ERIC
The
ERISA
Industry
Committee

April 27, 2010

FinCEN
P.O. Box 39
Vienna, VA 22183

Attention: FBAR Comments (RIN 1506-AB08)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to submit these comments on the proposed regulations implementing the foreign bank account reporting ("FBAR") requirement, which were published in the Federal Register on February 26, 2010.

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

ERIC believes that employee benefit trusts should be exempt from the FBAR filing requirements. These trusts are already subject to comprehensive disclosure requirements and extensive oversight by the United States Department of Labor and the Internal Revenue Service. There is no credible prospect that they will use foreign financial accounts to evade domestic laws. To impose the FBAR filing requirement on employee benefit trusts would add to the costs and burdens of maintaining these trusts without advancing any objective that the FBAR requirement is intended to achieve.

If, contrary to ERIC's recommendation, FinCEN applies the FBAR requirements to employee benefit trusts, the regulations should be revised and clarified so that these requirements are appropriately limited. If the regulations are adopted as proposed, they will impose duplicative reporting requirements not just on the trusts themselves, but also on a number of individuals who have no true authority over or financial interest in foreign financial accounts held in these trusts.

1400 L Street, N.W.
Suite 350
Washington, DC 20005
T (202) 789-1400
F (202) 789-1120
www.eric.org

Background

Employee benefit plans are governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The assets of these plans generally must be held in trust, and any person who exercises control over the management or disposition of a plan's assets is a fiduciary of the plan.[1]

ERISA fiduciaries are held to a standard of conduct that has been called "the highest known to the law."[2] They must act solely in the interest of the plan participants and beneficiaries, and they must use the plan's assets for the exclusive purpose of providing the benefits promised under the plan and defraying administrative expenses.[3] A fiduciary that breaches these duties, even inadvertently, is personally liable to make good any losses the plan suffers as a result.[4] A fiduciary or any other person who misappropriates a plan's assets is subject to criminal penalties.[5]

In almost all cases, ERISA requires that the indicia of ownership of employee benefit plan assets be held in the United States.[6] Although an employee benefit plan's trustee might invest in a foreign partnership or foreign fund as a way of diversifying the plan's investments, the trustee must hold the plan's ownership interest in the foreign fund in the United States. The Labor Department has created limited exceptions to this requirement for foreign corporate securities, foreign government securities, and foreign currency; but even these assets must be held by, or under the control of, a bank or broker/dealer that is regulated under the laws of the United States.[7] Accordingly, it generally is not possible to maintain the assets of an ERISA-governed employee benefit plan in an offshore trust.

The Employee Benefits Security Administration in the United States Department of Labor enforces the fiduciary requirements of ERISA. One of the principal duties of the Department of Labor is to safeguard the assets that are held and invested for the benefit of plan participants. The Department of Labor has at its disposal a wide array of **enforcement** tools, including civil and criminal penalties, injunctive relief, and recourse to the United States courts, to carry out this responsibility.[8]

---

[1] ERISA §§ 3(21)(A), 403(a), 29 U.S.C. §§ 1002(21)(A), 1103(a).

[2] *Donovan v. Bierwirth,* 680 F.2d 263, 272 n.8 (2d Cir. 1982).

[3] ERISA §§ 403(c)(1), 404(a)(1), 29 U.S.C. §§ 1103(c)(1), 1104(a)(1).

[4] ERISA § 409, 29 U.S.C. § 1109.

[5] 18 U.S.C. § 664.

[6] ERISA § 404(b), 29 U.S.C. § 1104(b).

[7] 29 C.F.R. § 2550.404b-1.

[8] ERISA §§ 501, 502, 29 U.S.C. §§ 1131, 1132.

