P. Serota

On February 24, 2011, the Financial Crimes Enforcement Network of the Department of Treasury (FinCEN) issued final rules on FBAR filing requirements applicable to U.S. persons, including U.S. pension plans that invest in foreign financial accounts or who have signature authority over such accounts. Although a complete exemption for U.S. pension plans from the reporting requirements was not adopted, the revised regulations provide relief from certain filings.

The final regulations amend the Bank Secrecy Act regulations regarding Reporting on Foreign Financial Accounts (FBAR) and will be effective for the 2010 FBAR filing due by June 30, 2011, and for prior years for which the FBAR filing was deferred pursuant to IRS Notices 2009-62 and 2010-23. (See our earlier alert at <http://www.pillsburylaw.com/index.cfm?pageid=34&itemid=39582>.) A U.S. person is required to file a FBAR report if such person has a "financial interest in" or "signature authority over" a bank, securities or other financial account in another country on Form TD-F- 90-22.1. Any such person must also disclose this on his or her 2010 Federal income tax return due on April 16, 2011 (subject to an extension). United States persons are defined as U.S. citizens, U.S. residents and any entity, including a corporation, partnership, trust or limited liability entity organized or formed under the laws of the United States, any State, the District of Columbia, the territories and Insular Possessions of the United States or the Indian Tribes.

U.S. Pension Trusts Must File FBARs

Although comments had been submitted on the proposed regulations requesting a broad exemption for pension plans and welfare plans, FinCEN determined that it was not appropriate to exempt entities from the FBAR requirement based on their tax-exempt status. Thus, the final regulations are clear that the trustee of a U.S. pension trust will have to file for all foreign financial accounts for which it is the owner of record or has legal title. However, a pension trust that invests in foreign financial accounts through a U.S. global bank custodian that maintains an omnibus account for such investments—e.g., a collective or group

trust—does not have to file FBAR reports with respect to such foreign assets provided the pension trust has no legal right in the assets of the omnibus account and can only access these holdings outside the U.S. through the U.S. global custodian bank. If however, the custodial arrangement permits the U.S. pension trust to directly access its foreign holdings maintained at the foreign institution, then the U.S. pension trust would have to report such an account.

Although a U.S. pension trust has to report a holding in a foreign mutual fund, holdings in foreign hedge and private equity funds whose shares are not available to the general public (and do not have a regular net asset value determination and regular redemptions) are excluded from the definition of a "mutual fund or similar pooled fund" deemed to be a foreign financial account and would not be reportable by the trust.

The same analysis applies to other U.S. qualified plan trusts, e.g., a 401(k) plan trust, and to other U.S. company and subsidiary qualified plan trusts. Note, the final regulations kept the exemption from FBAR reporting for participants and beneficiaries in qualified retirement plans, as well as owners of IRAs and ROTH IRAs with respect to a foreign financial account held by or on behalf of the retirement plan or IRA.

Pension Committee Members with "Signature or Other Authority"

With respect to "signature or other authority" over foreign financial accounts, even though the final regulations provide an exemption for officers and employees of an entity with a class of equity securities listed on any U.S. national securities exchange from being subject to the signature authority reporting requirements with respect to a foreign financial account of such entity if such officer or employee has no financial interest in the account, such exemption does not extend to employee benefit trusts established by the entity listed on the U.S. national securities exchange. The final regulations revise the definition of "signature or other authority" to mean, with certain exceptions not applicable to pension plans, "the authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account *by direct communication* (whether in writing or otherwise) to the person with whom the financial account is maintained" (emphasis added). Thus, the final FBAR regulations provide that only individuals who communicate "directly" with the person with whom the foreign financial account is maintained regarding the disposition of money, funds or other assets held in the account, have the "signature or other authority" which requires filing FBAR reports. This new test of "direct communication" by the individual provides pension plan committee members relief from filing where the pension committee members only communicate with a U.S. trustee or with U.S. investment managers. Under these circumstances, the committee members would not be communicating "directly" with the foreign person maintaining the foreign account—even though the trustee or the investment manager invests pension assets in a foreign financial account. Presumably, the in-house staff assisting the committee would also not be communicating directly with the entity maintaining the foreign account. The above analysis is subject to any resolutions of the committee or company relating to signatory authority of specific individuals due to dollar investment thresholds who may actually communicate "directly" with the person maintaining the foreign account regarding disposition of assets in the foreign account.

Further, if any member of the company's or a foreign subsidiary's investment committee has "signature or other authority" over the accounts held in the foreign trusts and is a U.S. person, such individual would have to file FBARs relating to such foreign trust and accounts.

FBAR Analysis Should Be Implemented Immediately

In light of the April 16, 2011 due date for filing federal income tax returns which must disclose whether the individual taxpayer has any financial interest in or signature or other authority over a foreign financial

account, U.S. pension plan committees, trustees and investment managers should implement a process to review the investment of plan assets in foreign financial accounts and determine which U.S. persons, if any, need to file an FBAR report. This process should be updated during the first quarter of each year.

If you have any questions about the content of this publication, please contact the Pillsbury attorney with whom you regularly work or the Executive Compensation & Benefits group.

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