

Employee Benefits & Executive Compensation ADVISORY

June 17, 2011

FBAR Filing Deadline – June 30 Some Relief Granted for Prior Year FBAR Filings

This advisory reminds employee benefit plan sponsors and plan personnel of the upcoming June 30, 2011, deadline for filing 2010 FBAR information statements. The advisory also summarizes some recent relief granted with respect to prior year filings.

2010 FBAR Filing Deadline – June 30, 2011

Under final regulations published in February 2011 under the Bank Secrecy Act, FBAR (Report of Foreign Bank and Financial Accounts) filings for the 2010 calendar year are due no later than June 30, 2011.

Generally, each U.S. person who has a financial interest in, or signature or other authority over, any foreign financial accounts whose aggregate value exceeded \$10,000 at any time during a calendar year, must file the FBAR information statement (Form TD F 90-22.1) before June 30 of the following calendar year. Civil and criminal penalties may apply for failures to timely file the FBAR statement.

The final regulations declined to grant a blanket exemption to the FBAR filing requirements for employee benefit plans and plan personnel and, therefore, benefit plan sponsors and related plan personnel may be subject to the FBAR filing requirements. We remind plan sponsors and plan personnel to review their employee benefit plans to ensure timely compliance with the upcoming June 30, 2011 deadline for 2010 FBAR filings. We have provided some details regarding items of particular interest to employee benefit plan sponsors and plan personnel below.

Individual 1040 Form Requirement

Individuals with signature authority or other authority over, or a financial interest in, foreign accounts may also be required to check a box on Schedule B of the individual's Form 1040 tax return regarding the individual's relationships with the foreign accounts. Individuals required to make a 2010 FBAR filing should check with their tax advisor to ensure that this requirement is met for their 2010 tax returns.

June 30, 2011 Deadline Extended for some 2009 and Earlier FBAR Filings

Notice 2011-54, recently issued by the IRS, provides some FBAR filing relief for filers who relied on a filing extension granted in IRS Notice 2010-23. IRS Notice 2010-23 extended the FBAR filing deadline

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until June 30, 2011, for persons with signature or other authority over, but no financial interest in, a foreign financial account for the 2009 or earlier calendar years.

Due to difficulty in compiling the information needed to complete accurate FBAR filings with respect to 2009 or earlier calendar years by the June 30, 2011 deadline, the IRS and the Financial Crimes Enforcement Network (FinCEN) have extended the filing deadline granted under Notice 2010-23 until November 1, 2011.

Notice 2011-54 does not change the filing deadline with respect to 2010 FBAR filings.

Important FBAR Issues for Employee Benefit Plan Sponsors and Plan Personnel

The final FBAR regulations contained several important items of guidance relevant to employee benefit plan sponsors and plan personnel.

- *Final Regulations Eliminate the Filing Obligation for So-called “Trust Protectors.”* Under the proposed regulations, where a plan sponsor had appointed a committee or named fiduciary with powers to appoint, replace or influence the activities of a plan trustee, it appeared that the plan sponsor would be deemed to have a financial interest in any foreign accounts under the plan’s trust. Under the final regulations, this rule was excluded, meaning that plan sponsors will not be required to file an FBAR merely because they appointed a named fiduciary with authority over the plan’s trustee.
- *Clarification of “Signature or Other Authority.”* Under the final regulations, in order for a U.S. person to have “signature or other authority,” the person must have the ability to control the disposition of assets in a foreign account by direct communication with the person with whom the account is maintained. This is particularly helpful to employee benefit plans because it presumably eliminates the need to file an FBAR statement for benefit plan committee members who merely administer a plan or participate in decisions regarding the allocation of plan assets, but who do not have the authority to contact directly a foreign financial institution and authorize disposition of plan assets.
- *Clarification of “Foreign Financial Account.”* The preamble to the final regulations clarifies that an account is not a foreign account under FBAR if it is maintained with a financial institution located in the United States, even if the account happens to hold foreign securities. The preamble to the final regulations also clarifies that, in general, a U.S. person will not have to file an FBAR information statement with respect to a custodial or omnibus account where a U.S. financial institution acts as a global custodian or intermediary if the U.S. person cannot “directly access” the foreign holdings in that account.
- *Filing Not Required for Offshore Hedge Funds or Private Equity Funds.* The final regulations “reserve” treatment of off-shore hedge funds, private equity funds and other commingled investment funds as foreign accounts for which an FBAR filing would be required. Thus, until additional guidance is issued, the only type of commingled investment funds that trigger