Almost all trusts that hold employee benefit plan assets are exempt from federal income tax under section 501(a) of the Internal Revenue Code of 1986, as amended (the "Code"). Retirement plan trusts are exempt from tax if they are "created or organized in the United States" and meet certain other requirements under section 401(a) of the Code. Trusts that hold the assets of employee welfare benefit plans, such as group health, life insurance, and disability plans, are exempt from tax under section 501(a) if they meet the requirements under section 501(c)(9) of the Code. Like ERISA, the Code requires that the assets of a tax-exempt employee benefit trust be used exclusively for the benefit of the plan participants and beneficiaries, and prevents these assets from inuring to the benefit of the individuals or entities that control the trust.[9]

Recommendations

1. The FBAR requirement should not apply to employee benefit trusts.

As the preamble of the proposed regulation acknowledges, the provision of the Bank Secrecy Act that authorizes reports of foreign financial accounts "reflects congressional concern that foreign financial institutions were being used to evade domestic criminal, tax, and regulatory laws."[10] The hearings that preceded enactment of this provision produced no evidence that ERISA-governed employee benefit trusts ever have, or ever could, use foreign financial accounts for these purposes.

Because almost all employee benefit trusts are exempt from U.S. income tax, they have no reason to use foreign financial accounts in an effort to evade United States tax laws. To the contrary, these trusts invest their assets predominantly in the United States and earn investment returns that are free of income tax by operation of U.S. law. Certain welfare benefit trusts, especially those that fund retiree medical benefits, are subject to unrelated business income tax on some or all of their investment earnings.[11] Even in a case where the trust is subject to U.S. tax, however, ERISA's requirement that the indicia of ownership be maintained in the United States prevents the trust from holding a substantial portion of its assets offshore.

Employee benefit trusts are already subject to extensive reporting requirements concerning their assets and investments. All funded employee benefit plans are required to file an annual financial report on IRS Form 5500 with the Department of Labor (and, in the case of a tax-exempt retirement trust, with the Internal Revenue Service as well). The annual financial report includes information on the plan's assets, investments, and service relationships. Certain collective trusts and other pooled investment arrangements are "direct filing entities" that file their own annual reports; these reports provide information not only about the entity's investments but also about

---

[9] Code §§ 401(a)(2), 501(c)(9).

[10] 75 *Fed. Reg.* 8844 (Feb. 26, 2010).

[11] Code § 512(a)(3).

each employee benefit plan that invests through the pooled arrangement. Plans with more than 100 participants must be audited each year by an independent auditor, and must file an audited financial statement with the Department of Labor.

The annual reports filed with the Department of Labor are signed by a plan fiduciary under penalty of perjury. Any person who willfully violates ERISA's annual reporting requirement is subject to fines up to $100,000 or to a prison term up to 10 years.[12] Unlike individual taxpayer information, these reports are not protected from disclosure. To the contrary, they are available for examination by plan participants, the Treasury Department, and FinCEN, and they are posted in a public database.

Both the Internal Revenue Service and the Department of Labor routinely audit employee benefit trusts to ensure that they comply with the requirements of the Internal Revenue Code and ERISA. The Employee Benefits Security Administration's Enforcement Manual directs investigators conducting a fiduciary audit to "inquire whether any plan funds are invested in assets which are beyond the reach of United States courts in contravention of [ERISA] section 404(b)."[13] In addition, the investigator must "verify the accuracy of plan financial data reported to [the Department of Labor] on the most recent annual report."

When one considers the existing financial disclosure requirements that apply to employee benefit trusts; the statutory restrictions on holding assets outside the United States; the scrutiny the trusts receive from independent auditors and federal regulators; and the severe penalties that apply if anyone who controls trust assets fails to handle the assets in compliance with applicable law, it does not seem possible that these trusts could present a risk of the kinds of abuse the FBAR filing requirement is designed to prevent. As FinCEN has recognized, the Bank Secrecy Act authorizes the Treasury Department to require reports "that are determined to have a high degree of usefulness in criminal, tax, regulatory, and counterterrorism matters."[14] We respectfully suggest that FBAR reports from employee benefit trusts do not meet this standard.

