



## One Minute Memo<sup>®</sup>

# FBAR: A Further Extension

## Must Employee Benefit Plans or Their Managers File?

### *Background*

For many years, Treasury Department Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), was required to be filed by any “United States person” with (i) a financial interest in, or (ii) signature or other authority over, one or more “foreign financial accounts,” provided that the aggregate value of those accounts was more than \$10,000 at any time during the year. The instructions to the FBAR provide that a “United States person” includes trusts. They also provide that “foreign financial accounts” include any bank, securities, securities derivatives or other financial investments accounts, and “generally also encompass any accounts in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund (including mutual funds).” Nonetheless, few pension funds believed that they might need to file the FBAR.

### *Discussion of Issue*

In a teleconference on June 12, 2009 hosted by the American Bar Association and the AICPA, IRS personnel expressed the view that an offshore hedge fund is a “foreign financial account” for FBAR purposes and, therefore, every U.S. investor in an offshore hedge fund should file an FBAR, whether or not the fund has any offshore bank or securities account. Because many large pension funds—public and private—invest in offshore hedge, private equity, and real estate funds, this view came as quite a surprise to many. It was a particularly unpleasant surprise since the FBAR filing date for 2008 was only a few weeks away, on June 30.

On June 24, 2009, the IRS released updated Frequently Asked Questions (FAQs) regarding the FBAR and filing requirements. As part of that, the IRS announced that filers will have until September 23, 2009 to file the FBAR, including prior years’ FBARs, if applicable, provided that (i) they have only recently learned of their obligation to file, (ii) there is insufficient time to gather the information needed to file, and (iii) any income from the “account” has been properly reported and paid for 2008 and prior years. An FBAR filed after June 30 will still be late, but no penalties will be assessed. The form(s) should be filed with a cover statement explaining the reason for late filing.

Unfortunately, the updated FAQs do not address whether offshore commingled investment vehicles constitute “foreign financial accounts.”

## *Current Status*

Due to the vocal opposition to filings for offshore commingled investment interests which may be owned by pension funds, on August 7, 2009, the IRS released Notice 2009-62 which further extends the due date for 2008 and earlier year filings to **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.

This extension should cover most pension funds and their managers. Prior to this extension, many pension funds that hold these types of investments were considering “protective filings,” but this should no longer be necessary.

The IRS has asked for comments on the FBAR filing requirements, and it is likely that it will reevaluate how FBAR applies to pension funds prior to the June 30, 2010 deadline.

*For more information on the FBAR, please contact the Seyfarth attorney with whom you work, or any other Employee Benefits attorney on our website ([www.seyfarth.com/EmployeeBenefits](http://www.seyfarth.com/EmployeeBenefits)).*



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