



for your information®

buck

Volume 34 | Issue 54 | July 15, 2011

## Treasury Provides Guidance on FBAR Filings for Foreign Financial Accounts

*Treasury issued final regulations on FBAR filings, which apply to U.S. persons, including pension plans, that invest in, or have signature authority over, foreign financial accounts. For 2010, these filings were generally due by June 30, 2011. In Notice 2011-54, the IRS delayed until November 1, 2011 filings for 2009 and earlier calendar years (but not for 2010) for persons having signature authority over, but no financial interest in, a foreign financial account.*

### Background

The Bank Secrecy Act authorizes the Department of the Treasury (Treasury) to issue regulations requiring persons to keep records and file reports that “are determined to have a high degree of usefulness in criminal, tax, regulatory, and counter-terrorism matters.” The Secretary of the Treasury delegated that authority to the Financial Crimes Enforcement Network (FinCEN) and the Internal Revenue Service (IRS).

Generally, United States (U.S.) citizens, residents, or domestic entities with financial interests in, or signature or other authority over, offshore financial accounts valued at more than \$10,000 at any time during a calendar year must file a report using Treasury [Form TD F 90-22.1](#), *Report of Foreign Bank and Financial Accounts* (FBAR). The report for a calendar year is due by June 30<sup>th</sup> of the next calendar year. Penalties for willful violations of the FBAR requirement can be as high as the greater of \$100,000 or 50% of the total balance of the foreign account.

Because of confusion over which entities are required to file FBARs, Treasury in its [proposed regulations](#) and other guidance provided delayed reporting dates for some situations to June 30, 2011. (See our March 19, 2010 [For Your Information](#).) FinCEN [final regulations](#), effective March 28, 2011, resolved many of the questions, including those concerning pension trusts.

IRS [Notice 2011-54](#) extended the June 30, 2011 filing deadline for 2009 and earlier years (but not for 2010) until November 1, 2011, but only for persons with signature or other authority over but no financial interest in, the foreign account. FinCEN Notices [2011-1](#) and [2011-2](#) separately extended the June 30, 2011 filing date for 2010 and earlier years to June 30, 2012 for certain officers and employees of controlled persons and of investment advisers registered with the Securities and Exchange Commission (SEC) who have signature authority, but no financial interest in, the reportable accounts.

## Final Regulations

### Reportable Foreign Accounts

Only foreign accounts are subject to FBAR reporting. The final regulations clarify that an account is not a foreign account if it is maintained with a financial institution located in the U.S.

**BUCK COMMENT.** *If, for example, a pension plan trustee purchases securities of a foreign company through a broker located in the U.S., there is no filing requirement. The mere fact that the securities are foreign is irrelevant.*

The final regulations also clarify that most “omnibus accounts” are not reportable foreign accounts. “Omnibus accounts” are pooled accounts that are in the name of a global custodian (i.e., a U.S. bank that holds a pool of assets consisting of cash and securities of multiple investors, such as pension funds, outside the U.S). As long as the pension funds or other U.S. investors cannot directly access the foreign holdings, no filing is required.

The final regulations continue to treat foreign bank accounts, securities accounts, and other financial accounts as reportable foreign accounts. “Other financial accounts” means an account with:

- A person that is in the business of accepting deposits as a financial agency;
- A cash value that is an insurance policy or annuity policy;
- A person that acts as a broker or dealer for futures or options transactions in any commodity on or subject to the rules of a commodity exchange or association; and
- A mutual fund or similar pooled fund that issues shares available to the general public that have a regular net asset value determination and regular redemptions.

Until further guidance is issued, non-mutual fund investment funds such as off-shore hedge funds and private equity funds are not treated as “other financial accounts.”

### Financial Interest

A U.S. person has a “financial interest” in a reportable foreign account if the person is the owner of record or holder of legal title, or if the person’s ownership or control over the owner of record or holder of legal title rises to a specified level.

**BUCK COMMENT.** *The final regulations do not adopt a provision of the proposed regulations that would have treated a person (e.g., a plan sponsor) who had appointed a “trust protector” (e.g., a plan fiduciary committee) subject to such person’s direct or indirect instruction as having a financial interest in the plan’s foreign investments. As a result, the trustees will typically have the only financial interest with respect to a qualified plan.*

The final regulations treat a person with a present beneficial interest of more than 50% in the trust assets and a person that received more than 50% of trust income as having a financial interest in the trust. A person does not have a financial interest in a discretionary trust simply because of his or her status as a discretionary beneficiary or because of a remainder interest. In addition, a beneficiary of a trust is not required to report if the trust, trustee of the trust, or agent of the trust is a U.S. person that files an FBAR on the trust's foreign financial accounts. The grantor of a grantor trust (such as a rabbi trust) is considered to have a "financial interest" in the trust assets.

All participants and beneficiaries of qualified plans under Internal Revenue Code (Code) Section 401(a) and annuities under Code Sections 403(a) and 403(b) are exempt from reporting. Owners and beneficiaries of individual IRAs or Roth IRAs under Code Sections 408 or 408A are also exempt.

**BUCK COMMENT.** *FinCEN rejected a request to expand the exemption to all pension plan participants and beneficiaries because participants and beneficiaries were not likely to have a filing requirement in the first place.*

## Signature Authority

The final regulations clarify that a person has signature authority over a foreign financial account only if the foreign financial institution acts or will act upon a communication from that individual regarding the disposition of assets in that account. If a second individual's signature is also required, both individuals would be considered to have signature authority.

**BUCK COMMENT.** *Prior to this clarification, there was concern that all parties involved in an investment decision (e.g., the entire investment committee) might be treated as having signature authority.*

## Recordkeeping

The FBAR rules require significant recordkeeping. The final regulations make clear that employees and officers who have signature authority over the foreign financial accounts of their employers do not have to personally maintain the records of the foreign financial accounts of their employer.

## Reporting Dates

Set forth below are the general and special FBAR reporting dates.

Type of Interest	Filing Year	Applicable Authority	Filing Deadline
Financial interest	2010 and later	Final Regulations	June 30th of the calendar year following the reporting year
Financial interest	Pre-2010	Final Regulations	June 30th of the calendar year following the reporting year
Signature authority but no financial interest (and not covered by FinCEN Notice Extension)	2010	IRS Notice 2010-23	June 30, 2011
Signature authority but no financial interest (and not covered by FinCEN Notice Extension)	Pre-2010	IRS Notice 2011-54	November 1, 2011
Employee or officer of an FBAR regulated entity with signature authority over, but no financial interest in, the foreign financial account of another person more than 50% owned by the regulated entity (and employees and officers of a more than 50% entity with respect to the regulated entity).	2010 or earlier	FinCEN Notice 2011-1	June 30, 2012
Employee or officer of an investment adviser (registered with the SEC) who has signature authority over, but no financial interest in, foreign financial accounts of persons who are not registered investment companies	2010 or earlier	FinCEN Notice 2011-2	June 30, 2012

## Conclusion

The final regulations and the reporting date guidance clarify and change many of the FBAR issues and reporting dates of concern to pension plans sponsors and advisers. Despite comments requesting a blanket exemption with respect to pension plans, there is no such exemption. Pension plan sponsors and advisers should consult with legal counsel as to their filing requirements and due dates.

Buck's consultants are available to help you.

---

*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*