

FBAR Relief For Benefit Plans is Urgently Needed

FBAR Background

- The Currency and Foreign Transactions Reporting Act of 1970, commonly referred to as the "Bank Secrecy Act," authorizes Treasury to require U.S. citizens and residents to provide reports regarding transactions with foreign financial institutions. Congress was concerned that foreign financial institutions were being used to help persons evade income taxes, conceal assets illegally, and finance organized crime. As a result, Treasury developed the "Report of Foreign Bank and Financial Accounts – Form TD F90-22.1" ("FBAR"). FBAR must be filed by June 30 for the previous calendar year.
- The current FBAR filing instructions provide that FBAR must be filed by each "U.S. person" who has a "financial interest in" or "signature or other authority over" a "foreign financial account" that, aggregated with his or her other foreign financial accounts, has a value exceeding \$10,000 at any time during the calendar year. All of these terms are very broadly defined, and the same account may be reported on multiple FBAR filings.
- Persons required to file FBAR are subject to a parallel reporting requirement on their personal tax returns. For example, Form 1040, Schedule B, Line 7, requires the taxpayer to report any "interest in" or "signature or other authority over" a "foreign financial account" and to report the name of the country in which the account is located.

How FBAR Applies to Plans and Plan Officials

- Over the past three decades, tax-exempt retirement plans (e.g., plans qualified under sections 401(a) and 501(a) of the Code) have increasingly focused on international investments and currently hold nearly \$1.5 trillion in foreign investments. These investments are made through a variety of foreign accounts – only recently recognized to fall within the FBAR definitions. Plans participate in foreign brokerage, securities, and subcustody accounts all over the world.
- Company officers (e.g., CFO or Treasurer) and other key employees often serve on plan investment committees to provide their special expertise on sophisticated investment matters. In doing so, they are subject to ERISA fiduciary responsibility rules and personal liability for breaches of duty.

Plans and Plan Officials Should Not be Subject to FBAR

Purposes Not Served

- The purposes of FBAR – to detect and prevent tax evasion, money laundering and other criminal activities – are not furthered by requiring Plan-related filings. Indeed, there is no indication they ever have been used in these activities.

- Plans, and the persons that run them and carry out their activities, are subject to extensive regulation under the Code and ERISA – including oversight by IRS and the Department of Labor ("DOL") – to ensure that they are administered for their intended purposes (i.e., to provide benefits to participants and beneficiaries).
- Financial institutions that provide services to plans are required by the Patriot Act to have anti-money laundering programs and to report suspicious activity.

Detailed Information Already Available

- The information FBAR provides – namely the location of "foreign financial accounts" and the identity of persons that own, hold, or manage those accounts – is already available to Treasury. Plans are required to disclose annually information regarding their investments, service provider relationships, and significant transactions on Form 5500 and accompanying schedules.
- Plans are also required to report transfers of property to foreign corporations and partnerships, report certain interests in foreign corporations, and file returns with respect to passive foreign investment companies. See IRS Forms 926 (return by a U.S. transferor of property to a foreign corporation), 5471 (return with respect to certain foreign corporations), 8621 (return by shareholder of a passive foreign investment company), and 8865 (return with respect to certain foreign partnerships).

Costly and Burdensome

- The FBAR filing requirements impose significant administrative costs on plans, which must first identify and value the plans' foreign investments, under FBAR's broad and confusing definition of "foreign financial account," and then identify those persons with an obligation to file.
- Plans also must identify any foreign financial accounts held indirectly, such as foreign custody accounts established by the plan's custodian to facilitate international investment, even though information about indirectly held foreign financial accounts is not readily available.
- Under the FBAR instructions' broad definitions of "financial interest" and "signature or other authority," numerous plan-related FBAR filings could be required for each plan investment – for example, the plan sponsor, the plan trust, all of the plan committee members, the institutional trustee and the investment manager all may be subject to FBAR filing requirements for the same account.

Concerns of Company Officials

- Company officers who serve on plan investment committees are justifiably concerned about having to report plan-owned accounts on their personal returns. Given the complexity of benefit plan financial accounts and investments, such

officers potentially could be subject to audits and penalties for inadvertently not including some accounts.

- These concerns may drive some officials to resign their plan positions – depriving plans of their expertise.

Broad, Straightforward FBAR Relief is Warranted

- FinCEN rules should exempt U.S. persons from any obligation to report their financial interest in, or signature or other authority over, a foreign financial account maintained or held, directly or indirectly, by a plan as long as U.S. persons have no *personal* financial interest in the account (other than any interest as a participant or beneficiary of the plan). The proposed regulations already grant similar exceptions for officers and employees of certain banks, publicly traded corporations, and financial institutions registered with the SEC – the same logic applies here.
- FinCEN should curb the excessive burdens placed on benefit plans by completely exempting them from the filing requirements – just as the recent Foreign Account Tax Compliance Act exempts tax-exempt plan accounts from the new reporting rules on foreign financial institutions.