The Hiring Incentives to Restore Employment ("HIRE") Act, which was enacted on March 18, substantially revises the reporting requirements and other enforcement provisions that apply to foreign financial accounts, effective generally in 2013 with respect to the withholding and reporting requirements for foreign financial institutions. ERIC recognizes that FinCEN's proposed regulations, which were issued before the HIRE Act became law, do not address the effect of the HIRE Act on the FBAR reporting requirements. We note, however, that the HIRE Act explicitly excludes from the reporting requirement any foreign financial account owned by "any organization

---

[12] ERISA § 501, 29 U.S.C. § 1131.

[13] Employee Benefits Security Administration Enforcement Manual, Chapter 48, Fiduciary Investigations Program.

[14] 75 *Fed. Reg.* at 8844.

exempt from taxation under section 501(a) [of the Internal Revenue Code]."[15] As explained above, almost all employee benefit trusts are exempt from tax under section 501(a). Accordingly, the HIRE Act strongly supports ERIC's view that these trusts should not be subject to the FBAR reporting requirement.

Because FinCEN does not ordinarily regulate employee benefit trusts, we are concerned that it will be difficult for FinCEN to appreciate how great an administrative burden these trusts already bear. Employee benefit plans and trusts are subject to a wide variety of mandatory reporting and disclosure requirements in addition to the detailed annual reporting requirement we have already described. Depending on the nature of the investments the plans make and the benefits they provide, these plans might be required to file periodic reports with the Pension Benefit Guaranty Corporation, the Securities and Exchange Commission, the Health and Human Services Department, and the Centers for Medicare and Medicaid Services, in addition to meeting a number of other reporting requirements imposed by the Department of Labor and the Internal Revenue Service. Employee benefit plans must also distribute forms, notices, summaries, and other required disclosures to the participants and beneficiaries they serve, and must obtain and store elections and consents from these individuals.

Although we recognize that the FBAR reporting requirement, standing alone, might seem to impose only a modest administrative burden on those who are required to file the report, it must be viewed in the context of the extensive federal reporting and disclosure regime that already applies to employee benefit trusts. The costs of evaluating federal reporting requirements, determining how and to whom they apply, building systems and safeguards to ensure compliance, collecting and providing the necessary information, and maintaining records to show that the required reports have been timely filed, are substantial. These costs, which are typically paid from trust assets, reduce the funds available to provide promised benefits to employee benefit plan participants and strain the already scarce resources of the employers that fund the trusts. We urge FinCEN not to impose yet another federal reporting obligation—particularly one that serves no useful purpose—on entities that are already so heavily regulated.

2. The regulations should make clear who must file an FBAR.

For the reasons explained above, employee benefit trusts should be exempt from the FBAR reporting requirement. If FinCEN chooses to apply the FBAR reporting requirement to these trusts, however, it must at a minimum make clear which of the many individuals associated with the trusts are subject to the reporting requirement.

Under the proposed regulations, a United States person (including a trust) must file an FBAR if the person has "a financial interest in, or signature or other

---

[15] Pub. L. No. 111-147, § 501(a), adding a new definition of "specified United States person" as section 1473(3)(C) of the Internal Revenue Code.

authority over" a foreign financial account. A person has a financial interest in an account if the person has legal title to the account; but a person who does not own the account might nevertheless have a financial interest if the owner acts as an agent "or in some other capacity" on behalf of the person, or if the owner is a trust and the person appointed a "trust protector" that is subject to the person's direct or indirect instruction.

With limited exceptions, a United States person who has no financial interest in a foreign financial account must nevertheless file an FBAR if the person has "signature or other authority" over the account. An individual has the requisite authority if the person controls the disposition of assets in the account, either alone or in conjunction with another, by delivering instructions directly to a person with whom the account is maintained.

It is unclear how these reporting requirements apply to employee benefit trusts. A typical trust established by a large public company might invest hundreds of millions, or even billions, of dollars in a wide variety of assets, of which the trust holds some directly and others through intermediaries. Investment arrangements of this size are necessarily complex, and involve a number of different individuals and entities serving in a variety of different roles.

