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By Electronic Delivery

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2009-62)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Re: Comments on FBAR Filing Requirement for Pension Plans

Dear Commissioner Shulman:

We represent a coalition of public and private employee benefit pension plans, plan sponsors, and plan service providers whose members are responsible for investing and safeguarding hundreds of billions of dollars in assets intended to provide retirement security for millions of working Americans. On behalf of this coalition, and the employee benefit pension plans, voluntary employee beneficiary associations ("VEBAs"), and individual retirement accounts ("IRAs," and collectively, "Plans") its members serve, we commend the Internal Revenue Service ("IRS" or the "Service") for issuing Notice 2009-62, I.R.B. 2009-35 (Aug. 31, 2009), which extends the filing date for certain U.S. persons to file a Report of Foreign Bank and Financial Accounts (commonly referred to as "FBAR").[1] We very much appreciate the temporary relief provided by the Service and the willingness on the part of the U.S. Department of Treasury ("Treasury") to consider comments regarding the application of the FBAR filing requirements to Plans.

We write to respond to the Treasury's request for comments regarding FBAR and the accompanying instructions. As noted in our July 29, 2009 letter and discussed in more detail below, the policy goals of FBAR – to detect and prevent taxpayers from hiding assets offshore to avoid income taxes or launder money – are not advanced by requiring U.S persons to file an FBAR with respect to "foreign financial accounts" held by or for the benefit of Plans. Nevertheless, Treasury may expect at least a 40 percent increase in annual FBAR filings (nearly 75,000 additional filings) from Plans qualified under Code section 401(a), which would test

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[1] All the Plans discussed in this letter are entities described in section 402(c)(8) or 501(c)(9) of the Internal Revenue Code of 1986, as amended (the "Code").

IRS's already limited resources to indentify violators. Thus, we respectfully make the following recommendations, which are discussed in detail below:

- Treasury should exempt, *for all current and prior years*, 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;

- Treasury should confirm that U.S. persons do not have – *and have never had* – an 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 established or maintained by a state or local government or an agency or instrumentality thereof within the meaning of Code section 414(d) ("Governmental Plan");

- If unwilling to grant a complete exemption for U.S. persons with a covered relationship to a Plan's foreign financial account, Treasury should provide guidance with respect to a number of difficult interpretive issues, which are discussed in part III of the Comments section of this letter;

- In addition to any prospective relief or guidance, Treasury should grant retroactive relief for all U.S. persons who may have been required to report their financial interest in or signature or other authority over Plan-related foreign financial accounts on their personal income tax return (*i.e.*, Form 1040, Schedule B) for 2008 and prior calendar years; and

- Treasury should issue guidance regarding FBAR no later than December 31, 2009, in order to allow Plans and service providers sufficient time to comply with the FBAR requirements.

BACKGROUND

I. FBAR

A. History

In 1970, Congress passed the Currency and Foreign Transactions Reporting Act of 1970, commonly referred to as the "Bank Secrecy Act," which authorized Treasury to require U.S. citizens and residents to provide certain reports regarding their transactions with foreign financial institutions. Pub. L. No. 91-508 (1970). Specifically, section 241 of the Bank Secrecy Act, as codified at 31 U.S.C. § 5314(a), provides, in pertinent part, as follows:

> *Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency.*

Congress's principal purpose in requiring Treasury to implement such reporting was to "furnish American law enforcement authorities with the tools necessary to cope with the problems created by so called secrecy jurisdictions… [which] simply do not recognize cheating on taxes, violations of securities laws, and many other acts as criminal." H.R. Rep. No. 91-975 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4394, 4405. Congress was particularly concerned that foreign financial institutions were being used to avoid U.S. laws and, in particular, to evade income taxes, conceal assets illegally, and finance organized crime. *Id.* at 4397.

However, Congress recognized that Treasury's power to require reports under the Bank Secrecy Act would be broad and that "the Secretary could impose recordkeeping and reporting requirements which would create a substantial and harmful burden on the free flow of legitimate international commerce or could result in a requirement of much valueless paperwork." *Id.* at 4398. Consequently, the Bank Secrecy Act granted Treasury a broad power to create exemptions from the reporting obligations. 31 U.S.C. § 5314(b); 1970 U.S.C.C.A.N. at 4398. The House Report on the Bank Secrecy Act states that the drafters had "every confidence that" the Secretary of Treasury would not impose burdensome, valueless requirements, "especially in view of his broad powers of exemption." 1970 U.S.C.C.A.N. at 4398.

Under its Bank Secrecy Act authority, Treasury promulgated a regulation establishing a reporting requirement for U.S. persons with certain relationships to foreign financial accounts. The regulation, codified at 31 C.F.R. § 103.24, provides, in its entirety, as follows:

> *Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship to the Commissioner of the Internal Revenue for each year in which such relationship exists, and shall provide such information as shall be specified in a reporting form prescribed by the Secretary to be filed by such persons. Persons having a financial interest in 25 or more foreign financial accounts need only note that fact on the form. Such persons will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.*

IRS requires that reporting under 31 C.F.R. § 103.24 be made using FBAR, a standardized form that requires disclosure of, among other things, the identity of the filer and the location, type, and value of certain foreign financial accounts.

