



One Minute Memo[®]

FBAR: Further Relief for Employee Benefit Plans and Certain Foreign Commingled Funds

Background

Generally, U.S. persons with an interest in, or signatory authority over, a foreign financial account are required to file the Treasury Department Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR). Last year we informed you that the IRS had taken the position that offshore funds of the type often used by pension funds and other institutional investors were considered to be foreign financial accounts and potentially required to file the FBAR. (See Alert [FBAR: A Further Extension](#).) We also informed you that, due to the surprise by which this announcement took most pension funds and their advisors, as well as the fact that the guidance did not address whether offshore commingled investment vehicles constitute "foreign financial accounts", the filings for 2009 and earlier years were delayed until June 30, 2010, for the following groups:

- Persons with signatory authority over, but no financial interest in, a foreign financial account; and
- Persons with a financial interest in a foreign commingled fund.

The IRS recently issued two additional Notices with further guidance and extensions for these two groups, as well as for non-U.S. persons.

Filings by Non-U.S. Persons

In Notice 2010-16, the IRS suspended the filing requirement for 2009 and prior calendar years for "non-U.S. persons". Thus, for non-U.S. persons, any FBARs that would have been required to be filed by June 10, 2010 will not need to be filed. A non-U.S. person is any person who is not a citizen or resident of the United States, a domestic corporation or partnership, or a domestic estate or trust. Thus, foreign commingled funds, including those with U.S. investors,

should not be required to file an FBAR for 2009 and earlier years. Whether FBARs will need to be filed by non-U.S. persons for 2010 and later years is still an open question.

Delay and Suspension of Certain Filings

In Notice 2010-23, the IRS delayed until June 30, 2011, FBAR filings which would otherwise be due on June 30, 2010 for U.S. persons with signatory authority over, but no financial interest in, a foreign financial account. This should keep those fiduciaries who have no financial interest, even if they have signatory authority, from having to file.

In addition, IRS Notice 2010-23 also suspended filings for U.S. persons with a financial interest in certain foreign commingled funds, provided they are not foreign mutual funds. The Notice specifically says that foreign hedge and private equity funds are covered by the suspension. Under the suspension, no filing is required for 2009 and prior calendar years. The suspension applies to persons with a financial interest in the fund as well as those with signatory authority but no financial interest. This should mean that most U.S. pension funds who invest in foreign private equity or hedge funds will not be required to file FBARs until further notice. However, if the U.S. person is invested in a foreign mutual fund or a foreign separate account or custody account, filing will still be required unless one of the other exemptions described above applies.

For more information on the FBAR, please contact the Seyfarth attorney with whom you work, or any other [Employee Benefits attorney](#) on our website.

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