Although legal title to the assets is held in trust by one or more trustees, a custodian separate from the trustee might have physical custody of some or all of the assets. Each employee benefit trust has one or more "named fiduciaries" who appoint and remove trustees and investment managers and who oversee the trust's investment activities; the named fiduciary might also be directly responsible for investing a portion of the trust's assets. A "named fiduciary" often is an investment committee made up of officers or employees of the employer that sponsors the employee benefit trust. Professional investment managers oversee the investment of designated portions of the trust's assets, often pursuing specific investment strategies. Plan fiduciaries who are not responsible for the trust's investment activities often have authority to direct payments from the trust's accounts in order to satisfy the trust's obligations. Any or all of these persons or entities might carry out their responsibilities through individuals who do not have discretionary responsibility for trust assets, but who have administrative signature authority that they exercise at the direction of the responsible fiduciaries. When an employee benefit trust makes investments (as many of them do) through intermediaries such as a collective trusts or private investment funds, the various responsibilities and relationships are often replicated at the level of the intermediaries.

Under the proposed regulations, it seems clear that at least some foreign financial accounts maintained directly or indirectly on behalf of employee benefit trusts are subject to the FBAR filing requirement. As we explain in more detail in the comments that follow, however, it is by no means clear which of the individuals and entities associated with the trust are responsible for making the filing, or how many filings must be made for the same foreign financial account.

A person who is subject to the reporting requirement and who inadvertently fails to file an FBAR report is subject to civil penalties up to $10,000 per report. A person who is judged willfully to have failed to file an FBAR report might be subject to a penalty up to 50% of the foreign account balance, or might even be subject to criminal penalties. In view of these severe sanctions for noncompliance, it is imperative that the regulations clearly identify the individuals and entities who are subject to the reporting requirement.

3. The regulations should not require more than one FBAR report for each foreign account maintained by an employee benefit trust.

As currently written, the regulations could be interpreted to require that the same foreign financial account be reported by the plan sponsor, the plan's trust, all of the plan's individual or institutional trustees, all members of the plan's investment committee, the plan's investment manager, plan fiduciaries who have authority to direct payments from the account, and, potentially, all directors, officers, and employees of any of the foregoing who have authority to sign on behalf of the trust at the direction of a fiduciary. Each of these individuals and entities would be required to file an identical FBAR, and each individual would be required to indicate an interest in the foreign financial account on his personal tax return.

Consider the following example, which illustrates a division of responsibility that is quite common in large employee benefit trusts. A professional investment manager for an employee benefit trust trades foreign securities on behalf of the trust. As permitted by the Department of Labor's regulations, the investment manager maintains the securities and a small amount of foreign currency in a foreign account with a U.S. broker registered under the Securities Exchange Act of 1934. The broker executes securities trades in the account at the direction of the investment manager. The employee benefit trust is the owner of the securities, which are issued in the name of a U.S. bank as trustee of the trust.

The corporation that sponsors the trust, acting through its twelve-member board of directors, has appointed an investment committee as a "named fiduciary" to oversee the management of the trust's assets. The investment committee consists of eight employees named by the corporation's board of directors; the committee reports to the company's chief financial officer, who reports to the directors. The investment committee appointed (and has the power to remove) both the trustee and the investment manager, and it determines what portion of the trust's assets will be allocated to the investment manager's account. The corporation's chief human resources officer is not involved in the investment of the plan's assets, but has authority to withdraw funds from the trust (including the foreign account) to pay the plan's administrative expenses. Four individual employees who work in the corporation's finance department have authority to instruct the broker that maintains the foreign account to transfer assets from that account to other investment accounts within the trust; at least two signatures are needed on any instruction, and the employees issue instructions only at the direction of the investment committee.