B. Current FBAR Rules

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. "Person," is defined, by reference to 31 C.F.R. § 103.11(z), as "an individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, an Indian Tribe (as that term is defined in the Indian Gaming Regulatory Act), and all entities cognizable as legal personalities." "Financial accounts" include the following:

- any bank, securities, securities derivatives or other financial account;
- any savings, demand, deposit, time deposit, or other account (including debit card and prepaid credit card accounts) maintained with a financial institution or other person engaged in the business of a financial institution; and
- any account in which the assets are held in a commingled fund and the account owner holds an equity interest in the fund (including mutual funds).

Individual bonds, notes, or stock certificates held by a person or unsecured loans to foreign trades or businesses (other than financial institutions) are generally not "financial accounts."

The FBAR instructions provide that a person has a "financial interest" in an account where that person is the owner of record or holds legal title to that account, regardless of whether the account is maintained for his or her own benefit. A financial interest also may arise by virtue of a person's role as agent, nominee, attorney, or in some other capacity with respect to a financial account on behalf of a U.S. person. A 50 percent interest in a corporation, partnership or trust that holds legal title to, or is the owner of record for, a foreign financial account also qualifies as a "financial interest" in such account.

"Signature authority" over an account exists where a person can control the disposition of money or other property by delivery of a document containing his or her signature (or his or her signature and that of one or more other person) to the bank or other person with whom the account is maintained. Similarly, a person will have "other authority" where that person can exercise power over an account by communicating oral instructions to the bank or person with whom the account is maintained.

Because more than one person may have a financial interest in or signature or other authority over a foreign financial account, the same account may be reported on multiple FBAR filings. However, in some instances, persons required to file FBAR may make a simplified filing. Specifically, persons required to report 25 or more foreign financial accounts need not provide information regarding every account, provided they retain detailed records about the accounts for five years, and corporations may consolidate FBAR filings with any 50 percent-owned companies that also must report. Additionally, the FBAR instructions provide exceptions to the reporting requirements in certain circumstances, including the following:

- *Certain employees of U.S. Corporations.* Where the U.S. Person required to file an FBAR is a public U.S. corporation with shares traded on a national exchange, more than $10 million in assets and more than 500 shareholders, an employee or officer of the corporation need not file a separate FBAR by reason of his or her signature or other authority over the corporation's foreign financial accounts, if (i) the officer or employee has no independent financial interest in the account, and (ii) the chief financial officer has informed the officer or employee that the Corporation has filed a report for the account.

- *Bank employees*. Bank officers and employees need not file FBAR with respect to accounts maintained by the bank where the bank is examined by a federal supervisory agency, provided the officer or employee has no financial interest in the account.

See Frequently Asked Questions Regarding Report of Foreign Bank and Financial Accounts (FBAR), IRS, *no longer available online* (*last visited* Jan. 24, 2008) (on file with authors) ("issuing instructions for the FBAR form is one way the Secretary may exercise its discretion" to exempt groups of persons from the FBAR requirements).

FBAR must be filed on June 30 for the previous calendar year, and IRS has discretion to impose penalties for failure to file FBAR, incorrect FBAR filings, and a failure to maintain appropriate records. Civil penalties range from $500 per violation up to the greater of $100,000 or 50 percent of the account balance, and criminal penalties may also be imposed. 31 U.S.C. §§ 5321, 5322; 31 C.F.R. §§ 103.57, .59.

Those required to report a foreign financial account on FBAR are also subject to a parallel reporting requirement on their personal, partnership, or corporate income tax returns. For example, Form 1040, Schedule B, Line 7 requires the taxpayer to affirmatively check a box if the taxpayer has an "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. Taxpayers are referred to the FBAR instructions for guidance as to what accounts need to be reported. Penalties under the Code could apply if taxpayers file a tax return that fails to disclose a foreign financial account.

C. Currency Banking Retrieval System

The information reported on FBAR is entered into the Currency Banking Retrieval System ("CBRS"), a database accessible by federal, state and local law enforcement agencies. The Life and Times of a Currency Transaction Report, IRS, http://www.irs.gov/compliance /enforcement/article/0,,id=112228,00.html (last visited Sept. 1, 2009). As we understand it, CBRS is used by IRS, the Financial Crimes Enforcement Network ("FinCen"), and other government agencies to link transactions reported by financial institutions – such as those reported to Treasury on Currency Transaction Reports (FinCen Form 104, "CTR"), Suspicious Activity Reports (Form TD F 90-22.47, "SAR"), and Form 8300 (report of certain cash payments over $10,000) – with the account owners reported on FBAR. In this regard, the information derived from FBARs is intended to "provide leads to investigators that facilitate the identification and tracking of illicit funds or unreported income, as well as providing additional prosecutorial tools to combat money laundering and other crimes." Workbook on the Report of Foreign Bank and Financial Accounts (FBAR), IRS, http://www.irs.gov/businesses/small/article/ 0,,id=159757,00.html (last visited Sept. 1, 2009).

II. Plan Regulation

As long-term investment programs exempt from taxation, Plans are subject to an extensive and comprehensive regulatory scheme under the Code and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The Code sets strict controls on the flow of money into and out of Plans. *See, e.g.*, Code §§ 401(a)(9) (required distributions); 401(a)(13) (prohibition on assignment and alienation); 404(a) (deduction limitations). Those that manage Plan assets are subject to ERISA's stringent fiduciary duties – among the highest established – that require prudent management and prohibit related-party transactions and self-dealing. ERISA §§ 404, 406. ERISA also requires that Plan fiduciaries diversify the assets of the Plan so as to minimize the risk of large losses. ERISA §§ 404(a)(1)(C). Plan fiduciaries frequently seek to fulfill this mandate by investing in non-U.S. markets, though ERISA generally requires that Plan fiduciaries hold the "indicia of ownership" of foreign investments within the jurisdiction of U.S. courts. ERISA § 404(b) (includes special rules regarding the holding of foreign securities by Plans). In addition, IRAs are subject to substantially identical prohibited transaction rules under the Code. Code § 4975.

