

ALERT

JUNE 29, 2011

EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION

News Concerning Recent
Employee Benefits & Executive Compensation Issues



FURTHER UPDATES – FBAR REPORTING REQUIREMENTS FOR EMPLOYEE BENEFIT PLANS

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Since our previous Alert, the Treasury Department has issued final regulations and a new disclosure form for the Report of Foreign Bank and Financial Accounts (FBAR), instituted a new Offshore Voluntary Disclosure Program, and provided certain individuals with extensions of filing deadlines.

FBAR REPORTING

The actual FBAR filing is short and simple; however, the penalties are potentially severe – civil penalties of up to \$10,000 for a nonwillful violation and the greater of \$100,000 or 50 percent of the amount in the account for willful violations. Criminal penalties could also apply.

FBAR reporting is required of any “U. S. person” (U. S. citizens and residents, and domestic corporations, partnerships, and trusts, including employee benefit trusts) that holds either a *financial interest* in or *signatory authority* over a foreign *financial account* if the aggregate value of such accounts exceeds \$10,000 at any time during the calendar year. The 2010 disclosure is made by filing Form TD F 90-22.1, which must be received by the Department of Treasury (not merely mailed) by June 30, 2011.

A financial interest is broadly defined. It includes direct ownership of an account (legal title or record ownership), whether for the holder or for the benefit of others, and indirect ownership through corporations, partnerships, or trusts in which the filer owns more than 50 percent of the voting power, value, capital, or beneficial interests.

A financial account includes any bank account, brokerage, or securities account, derivatives or financial instrument account, life insurance or annuity policy with a cash value, and any mutual fund or pooled fund that is available to the general public with regular valuations and redemptions.

It does not include the owner of beneficial interests in a retirement plan or an IRA that hold such an account (although the plan or IRA would be required to file). Also, it would not include accounts with a U. S. financial institution even if the account contained holdings of foreign assets. Accounts of state or local governments, including their retirement and welfare benefit plans, are excluded. At this time, foreign hedge funds and private equity funds are excluded.

FBAR reporting extends to individuals who have signatory authority over a foreign financial account even if they have no financial interest in the account. Such persons must file even if the legal and beneficial owner also files with respect to the same account. Signatory authority contemplates control over the disposition of funds in the account by delivery of instructions. It does not apply to mere control of the investment of the account without its disposition. For example, it would not apply to employee benefit plan committee members who have authority to make decisions regarding plan assets but who cannot authorize the disposition of those assets. Also excluded from this category are employees of banks, financial institutions, and entities that are listed on a U. S. national securities exchange.

2011 OFFSHORE VOLUNTARY DISCLOSURE PROGRAM.

The IRS is presently operating a program under which taxpayers may report previously undisclosed foreign accounts and avoid certain applicable civil penalties and criminal prosecution. The program replaces a more generous one which ran in 2009. Under the 2011 program, taxpayers must report and pay taxes for the preceding 8 years, pay interest and accuracy-related penalties, and pay a penalty which will range between 25 percent and 5 percent of the highest balance in the foreign account. The required submissions must be made by August 31, 2011, although

an extension of this deadline is possible if the taxpayer can demonstrate a good faith attempt to comply by such date.

The voluntary disclosure program is for taxpayers who failed to report income from foreign accounts and failed to file the required FBAR's. If the taxpayer did report all of his taxable income, he should not utilize the program. Instead, he should file the pre-2010 FBAR's before August 31, 2011 with an explanation as to the late filing. If the failure to file was due to reasonable cause, no penalties will be asserted.

LAST MINUTE EXTENSIONS

The IRS has recently provided extensions for certain persons that are required to file FBAR solely because they have signatory authority over the foreign financial account but no

financial interest. A subset of employees of banks, financial institutions, and exchange-listed entities may defer filing until June 30, 2012 for FBAR's for 2010 and earlier years. Other employees with signatory authority only may defer filings until November 1, 2011 for 2009 and earlier years but not for 2010. All other filers must meet the June 30, 2011 deadline for all years, including 2010.

If you have any questions on the information presented in this alert, please contact Arthur Zatz at 215.665.2194 or azatz@cozen.com.