# FBAR Rules for Employee Benefit Plans

**By Marcia S. Wagner**

On Feb. 26, 2010, the Financial Crimes Enforcement Network ("FinCEN") issued proposed regulations regarding foreign bank account reporting on Form TD F 90-22.1 (the "FBAR"). Employee benefit plans and those with authority over their investment activities may be required, like other investors, to file an FBAR if plan investments involve foreign banks or securities accounts. The FBAR for calendar year 2009 had to have been filed with the IRS no later than June 30, 2010.

## General Reporting Requirements

The FBAR reports a person's financial interest in, or signature or other authority over, one or more foreign financial accounts.

### *Financial Interest*

With few exceptions, a person who is a citizen or resident of the United States, including a domestic trust and most other types of domestic entities, must file an FBAR for any calendar year in which that person has a "financial interest" in a foreign bank, securities or other financial account, if during the year the aggregate value of all such accounts exceeds $10,000. This would include credit cards drawn on a foreign bank. A person has a financial interest in a reportable account if the person is "the owner of record or has legal title" to the account, "whether the account is maintained for his own benefit or for the benefit of others."

### *Signature Authority*

A U.S. person who does not own any reportable financial accounts may nonetheless be required to file an FBAR if the person has "signature or other authority" over a reportable account. Signature or other authority includes authority to control the disposition of assets in an account, alone or in conjunction with another, by delivering written or other instructions directly to the person with whom the account is maintained.

## Penalties for Failure to File

Civil and criminal penalties may be imposed for failure to file an FBAR. The IRS may impose civil penalties of up to the greater of: $100,000 or 50% of the value of the foreign account. Furthermore, the government could bring criminal charges for willful failure, a federal felony, punishable by up to a $250,000 fine, five years'a imprisonment, or both. If the willful failure is part of other illegal activity, the penalty doubles to up to $500,000, ten years' imprisonment, or both.

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## Do Employee Benefit Plans Have a Reportable Financial Account?

Employee benefit plans invest plan assets in a wide variety of investments through many different types of investment vehicles, which can be divided into two broad categories: 1) shares and other similar interests in commingled investment funds; and 2) separately managed investments.

### *Commingled Funds*

The proposed regulations make it clear that shares of foreign mutual funds are considered "financial accounts" and must be reported on the FBAR. However, Notice 2010-23 states that pending the issuance of final regulations, other foreign commingled funds such as hedge funds and private equity funds, are not reportable on the FBAR for 2009 or any prior year. Therefore, interests in those foreign commingled funds need not be reported until June 30, 2011, the due date for the 2010 FBAR.

### *Other Separately Managed Investments*

The proposed regulations treat the following as "financial accounts" subject to FBAR reporting: 1) foreign bank accounts; 2) foreign securities accounts; 3) accounts with a foreign financial agency; 4) foreign insurance policies that have a cash value; 5) foreign annuity policies; and 6) foreign brokerage accounts used for commodities trading.

Identifying investments that include reportable accounts is complicated, and identifying the reportable accounts themselves is complicated. ERISA requires the indicia of ownership of plan assets be held in the U.S. For example, when a plan invests abroad in a private equity fund, the plan must hold its ownership interest in the fund in the U.S. Often such interests are held in an account with a U.S. custodial bank. Even though that account is in the U.S., the assets held within the account might be reportable on the FBAR.

In addition, plan investments may trigger an FBAR reporting obligation if the investment involves foreign securities. When a plan allocates assets for investment by a professional investment manager solely on behalf of the plan (*i.e.*, a separately managed investment, as opposed to a commingled fund), those assets generally are placed in an account with a U.S. custodial bank. U.S. custodial banks generally open sub-custody accounts with banks in foreign countries to settle foreign securities transactions. These accounts may be established with an unrelated foreign bank, or in a foreign branch of an affiliate of the U.S. custodian. Although not entirely clear, it is advisable to report sub-custody accounts on the FBAR.

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## *FBAR*

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### Who Must Report a Plan's Foreign Accounts?

Because many different parties may be involved with an employee benefit plan's investments, the broad language of the instructions and proposed regulations could require a number of identical FBARs be filed with respect to a single plan account. Some of these FBARs will report a "financial interest" in plan accounts, while others will report "signature or other authority." A plan investment in a foreign financial account may trigger an FBAR filing by:

- *The Plan Trust.* The proposed regulations confirm that employee benefit plans are not exempt from filing the FBAR. In addition, because certain trusts are considered "financial accounts," an FBAR may be required with respect to rabbi trusts.
- *The Plan Sponsor.* The current instructions may require plan sponsors to file an FBAR to report a financial interest in any foreign financial account held by the plan. A person is treated as having a financial interest in "a trust that was established by the person and for which the person has appointed a trust protector that is subject to the person's direct or indirect supervision." The term "trust protector" is not defined in the proposed regulations.
- *Members of a Plan Committee,* such as an Investment Committee or Administrative Committee, and Other Officers and Employees of the Plan Sponsors. Each committee member, officer or employee with the requisite signature or other authority over the plan's foreign financial accounts may be required to file an FBAR to report that authority, and may also be required to report on their personal income tax return that they were required to file an FBAR.
- *The Plan's Trustees.* Plan trustees, whether institutional or individual, may have to report both a financial interest in and signature or other authority over plan accounts. Plan trustees generally have authority to execute documents on behalf of the plan, or at least to deliver instructions to financial institutions that hold plan assets. Each plan trustee with such authority may be required to report "signature or other authority" over plan accounts. Furthermore, trustees may be required to report legal title to plan accounts as a "financial interest" in those accounts.
- *Others Involved with the Plan's Investments, such as an Investment Adviser, Investment Manager, or Custodial Bank.* Whether an investment advisor, investment manager or custodian must file an FBAR to report a financial interest in, or signature authority over, plan accounts may depend in large part on their responsibilities under the terms of their contractual arrangements and on the facts and circumstances of each case. Some cases in which an FBAR filing may be required include: an investment adviser with authority to execute investment-related documents on behalf of the plan; an investment manager with discretionary authority over the investment of plan assets; and a custodial bank or other financial institution with record ownership of a plan's foreign accounts.

### Disclosure on Form 1040

If an individual is required to file an FBAR (*e.g.*, a trustee), he must disclose that on Schedule B of his or her personal income tax return (Form 1040). Notice 2010-23 relieves those with signature or other authority of the obligation to make this disclosure on their 2009 and prior years' tax returns. However, if trustees are required to report financial interests in plan accounts, they arguably would not be entitled to this relief and, therefore, may be required to make an FBAR-related disclosure on Form 1040.

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