Most Plans are also required to file Form 5500 annually. Form 5500 is filed with IRS and other agencies and contains disclosures regarding Plan participants, investments, assets, service provider arrangements, insurance contracts, prohibited transactions, and the Plan's funded status. These Plans must also submit financial statements along with Form 5500 that have been audited by a certified public account in compliance with Generally Accepted Accounting Principles. The persons filing Form 5500 must sign a penalty of perjury statement, and there are significant penalties for failure to file.

Plan service providers, too, are subject to a multitude of federal and state regulation governing their conduct with respect to Plans and in managing Plan assets. For example, custodians and other financial institutions are regulated by federal and/or state banking laws that control the holding and management of client assets and frequently require extensive reporting and routine compliance audits. Financial institutions are generally also subject to the recordkeeping requirements of the Bank Secrecy Act, the anti-money laundering and anti-terrorism provisions of the USA PATRIOT Act (the "Patriot Act"), and certain customer identification requirements. *See, e.g.,* 31 U.S.C. § 5318(h); 31 C.F.R. §§ 103.121, .122. Similarly, insurance companies are highly regulated and monitored at the state level, and investment service providers, such as investment managers, advisers and funds, may be required to comply with a variety of federal laws, including, among other things, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Commodity Exchange Act.

III. Plan Foreign Investments

Over the past three decades, Plans gradually have become more focused on international investment opportunities and, as a general matter, have increased their investments outside of the U.S.[2] In addition, the types of investments available to Plans that may involve foreign financial accounts have also expanded. For instance, Plan fiduciaries may elect to accomplish certain types of investment objectives (both foreign and domestic) by investing through "feeder" funds located outside of the U.S. in order to minimize administrative expenses.[3]

In recent years, service providers, such as custodians, trustees, and investment managers have facilitated Plans' foreign investment by establishing foreign brokerage, securities, and sub-custody accounts all over the world. For example, U.S. financial institutions frequently utilize vast, world-wide custody networks for their Plan clients. These custody networks include large numbers of sub-custody accounts that are opened with either unrelated, foreign financial institutions or, in some cases, foreign branches or affiliates of U.S. financial institutions. The

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[2] As of March 31, 2009, approximately $1.4 trillion in assets of institutional, tax-exempt entities, including Plans, were invested with the top 200 international/global asset managers. Top International/Global Managers by U.S. Assets, Pensions & Investments, http://www.pionline.com/apps/pbcs.dll/section?category=Data (last visited Oct. 5, 2009).

[3] For example, where a Plan fiduciary determines that it is prudent to engage a manager to make investments that could trigger unrelated business income tax (*e.g.*, investments employing leverage), such investments are frequently made through an offshore investment fund that "feeds" into a domestic master fund. Notably, feeder funds are still required to file and pay U.S. taxes (*i.e.*, effectively connected income tax), but the administrative burden and costs on Plans is significantly reduced as taxes are reported and paid by the feeder fund and not the Plans.

record ownership of sub-custody accounts depends on local law and the practice of each particular financial institution, but sub-custody accounts will generally be opened either in (i) the Plan client's name or (ii) in the financial institution's name as "omnibus" accounts for multiple clients. Plans generally have no direct right to deliver instructions to a sub-custodian to transfer assets to or from sub-custody accounts, regardless of who the record owner of the sub-custody account is. We are aware that some financial institutions routinely open sub-custody accounts all over the world on behalf of their Plan clients to facilitate potential future investments, even though some or all of these sub-custody accounts may not be used by Plans during a given calendar year.

COMMENTS

On behalf of the members of our coalition, we respectfully submit the following comments for consideration by Treasury:

I. Request for Exemption for Plan-related Filers

Requiring U.S. persons to file FBAR solely because they have a relationship with a Plan does not further the purposes of FBAR. Plans generally are exempt from U.S. taxes and do not engage in money laundering or other criminal activities. However, FBAR compliance is costly and burdensome, and much of the information reported is duplicative of information already available to Treasury. Therefore, we respectfully request that Treasury exempt U.S. persons, *retroactive for all prior years*, 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.

A. Purposes of FBAR Are Not Furthered by Plan-related Filings

The purposes of FBAR – to detect and prevent tax evasion, money laundering and other criminal activities – are not furthered by requiring Plan-related filings. Plans are long-term investment programs exempt from income taxation and subject to extensive regulation under the Code and ERISA. Together, the Code and ERISA form a comprehensive regulatory scheme that is specifically designed to ensure that Plans are administered for their intended purpose (*i.e.*, to provide retirement benefits for participants and beneficiaries) by placing rigorous controls on nearly all aspects of Plan administration, including Plan participation, contributions to and distributions from Plans, and the management of Plan assets. In fact, Plan fiduciaries generally have no authority to distribute assets from the trust other than to pay benefits or the reasonable expenses of administering the Plan. Compliance with these laws is overseen by a number of administrative entities – including IRS, the Department of Labor, and the Pension Benefit Guaranty Corporation ("PBGC") – and these agencies routinely conduct compliance audits and bring enforcement actions. Financial institutions that provide services to Plans also ensure that Plans are not used for illicit purposes as financial institutions are required by the Patriot Act to

have anti-money laundering programs and to report suspicious activity. Because Plans pose virtually no criminal threat, requiring Plan-related FBAR filings provides virtually no information that would be useful to Treasury in detecting and preventing the crimes that are the focus of FBAR reporting.