FBAR filing obligations are foreign “mutual funds” or similar funds which issue shares generally available to the general public and offer regular redemptions.

- *Plan Participants and Beneficiaries Not Required to File.* Participants in and beneficiaries of qualified retirement plans under Section 401(a) of the Code, qualified annuity plans under Section 403(a) of the Code or tax-deferred annuity plans under Section 403(b) of the Code, as well as owners and beneficiaries of individual retirement accounts under Code Sections 408 and 408A, are not required to file the FBAR information statements with respect to a foreign financial account held by or on behalf of the plan or IRA.
- *Exception for Governmental Plans.* A foreign financial account of any employee retirement or welfare plan of a governmental entity is not required to be reported on FBAR by any person.

Please contact your Alston & Bird LLP attorney if we can assist you with questions regarding the FBAR filing requirements related to employee benefit plans.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any one of the following:

Members of Alston & Bird's Employee Benefits & Executive Compensation Group

Robert A. Bauman
202.239.3366
bob.bauman@alston.com

David C. Kaleda
202.239.3329
david.kaleda@alston.com

John B. Shannon
404.881.7466
john.shannon@alston.com

Saul Ben-Meyer
212.210.9545
saul.ben-meyer@alston.com

Laurie Kirkwood
404.881.7832
laurie.kirkwood@alston.com

Richard S. Siegel
202.239.3696
richard.siegel@alston.com

Sarah Burke
404.881.7272
sarah.burke@alston.com

Johann Lee
202.239.3574
johann.lee@alston.com

Carolyn E. Smith
202.239.3566
carolyn.smith@alston.com

Emily Seymour Costin
202.239.3695
emily.costin@alston.com

Blake Calvin MacKay
404.881.4982
blake.mackay@alston.com

Michael L. Stevens
404.881.7970
mike.stevens@alston.com

Patrick C. DiCarlo
404.881.4512
pat.dicarlo@alston.com

Emily W. Mao
202.239.3374
emily.mao@alston.com

Jahnisa P. Tate
404.881.7582
jahnisa.tate@alston.com

Ashley Gillihan
404.881.7390
ashley.gillihan@alston.com

Sean K. McMahan
404.881.4250
sean.mcmahan@alston.com

Laura G. Thatcher
404.881.7546
laura.thatcher@alston.com

David R. Godofsky
202.239.3392
david.godofsky@alston.com

Craig R. Pett
404.881.7469
craig.pett@alston.com

Elizabeth Vaughan
404.881.4965
beth.vaughan@alston.com

John R. Hickman
404.881.7885
john.hickman@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com

Kerry T. Wenzel
404.881.4983
kerry.wenzel@alston.com

H. Douglas Hinson
404.881.7590
doug.hinson@alston.com

Thomas G. Schendt
202.239.3330
thomas.schendt@alston.com

Kyle R. Woods
404.881.7525
kyle.woods@alston.com

James S. Hutchinson
212.210.9552
jamie.hutchinson@alston.com

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

Chase Tower
Suite 3601
2200 Ross Avenue
Dallas, TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

4721 Emperor Blvd.
Suite 400
Durham, NC 27703-8580
919.862.2200

SILICON VALLEY

275 Middlefield Road
Suite 200
Menlo Park, CA 94025-4004
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.239.3300

www.alston.com

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