In this example, the following individuals or entities, all of whom fall within the definition of "United States person," might be required to file an FBAR for the foreign account:

- The trust itself, which is the legal owner of the account;

- The bank that serves as trustee of the trust, which is the record owner (in its capacity as trustee) of the securities in the account;

- The corporation, which established the trust and (through its directors) appointed the investment committee as the named fiduciary of the trust—and, in so doing, might be viewed as having appointed a "trust protector," a term that is not defined in the proposed regulation and whose meaning is unclear;[16]

- The twelve individual directors of the corporation, who acted on behalf of the corporation in establishing the trust and appointing the investment committee as named fiduciary, and who are able to instruct the committee indirectly through the chief financial officer;

- Each of the eight employees who serve on the investment committee, on whose behalf the trustee could be viewed as acting as agent "or in some other capacity" (since the trustee was appointed by them and serves at their pleasure, and since the trustee moves assets into or out of the foreign account at their direction);

- The investment manager, on whose behalf the trustee could be viewed as acting as agent "or in some other capacity" (since the trustee follows the investment manager's instructions with respect to the disposition of the assets in the foreign account);

- The U.S. broker, which (acting at the direction of the investment manager) controls the purchase and sale of securities in the account;

- The corporation's chief human resources officer, who has authority to withdraw funds from the trust (including the foreign account) to pay the trust's administrative expenses; and

- The four employees in the corporation's finance department, who have authority (acting at the direction of the investment committee) to instruct the broker that maintains the foreign account to transfer assets to a different investment account within the trust.

[16] The current FBAR form defines a "trust protector" as a person who is responsible for monitoring the activities of a trustee, with the authority to influence the decisions of the trustee or to replace, or recommend the replacement of, the trustee.

Accordingly, even in this relatively simple example, up to thirty separate FBARs would be filed for a single foreign financial account, and all of the corporation's twelve directors, the eight members of its investment committee, and the four employees in its finance department would have to report their financial interest or signature authority on their personal tax returns. Large as this total is, it could be larger still: the U.S. bank, the U.S. broker, and the investment manager each will employ many individuals who have signature authority with respect to the foreign account, and the example assumes that all of these individuals are exempt from the FBAR requirements under the exceptions that apply to employees of regulated financial institutions.

This proliferation of duplicate FBAR reports not only imposes a substantial burden on the individuals and entities who must prepare and file the reports, it also buries beneath a mountain of paper any useful information FinCEN and other regulators might hope to derive from the reports. We question whether even one FBAR report filed on behalf of an employee benefit trust provides useful information; but surely it is beyond question that reviewing thirty or more reports filed for the same foreign account will only divert enforcement resources away from the true targets of the reporting requirement.

If FinCEN determines that a foreign financial account maintained on behalf of a U.S. employee benefit trust should be reported on an FBAR, we urge FinCEN to state that the trust need file only one report for each foreign account. Except in the circumstance described in the following paragraph, the regulations should also make clear that it is the trust itself, and not the trustees or any other entities and individuals associated with the trust, that must file the FBAR. Every individual and entity that controls the assets in the trust's account either is a fiduciary of the trust or acts at the direction of a fiduciary. As we have explained, employee benefit plan fiduciaries are held to the highest standard of conduct, are prohibited from diverting trust assets to their own use or to the use of any other party, and are subject to intense scrutiny from an array of federal regulators. Accordingly, these individuals and entities cannot control the trust's foreign accounts for their own benefit: any actions they take with respect to the account must be taken on behalf of the trust, and any FBAR they file would only duplicate a filing made by the trust.

An employee benefit trust should not be required to file an FBAR for a foreign sub-custodial account established by a U.S. custodian. A bank or other U.S. financial institution that serves as custodian of an employee benefit trust's assets might establish sub-custodial accounts in the employee benefit trust's name for a variety of regulatory or administrative reasons. Legal title to the assets in the custodial account, including any foreign sub-custodial account, remains with the trustee, and the custodian does not have any discretionary authority to manage or dispose of the assets in the custodial account. Accordingly, the behind-the-scenes banking relationships between the U.S. custodian and its foreign sub-custodians might not be readily apparent to the trustee or other fiduciaries of the employee benefit trust. If the regulations require an FBAR for a foreign sub-custodial account established in the name of a U.S. employee benefit trust, the regulations should make clear that the U.S. custodian is the only entity responsible for filing the FBAR with respect to the foreign sub-custodial accounts it establishes.