B. High Costs of FBAR Compliance

The FBAR filing requirements impose significant administrative costs on Plans, which must engage in the laborious task of first identifying and valuing the Plans' foreign financial accounts and then identifying those persons with an obligation to file. Plan fiduciaries must comb through their Plan's portfolio to identify which of the Plan's direct investments may fall under FBAR's confusing definition of "foreign financial account." Further, Plans must then identify any foreign financial accounts held indirectly, such as foreign custody accounts established by the Plan's custodian to facilitate international investment. However, information about indirectly held foreign financial accounts is not typically available directly to Plan fiduciaries, and instead, Plan fiduciaries must send information requests to nearly every Plan investment service provider, most of which have no automated system for identifying Plan-related foreign financial accounts and reporting the necessary information to the Plan. These efforts to identify foreign financial accounts are just the beginning for Plans.

Plans must then determine which persons have a relationship to a foreign financial account that triggers an FBAR filing. Like most institutional investors, Plans are typically managed and administered by a large number of people, so under the FBAR instructions' broad definitions of "financial interest" and "signature or other authority," dozens of Plan-related FBAR filings could be required for each Plan investment. For example, the following parties may all have a financial interest in a Plan's foreign financial accounts:

- the trust under the Plan;
- the Plan's trustees, which may be a financial institution, an individual, or a board comprised of corporate employees and/or union members;
- the Plan's custodian(s); and
- the company and/or union that established and maintains the Plan and trust.

Additionally, the following persons may have "signature or other authority over" a Plan's foreign financial accounts:

- each member of the Plan's investment and/or administrative committees;
- investment managers and other Plan fiduciaries;
- the Plan's sponsor and its officers, employees, and/or members responsible for Plan investment decisions; and
- participants with certain brokerage accounts that may be available under participant-directed Plans (*e.g.*, 401(k) plans).

The costs of coordinating the FBAR filings for multiple parties can be significant, particularly in light of the fact that Plans may experience routine personnel and service provider changes many times during each calendar year. Importantly, these costs may be borne by the Plans themselves as well as the Plan sponsor.

We note that reviewing and analyzing the potentially large number of Plan-related FBAR filings would also require IRS to expend a significant amount of time and resources. For example, we estimate that IRS can conservatively expect U.S. persons to file an additional 73,560 FBAR solely to report investments made by ERISA-covered defined benefit pension plans.[4] These new filings would account for an approximately 42 percent increase in the total number of FBAR filings.[5] Notably this does not take into account the large numbers of filings that will be made for the investments of other types of Plans, including defined contribution plans qualified under Code section 401(a) (*e.g.*, 401(k) plans), non-qualified plans (*e.g.*, 457 or 403(b) plans), VEBAs, and IRAs.

Not only will the substantial number of new filings pose a difficult administrative burden on IRS, but they will also make it difficult for investigators from IRS, FinCen, and other agencies to identify the true owner or manager of an account. Where multiple filings are required for a single Plan-related investment, such filings will contain virtually identical information, and those U.S persons with two roles with respect to a Plan may be required to file two *identical* FBARs (*e.g.*, where a trustee files FBAR for its own interest in a Plan's foreign financial account as well as on behalf of the Plan's trust). Each time such redundant information is added to CBRS, investigators will face more challenges in identifying the true owner of an account because a single financial account could become associated with dozens of U.S. persons who have only tenuous connections to the financial account. This will undoubtedly be burdensome to investigators who will have to sort out a complex web of relationships in order to identify the Plan as the owner of a financial account.

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[4] For purposes of this calculation, we assumed the following: (i) 25 percent of the approximately 29,424 ERISA-covered single-employer and multiemployer defined benefit pension plans have foreign financial accounts, and (ii) each Plan with a foreign financial account has 10 U.S. persons with a "financial interest in" or "signature or other authority over" that account. *See* Pension Insurance Data Book 2008 Number 13, PBGC, at pg. 4, http://www.pbgc.gov/docs/2008databook.pdf (last visited Oct. 1, 2009); Private Pension Plan Bulletin – February 2008, Employee Benefits Security Administration, at Table E1, http://www.dol.gov/ebsa/pdf/privatepensionplanbulletinhistoricaltables.pdf (last visited Oct. 1, 2009).

[5] This estimate is based on the 177,151 FBAR filings made in calendar year 2001. U.S. Treasury Department, Report to Congress in Accordance with Sec. 361(b) of the Patriot Act (April 26, 2002).

C. FBAR Provides Duplicative Information

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 readily available to Treasury with respect to Plan investments. In particular, many Plans are required to disclose annually information regarding investments, service provider relationships, and certain transactions on Form 5500. They 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). Additionally, information about the parties with authority over Plan investments is typically already available to Treasury, as it is included both on Form 5500 and in the Plan's governing documents, which are submitted to Treasury during the determination letter process. Moreover, Plan service providers are subject to extensive reporting and disclosure requirements. For example, financial institutions must disclose investor information to Treasury upon request under the Bank Secrecy Act. 31 CFR § 103.33(e), (g).

