

## EXPANDED FBAR REPORTING REQUIREMENTS FOR EMPLOYEE BENEFITS PLANS

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Recent IRS pronouncements have expanded the obligation of retirement and other employee benefits plans, along with other taxpayers, to file the Report of Foreign Bank and Financial Accounts ("FBAR"). FBAR reporting requirements have been around for many years. A "U. S. person" (U. S. citizens and residents, certain foreign persons doing business in the U. S. and domestic corporations, partnerships and trusts, including employee benefits trusts) which holds either a financial interest in or signatory authority over a foreign financial account must file a FBAR report if the account exceeds \$10,000 at any time during the year. In recent months, enforcement of this reporting requirement has been stepped up as part of a broader IRS enforcement initiative against taxpayers who fail to report income from off-shore investments.

The actual FBAR filing is short and simple. However, the penalties are potentially severe - civil penalties of up to \$10,000 for a non-willful violation and 50% of the amount in the account for willful violations. Criminal penalties could also apply.

### EXPANDED FBAR REQUIREMENTS

FBAR has focused primarily on foreign bank accounts. Revised instructions to the FBAR form now indicate that a foreign "financial account" includes any comingled fund, such as a mutual fund, in which the owner holds an equity interest. In addition, recent oral comments by IRS representatives set forth the view that this definition extends to foreign hedge funds. Thus, employee benefits plans which have never had a foreign bank account may in fact have a filing obligation in connection with foreign mutual or hedge funds. The obligation to file exists if the mutual or hedge fund is located outside of the U. S., even if it invests entirely in U. S. securities. It does not apply to a mutual or hedge fund which is located in the U. S. but invests in foreign securities, unless the U. S. person owns more than 50% of the voting interest in a corporate fund or more than 50% of the profits or capital interest in a

partnership fund. Because the FBAR reporting requirements extend to individuals who have signatory authority over a foreign financial account, there may be multiple filings with respect to the same account. The trustee of the employee benefits plan and perhaps the plan committee (there is no guidance on this point) may also be required to file.

### REPORT DEADLINES

The FBAR reports for 2008 were due to be filed by June 30, 2009. No extension was possible. On June 24, the IRS extended the filing deadline until September 23, 2009 for taxpayers who reported and paid tax on all of their income from foreign accounts but who only recently learned of their FBAR filing obligation. The extension will also permit taxpayers who failed to file FBAR for prior years and who paid tax on the related taxable income to submit reports for each of the prior six years by September 23, 2009, with an explanation of why they were not timely filed. No FBAR penalties will then apply.

If a taxpayer *did not file its FBAR report and did not report and pay tax* on the income from the applicable account, a voluntary disclosure program is also available through September 23, 2009 to provide partial relief. If the taxpayer files its FBAR reports and amended tax returns, it will receive reduced FBAR penalties but pay regular income tax and some, but not all, applicable income tax penalties.

*If you need assistance in this area please contact one of the following attorneys in our Employee Benefits & Executive Compensation Group.*

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