4. The exceptions for regulated financial institutions should extend to employee benefit trusts.

As we have explained in the preceding comment, we think that an employee benefit trust should file (at most) one FBAR for each foreign financial account, and that individuals and entities who act on the trust's behalf should not be required to file an FBAR for the same foreign account. This approach would reduce the burden of unnecessary paperwork both for those who file the FBAR and for those who receive and process it. If FinCEN does not accept this recommendation, however, we urge FinCEN at least to extend the same exceptions to employee benefit trusts that apply to other federally-regulated financial entities.

The proposed regulation provides a number of exemptions from the FBAR reporting requirements for employees of federally-regulated financial institutions if the employees have signature authority over, but no financial interest in, foreign accounts maintained by the institution. For example, the officers and employees of banks and thrifts that are subject to federal supervision, and the officers and employees of registered investment advisers examined by the Securities and Exchange Commission, are not required to report their signature authority over foreign accounts maintained by the institution. The preamble of the proposed regulations explains that this exception is appropriate because of the federal oversight these entities receive.[17]

Employee benefit trusts, too, are subject to a high degree of federal oversight. As we have explained above, these trusts are regulated and examined by the United States Department of Labor, and are required to report financial information both to the Department of Labor and to the public, in a manner comparable to the requirements that apply to banks and registered investment advisers. The fiduciaries of an employee benefit trust are held to the highest standard of conduct, and are subject to a variety of penalties (including personal liability) if they depart from that standard. Accordingly, individuals who have signature authority over an employee benefit trust's foreign account, but no financial interest in the account, should not be required to file an FBAR.

The regulations also should make clear that an individual is not deemed to have a "financial interest" in the account merely because he is a participant in the underlying employee benefit plan, and thus has the same beneficial interest in the trust's assets that any other participant would have. This clarification is necessary because the individuals who have signature authority over the foreign accounts of an employee benefit trust often are employees of the plan sponsor, and thus are participants in the employee benefit plans that are funded through the trust. The proposed regulations have recognized that it is not necessary to require the participants and beneficiaries of tax-qualified retirement plans to file an FBAR. It is unclear why this exception is needed, since plan participants and beneficiaries have only a beneficial interest in (not

---

[17] 75 *Fed. Reg.* at 8848.

legal ownership of) the plan's assets, and since they generally would not have the authority to issue instructions directly to the entity that maintained a foreign account. The existence of this exception creates uncertainty as to whether the beneficial interest of a plan participant is deemed to be a "financial interest" for purposes of the FBAR requirement; we ask FinCEN to clarify that this beneficial interest is not a financial interest.

5. The exception for public-company accounts should extend to accounts of employee benefit trusts sponsored by public companies.

The proposed regulation also creates an exception for officers and employees of a corporation with publicly-traded stock, if the officers or employees have signature authority over, but no financial interest in, a foreign account of the corporation (or of a U.S. subsidiary included in a consolidated FBAR filed by the parent). The preamble indicates that an exemption for these entities is appropriate because of the federal oversight they receive from the national securities exchanges and from the Securities and Exchange Commission.[18]

This exception should be extended to employees of the corporation who have signature authority over, but no financial interest in, a foreign account of an employee benefit trust established and maintained by the corporation. With respect to the trust accounts, the corporation is subject to a double layer of federal supervision: it must report the assets and liabilities of its employee benefit plans on its own financial statements filed with the Securities and Exchange Commission, and the trust accounts also are subject to oversight and examination by the Department of Labor. Accordingly, the rationale for the exception covering corporate accounts applies with equal or greater force to trust accounts. (As noted in the previous comment, FinCEN should clarify that employees of the corporation do not have a "financial interest" in the trust account merely because they participate in an employee benefit plan that is funded through the trust.)