D. FBAR Discourages Plan Involvement

In addition to the substantial cost, the FBAR reporting requirement is also particularly burdensome on Plans because it may discourage qualified people from working with Plans in the future. Corporate officers, employees, and union members, for example, may simply be unwilling to accept Plan-related responsibilities if such responsibilities could subject them to the FBAR reporting requirements because (i) the potential penalties for failing to file (or incorrectly filing) are significant, and (ii) there is a myriad of unresolved interpretive issues (some of which are discussed below). The FBAR filing obligation also triggers reporting on individual tax returns that could subject those working with Plans to penalties under the Code. Often, these burdens go far beyond what those working with Plans can reasonably be expected to bear.

E. Retroactive Relief Necessary

It is critical that any exemptive relief granted by Treasury be applied retroactively so that Plan fiduciaries, employees, and agents are not forced to live under the threat of substantial FBAR-related penalties. As Treasury is aware, compliance with the FBAR reporting

requirements has, historically, been very low.[6] The Plan community is no exception, and the vast majority of those required to report Plan-related foreign financial accounts were not aware of their obligation until very recently. Thus, if Treasury does not provide retroactive relief, large numbers of fiduciaries, employees, and agents of Plans with one or more foreign financial accounts will have to file FBAR for 2008 and/or prior calendar years.

It may, however, be very difficult to make accurate filings for past years, and in many cases, it may be impossible. In addition to the practical difficulties of making a current-year FBAR filing discussed above, past year filings are complicated by the lack of available information for prior years and the difficulty of procuring information from former Plan service providers. Additionally, in many cases, those persons with an obligation to report for prior years will no longer be working with the Plan that triggered FBAR, and it may be impossible for the Plan to alert them of their obligation.

II. Request for Confirmation that Governmental Plans Are Not Subject to FBAR

There has been widespread concern that FBAR may need to be filed by persons with a covered relationship to a foreign financial account maintained or held, directly or indirectly, by a Governmental Plan. This concern stems from ambiguity created by the FBAR instructions. Specifically, the FBAR instructions incorporate by reference the broad definition of "person" in to 31 C.R.F § 103.11(z), which specifically includes trusts and all other legally cognizable entities. Although there is no explicit reference to government entities, some Governmental Plan fiduciaries have been concerned that this definition of "person" could include, among other things, Governmental Plan trusts.

Despite the broad definition in the FBAR instructions, government entities, such as Governmental Plans, should not be "persons" for FBAR purposes. IRS generally treats Governmental Plan trusts as instrumentalities of state and local governments because they are an integral part of the state and local governments, and the benefits they provide to government employees are an essential government function. Code § 115. Under the statute authorizing Treasury to determine which persons are subject to the filing requirements, government entities are only to be included if specifically prescribed by Treasury. 31 U.S.C § 5314 (Treasury may prescribe "a reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section…."); 31 U.S.C. § 5312(a)(5) (For purposes of 31 U.S.C. § 5314, "person" is defined to include "a trustee, a representative of an estate and, *where the Secretary prescribes*, a government entity.") (emphasis added). In this regard, neither the

[6] In its 2002 report to Congress, Treasury acknowledged that a number of U.S. persons failed to file FBAR because of a lack of knowledge or confusion about the filing requirements. U.S. Treasury Department, Report to Congress in Accordance with Sec. 361(b) of the Patriot Act (April 26, 2002). Treasury estimated that less than 20 percent of those obligated to file FBAR in 2001 actually filed. *Id.*

Treasury regulations nor the FBAR instructions specifically prescribe that Governmental Plans, or any other government entities, are "persons." Thus, we ask that Treasury confirm our conclusion that Governmental Plans trusts and U.S. persons who manage the assets of Governmental Plans need not file FBAR with respect to foreign financial accounts held or maintained by a Governmental Plan.

As a policy matter, requiring FBAR filings with respect to Governmental Plan investments would not further the goals of FBAR. As with private sector Plans, Governmental Plans are tax-exempt entities under the Code, and the management of Governmental Plan assets is regulated by state and/or local law requirements that often resemble ERISA. Additionally, Governmental Plans are subject to extensive oversight from state and/or local officials, and because considerable amounts of information are made available under state laws similar to the federal Freedom of Information Act, Governmental Plans are monitored by the general public. Therefore, like private sector Plans, Governmental Plans pose virtually no risk of tax evasion, money laundering, or other criminal activity with respect to the use of foreign financial accounts.

Complying with the FBAR filing requirements would impose substantial costs on Governmental Plans. As with private sector Plans, identifying foreign financial accounts and all of the persons who must file would be extremely difficult. Additionally, many Governmental Plans would face the added practical difficulty of coordinating FBAR filings with countless elected and appointed officials at all levels of government. For example, where a Governmental Plan holds assets in a segregated account within a government's treasury, high level executive and legislative officials may have sufficient power to dispose of assets of the treasury (either alone or in conjunction with other officials and/or staff) that would give them "signature or other authority" over a Governmental Plan's foreign financial accounts.

In light of the foregoing, we respectfully request that Treasury confirm that U.S. persons, including Governmental Plan trusts, do not have – *and have never had* – an 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 Governmental Plan.

