

ALERT

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EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION

News Concerning Recent
Employee Benefits & Executive Compensation Issues



UPDATE – FBAR REPORTING REQUIREMENTS FOR EMPLOYEE BENEFIT PLANS

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During the past year, we have reported on expanded obligations of retirement and other employee benefit plans, along with other taxpayers, to file the Report of Foreign Bank and Financial Accounts (“FBAR”). This report must be received by the U. S. Department of Treasury (not merely mailed) by June 30, 2010. There are no extensions of time to file. Recently, further guidance and administrative relief have been provided by the IRS for the 2009 FBAR.

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 non-willful violation and the greater of \$100,000 or 50% of the amount in the account for a willful violation. 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) which hold 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 year.

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

DEFINING A “FINANCIAL ACCOUNT”

A “financial account” includes any bank account, brokerage account or securities, derivatives or other financial instrument account. It also includes a foreign commingled fund, such as a mutual fund located outside of the United States. It would not apply to a U. S. mutual fund which invests in foreign securities unless the U. S. person’s ownership of the U.S. mutual fund

exceeds 50%. Informal comments by IRS staff had suggested that it would also include offshore hedge funds and private equity funds. However, in Notice 2010-23, the IRS announced that the FBAR requirement would not apply to foreign hedge funds or private equity funds for 2009 and prior years. The announcement does not change the FBAR requirement with respect to mutual funds. Proposed regulations reserve the question of foreign hedge funds and would further clarify the other types of financial interests which are covered. These regulations will not be effective until adopted.

CERTAIN FILING RELIEF

FBAR reporting requirements extend to individuals who have *signatory authority* over a foreign financial account even if they have no financial interest in the account. Thus, multiple filings may be required with respect to the same account. For example, the trustee of an employee benefits plan and perhaps plan committee members might be required to file in addition to a filing by the plan itself. *Signatory authority* contemplates control over the disposition of funds in the account by delivery of instructions. The ability to control the investment of the account but not its disposition will not subject the controlling party to a reporting requirement.

Notice 2010-23 also provided temporary relief to persons with *signatory authority* over, but no financial interest in, a foreign financial account. These individuals may wait until June 30, 2011, to report with respect to foreign financial accounts for 2009 and prior years. The proposed regulations would eliminate the requirement permanently for employees and officers (including plan committee members) of certain obligated filers who have *signatory authority*.

The IRS had administered an amnesty program which provided reduced penalties to FBAR nonfilers. The program ended in 2009.

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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