6. The interest of an employee benefit trust in an illiquid pooled account should be exempt from reporting.

One of the most controversial aspects of the FBAR reporting requirement has been the possible application of the requirement to an investor's interest in an illiquid pooled investment fund, such as a private equity fund, hedge fund, or venture capital fund. In the proposed regulations, FinCEN applies the FBAR reporting requirement only to mutual funds and similar funds that have regular net asset value determinations; and the Internal Revenue Service has granted retroactive relief in Notice 2010-23 for investments in foreign private investment funds. In the preamble, however, FinCEN identifies a concern that hedge funds, in particular, might be used to avoid U.S.

---

[18] *Id.*

taxes.[19] Accordingly, FinCEN has reserved for further study the question whether investors in foreign private investment funds should be subject to an FBAR reporting requirement.

In order to diversify their investments, as required by ERISA, employee benefit trusts invest in a variety of alternative investments, including foreign private investment funds (which can be an important source of geographic diversification, since they allow the employee benefit trust to gain exposure to economies outside the United States). The foreign private investment funds typically are organized as limited partnerships. As a limited partner, the employee benefit trust has no ability to direct the fund's general partner or investment manager how to invest the assets of the fund. In addition, limited partners typically have no right to withdraw from the fund during a lock-up period, which might be ten years in the case of a private equity fund. Hedge funds typically have shorter lock-up periods, but even for these funds the lock-up period might be eighteen months to two years.

Because private investment funds are relatively illiquid, there is little danger that an investor will use these funds for money laundering or similar purposes. The concern that FinCEN has identified in the preamble of the proposed regulations—that these funds will be used to evade United States tax—is irrelevant to a tax-exempt investor such as an employee benefit trust. (As noted above in our first comment, the fact that the HIRE Act excludes tax-exempt investors from the new reporting requirements for foreign financial accounts strongly suggests that these investors should not be subject to the FBAR requirement.) In addition, employee benefit trusts are required by ERISA to hold their interests in foreign private investment funds within the jurisdiction of the United States courts, and to report these interests to the Department of Labor in their annual financial reports. Because employee benefit trusts' investments in foreign private investment funds do not present any of the risks the FBAR requirement is designed to address, these investments should be exempt from the FBAR requirement.

7. An employer that appoints a named fiduciary should not be deemed to have appointed a "trust protector".

The proposed regulations provide that a United States person will have a financial interest in, and therefore an FBAR filing obligation for, any trust established by a person if the person has appointed a "trust protector" who is subject to the person's direct or indirect instruction. The current FBAR form defines a "trust protector" as a person who is responsible for monitoring the activities of a trustee, with the authority to influence the decisions of the trustee or to replace, or recommend the replacement of, the trustee. The proposed regulations keep the references to a "trust protector" but do not include a definition of the term. Without clarification, this term could be interpreted to

[19] 75 *Fed. Reg.* at 8846 n. 13 and accompanying text.

cover a plan sponsor that appoints a named fiduciary, as required by ERISA, to oversee the investment activities of an employee benefit trust.

This FBAR reporting obligation would be in addition to any reporting required of the trust or its fiduciaries, but would provide FinCEN with no additional information. An employer that establishes a trust to fund an employee benefit plan does not have any ownership interest in the employee benefit plan's assets, and both ERISA and the Internal Revenue Code strictly prohibit the assets from being used to benefit the plan sponsor. A plan sponsor appoints a named fiduciary not for the purpose of controlling and possibly misusing the trust's foreign accounts, but rather because ERISA requires that every plan have a named fiduciary who is responsible for ensuring that the plan's trustee and other fiduciaries properly discharge their duties under ERISA. [20]

No purpose is served by requiring a plan sponsor to file an FBAR solely because it appoints a named fiduciary to oversee an employee benefit trust's investment activities. ERIC recommends that the term "trust protector" be defined in the regulations to exclude named fiduciaries.

* * * * *

ERIC appreciates the opportunity to submit these comments. If FinCEN has any questions about our comments, or if we can otherwise be of assistance, please let us know.

Sincerely,

Mark Ugoretz
President

---

[20] ERISA § 402(a)(1) states, "Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."