III. Interpretive Issues on which Further Guidance is Needed

We strongly believe that a complete, retroactive exemption for U.S. persons with a covered relationship to a Plan's foreign financial account is by far the best solution to the otherwise intractable set of problems and high that costs FBAR presents for Plans. However, if Treasury is unwilling to grant this exemptive relief, then it is critical for Treasury to provide specific guidance with respect to the interpretive issues discussed below.

A. Definition of Financial Interest

1. Do Plan sponsors have a financial interest in Plan-related accounts?

The FBAR instructions currently provide that a person has a "financial interest in" a foreign financial account "for which the owner of record or holder of legal title is a trust, or a person acting on behalf of a trust, that was established by such person and for which a trust protector has been appointed." Although "trust protector" is a term of art under trust law that typically refers to a U.S. person given certain powers over an irrevocable trust or foreign asset protection trust, the definition of "trust protector" in the FBAR instructions is expansive. Specifically, it includes any "person who is responsible for monitoring the activities of a trustee, with the authority to influence decisions of the trustee or to replace, or recommend replacement of, the trustee." This broad definition appears to apply to every Plan's "named fiduciary," who by operation of law bears ultimate authority for management of the assets in the trust and, in most cases, may replace – or recommend replacement of – the Plan's trustee. Thus, because Plans will almost universally have trusts for which a named fiduciary meeting the definition of "trust protector" has been appointed, Plan sponsors appear to have a financial interest in the foreign financial accounts of their Plans.

This result is counter-intuitive because, as a practical matter, Plan sponsors have no personal financial interest in the foreign financial accounts of a Plan. Instead, the assets of the Plan are held for the exclusive benefit of Plan participants and beneficiaries and may not be distributed to the Plan sponsor, except in unusual circumstances (*i.e.*, Plan termination). Notably, both ERISA and the Code impose substantial penalties on fiduciaries that use the assets of the Plan to benefit the Plan sponsor. ERISA §§ 406(a), 407; Code §§ 4975, 4976. Therefore, we ask that Treasury clarify that Plan sponsors are not required to file FBAR merely by reason of having established a Plan trust.

2. Does a Plan trust or individual trustee have a financial interest in foreign sub-custody or securities accounts?

In order to facilitate international investment by Plans, institutional trustees and custodians must establish accounts outside of the U.S.[7] In some cases, accounts are "omnibus" accounts established for multiple clients. In other cases, institutional trustees and custodians are required by the law of foreign jurisdictions to "open" a new account in the Plan client's name, which may entail merely adding the Plan to the list of clients that *may* utilize the account. Under

[7] Subject to certain exceptions, most Plans are required to hold their assets in trust, and this is accomplished either by (i) hiring an institutional trustee (typically a bank or trust company) or (ii) appointing one or more individuals as trustees and holding Plan assets in a custody account established with a bank or other financial institution. *See, e.g.,* ERISA § 403. In this regard, institutional trustees are distinguishable from individual trustees.

the current FBAR rules, a Plan trust may have a "financial interest in" foreign sub-custody accounts opened in the Plan's name because it is the record owner of the account. Similarly, an individual trustee may have a "financial interest in" a Plan's sub-custody account because it is a person acting on behalf of the Plan's trust. However, as a practical matter, even where a Plan is the record owner of a foreign sub-custody account, Plan fiduciaries are rarely able to directly transfer assets into or out of the account. Instead, Plan fiduciaries move assets into and out of the foreign sub-custody account by directing the institutional trustee or custodian that established and maintains the sub-custody account. Many Plan fiduciaries are not even aware that sub-custody accounts are opened in the Plan's name. This is an undesirable result because the trust and individual trustees may be required to report large numbers of sub-custody accounts that they have no direct control over and they have no knowledge of. Additionally, in many cases, sub-custody or securities accounts contain no assets at any time during the calendar year, and it is not clear whether such empty accounts must be reported on FBAR. Therefore, we ask that Treasury clarify that (i) U.S. persons do not have – and have never had – an obligation to report their "signature or other authority over" a foreign sub-custody or securities account maintained for the benefit of a Plan and (ii) "zero balance" accounts need not be reported on FBAR.

3. Do IRA owners have a financial interest in IRA accounts?

IRA assets must be held in a trust or custody account by an institutional trustee on behalf of the IRA owner (other than IRA annuities). As a beneficial owner of 100 percent of the IRA, the current FBAR instructions indicate that an IRA owner would have a financial interest in any foreign financial accounts held by the IRA. However, IRS has taken the position that an IRA owner does not need to report an interest in a foreign hedge fund that is held in an IRA located in the United States. Toscher, Steven and Michel Stein, *FBAR Enforcement—Five Years Later*, Journal of Tax Practice & Procedure, June-July 2008, 37-58 at 58 (reprinting guidance from IRS regarding FBAR that is no longer available on the IRS website). On the other hand, IRS has stated that a fiduciary for an IRA that holds a foreign financial account must file FBAR. Frequently Asked Questions Regarding Report of Foreign Bank and Financial Accounts (FBAR) – United States Person, IRS, http://www.irs.gov/businesses/small/article/0,,id=210252,00.html (last visited Sept. 1, 2009). These positions appear to be irreconcilable, so we ask that Treasury clarify that IRA owners are not required to file FBAR.

B. Scope of Signature or Other Authority

1. When is a fiduciary's authority over a financial account (e.g., a foreign sub-custody or securities account) too indirect or tenuous to be considered signature or other authority over that account?

The FBAR instructions indicate that anyone with the power to dispose of the assets of a foreign financial account will generally have "signature or other authority" over the account and have to file FBAR. However, in many cases, a person may only have the ability to indirectly

control the disposition of assets in an account. In a memorandum to Bank Secrecy Act compliance examiners and Managers, IRS has recognized the distinction between direct and indirect authority over an account with respect to "other authority." Interim Guidance on Money Transmitter Report of FBAR Filing Requirements, IRS, June 18, 2008 ("Having authority over a person who owns a foreign bank account is not the same as having authority over a foreign bank account."). However, it is not clear whether IRS would recognize the distinction with respect to signature authority or foreign financial accounts that are not foreign bank accounts.

The distinction between direct and indirect authority is particularly important in the context of foreign sub-custody accounts. As discussed above, Plans always have indirect authority (*e.g.*, the authority to direct the custodian or trustee with respect to the account) over the foreign accounts established by custodians or institutional trustees, but they are rarely able to directly transfer assets into or out of the account on their own. Similarly, Plan fiduciaries frequently hire investment managers to manage some or all of their Plans' assets, and those investment managers may invest in or through foreign financial accounts. Technically, Plan fiduciaries may have the authority to dispose of the assets of such financial accounts (*i.e.*, by liquidating the investments or otherwise closing accounts). However, as a practical matter, financial institutions maintaining a foreign account established by a manager will generally only act on directions from that investment manager. Therefore, Plans typically cannot directly dispose of the assets of such accounts.

As these examples indicate, the scope of "signature or other authority," as defined by the FBAR instructions, is potentially very broad and may include parties that have little-to-no actual ability to dispose of the assets of a foreign financial account. Therefore, we suggest that Treasury set clear limits that would not require FBAR filings where a person's authority over an account is indirect or tenuous

2. *When do investment managers have signature or other authority over Plan financial accounts?*

Investment managers will generally have the authority, subject to contractual obligations, to dispose of the assets of the financial accounts that they have opened or control. This authority could be considered signature or other authority over the accounts under the FBAR instructions. However, IRS provides on its website that investment managers do not have "other authority" if they direct how the account is invested but have no power to make disbursements. Frequently Asked Questions Regarding FBAR – Financial Accounts, IRS, http://www.irs.gov/businesses/small/article/0,,id=210249,00.html (last visited Oct. 1, 2009). Presumably, this guidance was intended to create an exception to the FBAR filing requirement for certain investment managers. Regardless of IRS's intention, the exemptive relief provided is illusory to the extent that an investment manager has the authority to dispose of the assets of an account he or she manages by, for example, compelling redemptions or closing the account. Therefore, we ask that

Treasury clarify that investment managers will not have signature or other authority over a Plan's foreign financial accounts.

3. Who has signature or other authority when there is a corporate named fiduciary?

As discussed above, ERISA requires that each Plan have a "named fiduciary" that is responsible for the management and administration of the Plan. In some instances, the named fiduciary will be the corporation (or other entity) sponsoring the Plan. Frequently, large numbers of directors, officers, and employees have the authority to enter into transactions on behalf of a corporation. Thus, where a corporation is a Plan's named fiduciary, all of those officers, directors, and employees may arguably have the power to dispose of the assets of the Plan's foreign financial accounts and may have signature or other authority over the account. However, as a practical matter, most service providers would not accept instructions from every officer, director, or employee of a corporation without the consent of those persons that typically manage the assets of the Plan. Thus, it is not clear if the tenuous authority of the directors, officers, and employees of a corporate named fiduciary would be considered "signature or other authority" by IRS. Treasury should, therefore, provide specific guidance limiting the reporting obligation where there is a corporate named fiduciary to the corporation itself and exempt all officers, directors, and employees of that corporation (regardless of the size of the corporation and whether or not the directors, officers, and employees participate in the Plan).

4. Do Plan participants have signature or other authority over foreign financial accounts in a participant-directed Plan?

Many Plans are "participant-directed," meaning the investment of the assets of the Plan is directed by the participants themselves. These Plans typically offer a variety of investment options, which may include mutual funds, variable annuity contracts, and collective trust funds. In order to give participants broader flexibility in selecting investments, many participant-directed Plans also have a "brokerage window" that allows the participants to direct the Plan to purchase investments not otherwise available under the Plan. In some cases, participants may direct the Plan to purchase interests in foreign financial accounts through the brokerage window. Participants directing the Plan to make such investments could be deemed to have signature or other authority over the foreign financial account because they have the authority to direct the Plan (the party maintaining the account) to dispose of the assets the account. However, the participant's authority over the disposition of the assets in the account is indirect and can generally be overridden by other Plan fiduciaries. Thus, it is not clear whether such participants would be required to report their relationship to a Plan's foreign financial accounts purchased through a brokerage window on FBAR. In this regard, we ask that Treasury confirm that participants in participant-directed Plans will never have signature or other authority over Plan-related foreign financial accounts.

C. Definition of Financial Account

1. Are foreign annuities foreign financial accounts?

Plans occasionally purchase annuities from foreign insurance companies. Annuities are contractual obligations of insurance companies to pay certain amounts to the policy holders or designated beneficiaries. For example, an annuity contract could require the insurance company to pay a Plan customer a set amount (*e.g.*, $50,000 annually) for a set period (*e.g.*, 20 years). Annuities can also be "variable," meaning the payment amount is not fixed but rather varies depending on the performance of an underlying pool of assets owned by the insurance company. Importantly, regardless of whether an annuity is fixed or variable, a Plan that purchases an annuity does not own any part of the insurance company's assets. The FBAR instructions do not specifically address annuities, either fixed or variable, but the contractual right to payment under an annuity is similar, in many respects, to the right to payment under an individual bond or note, neither of which is considered a "financial account" for purposes of FBAR. On the other hand, IRS previously took the position that the holder of a foreign life insurance policy must report the policy as a "foreign financial account" if the surrender value exceeded $10,000. Steven Toscher, *FBAR Enforcement—Five Years Later* at 49-50. However, IRS's focus on surrender value as the determining factor is confusing as individual bonds or notes may have a similar cash-out feature. Therefore, we ask that Treasury clarify that the annuity contracts are not financial accounts subject to FBAR.

2. Are foreign Plan trusts financial accounts?

Multinational corporations frequently establish retirement programs for employees living and working in foreign jurisdictions. These retirement programs are generally established in foreign countries in accordance with foreign law but may be managed by U.S. persons that are employees of the corporation. The assets of foreign retirement programs are often held in trust, similar to the assets of Plans. Under the broad definition of "financial account" contained in the FBAR instructions, foreign trusts used in connection with foreign retirement programs could be considered foreign financial accounts. However, IRS has informally indicated that "financial accounts for FBAR purposes do not include foreign pension accounts maintained by employers." Steven Toscher, *FBAR Enforcement – Five Years Later* at 55. We, therefore, ask that Treasury provide formal guidance that trusts of foreign retirement programs are not "financial accounts" for FBAR purposes.

3. What are securities derivatives accounts?

The FBAR instructions state that "financial accounts" include "securities derivatives accounts." Although not self-evident, the term "securities derivatives" was presumably intended to include financial instruments that derive their value from one or more underlying equity securities (*e.g.*, warrants, equity futures, equity options, or equity swaps). However, such

instruments are not necessarily held in an "account." Rather, they are contractual interests held by each of the counter-parties, which are similar in many respects to insurance contracts. Therefore, it is unclear what exactly IRS would consider a "securities derivatives account." If a "securities derivatives account" is the derivative itself, Treasury should clarify where such account is held as the evidence of a derivative transaction with a foreign counter-party (*i.e.*, the confirmation) will typically be held in the Plan's domestic trust.

IV. Retroactive Relief with Respect to Reporting on Income Tax Returns

Regardless of any other relief provided by Treasury, we request that Treasury provide specific guidance relieving U.S. persons with a covered relationship to a Plan-related foreign financial account from any obligation to amend their tax returns for 2008 and prior years. As discussed above, Plan fiduciaries were largely unaware of their potential obligation to file FBAR, and it was not until approximately 2 months after the April 15 deadline for filing calendar year 2008 individual income tax returns that news of potential reporting obligation spread through the Plan community.[8] IRS recognized that this late notice would make it difficult for many to file FBAR by June 30, 2009, and provided relief from the FBAR filing obligation. Notice 2009-62; Voluntary Disclosure Questions and Answers, IRS, May 6, 2009 (revised June 24, 2009), http://www.irs.gov/pub/irs-utl/faqs-revised_6_24.pdf at Question 43 (last visited Oct. 1, 2009), *modified by* IR-2009-81, Sept. 21, 2009, http://www.irs.gov/newsroom/article/0,,id=213463,00.html (last visited Oct. 1, 2009). However, IRS did not extend such relief to the parallel reporting requirement on income tax returns. Unless Treasury provides retroactive relief for the foreign account reporting obligation on Form 1040 and other income tax returns, many Plan fiduciaries will be left struggling to determine whether they had a reportable relationship to a foreign financial account and whether they need to amend their tax returns for 2008 and prior years. Therefore, we respectfully request that Treasury provide relief for U.S. persons failing to identify that they had a reportable relationship to a Plan-related foreign financial account on their income tax returns for the 2008 calendar year and prior years.

V. Timing of Guidance

Finally, we strongly encourage Treasury to provide guidance regarding the FBAR filing obligations as soon as is reasonably practicable or, at the very latest, by December 31, 2009. Although the deadline for FBAR is June 30, those with a "financial interest in" or "signature or other authority over" a foreign financial account must report their relationships on Schedule B of

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[8] Most Plan fiduciaries did not become aware of FBAR until after the June 12, 2009 teleconference hosted by the American Bar Association and the American Institute of Certified Public Accountants. It was at that teleconference that, as we understand it, an IRS official stated that interests in offshore hedge funds may need to be reported on FBAR. After this teleconference, many offshore hedge fund managers alerted their Plan clients that the Plans' investments may need to be reported on FBAR.

Form 1040 by April 15. Therefore, Plans must identify foreign financial accounts and the persons required to report such accounts on FBAR approximately 10 weeks prior to the actual FBAR deadline. As discussed above, procuring the necessary FBAR filing information is time consuming for Plans and frequently requires the assistance of multiple service providers. Service providers also will need sufficient time to develop procedures and/or automated systems for their Plan customers as well as their own reporting. Members of our coalition indicate that the development of such procedures and systems could take months. Thus, FBAR-related guidance provided by Treasury will be most helpful for the 2008 and 2009 calendar years if released by December 31, 2009.

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We sincerely appreciate Treasury's consideration of our comments. If you would like to discuss any of our comments, please do not hesitate to contact us.

Respectfully submitted,

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cc: Financial Crimes Enforcement Network

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