

[U.S. Reporting With Respect To Foreign Accounts - U.S. Governmental Plans](#)

Several key events have occurred recently regarding United States persons with interests in foreign financial accounts and investments. In general, it appears that U.S. governmental pension plans will be exempt from the current foreign account reporting requirements and the expanded reporting and withholding requirements that are being implemented with respect to certain foreign financial accounts and payments to foreign persons, though reporting may be required in limited circumstances (described below). However, a U.S. governmental pension plan may be adversely affected if it invests in a foreign financial institution, which may include investment funds, if the foreign financial institution does not comply with the new reporting requirements.

[Hiring Incentives To Restore Employment Act](#)

On March 18, 2010, President Obama signed the Hiring Incentives to Restore Employment Act, H.R. 2847 (the "HIRE Act"). The bill contains portions of the Foreign Account Tax Compliance Act (the "FATCA") that was introduced last fall by then House Ways and Means Committee Chairman Rangel. The FATCA portions of the HIRE Act, intended to reduce overseas tax evasion, increase reporting obligations (or impose withholding) on foreign (i.e., non-U.S.) financial institutions and persons.

The increased reporting obligations included in the HIRE Act are imposed on foreign financial institutions with respect to their United States accounts. For purposes of the HIRE Act, a financial institution includes not only traditional banks and custodians, but also any other entity primarily engaged in the business of investing, reinvesting or trading in securities, commodities or partnership interests. United States account is defined as any financial account held by one or more specified United States persons or United States owned foreign entities. Financial accounts generally include deposit accounts, custodial accounts and certain equity or debt investments in a financial institution. As a result, an investment in a foreign private investment fund or hedge fund would likely be considered a United States account for which the fund would be subject to the reporting obligations in the HIRE Act. However, the definition of "specified United States person," specifically excludes any State and any political subdivision or wholly-owned agency or instrumentality of a State. Therefore, a foreign private investment fund or hedge fund need not provide information to the IRS regarding investments by U.S. governmental pension plans.

If a foreign financial institution does not satisfy the reporting requirements described above, the HIRE Act imposes a new 30% withholding requirement on withholdable payments made to the

foreign financial institution. The HIRE Act also imposes a 30% withholding on withholdable payments made to certain non-financial foreign institutions that do not provide certifications regarding their beneficial ownership and identification of any U.S. owners. Withholdable payments generally include U.S.-source interest, dividends and other annual or periodic payments and gains from the sale of assets that can generate U.S.-source interest and dividends.

The withholding requirement imposed by the HIRE Act will impact U.S. governmental pension plans if they invest in a foreign financial institution that receives withholdable payments if the foreign financial institution does not satisfy the reporting obligations described above (even if those reporting requirements do not otherwise require reporting of a financial account held by a plan). Previously, foreign entities that are treated as pass-through entities for U.S. Federal tax purposes could provide documentation to U.S. payors regarding U.S. beneficial ownership to avoid withholding on payments allocable to U.S. holders. However, the new withholding requirements in the HIRE Act require withholding on withholdable payments to foreign financial institutions that do not comply with the reporting obligations described above, even when the foreign financial institution is owned by U.S. persons. It also appears that U.S. owners of the foreign financial institution, including governmental plans, may not apply for a refund of withholdings attributable to their interests in the foreign financial institution.

In addition to the new rules applicable to foreign financial institutions, the HIRE Act also expands reporting obligations with respect to specified foreign financial assets as defined in the HIRE Act. Generally, these expanded reporting obligations for foreign financial assets currently apply only to individuals. As a result, U.S. governmental pension plans will not be subject to these reporting obligations. However, U.S. persons, including U.S. governmental plans, are subject to annual reporting if they own an interest in an investment fund characterized as "passive foreign investment company" (generally a foreign corporation with substantial passive income or a large part of the assets of which produce passive income).

Report Of Foreign Bank And Financial Accounts

On February 26, 2010, the Treasury issued several pieces of important guidance relating to the required filing of Form TD 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR) by United States persons with a financial interest in, or signature authority over, financial accounts in a foreign country. In particular, this new guidance relieves persons that held interests in foreign private equity and hedge funds in calendar year 2009 and earlier from the FBAR filing requirement with respect to those years, and if the proposed regulations that were issued are finalized, would relieve governmental entities from FBAR filing requirements with respect to all foreign financial accounts.

Notice 2010-23 extends and expands relief initially granted by Notice 2009-62, which was issued in August of last year, for investors in foreign private equity and hedge funds. The new relief provides that the IRS will not apply its enforcement authority adversely in the case of persons with a financial interest in, or signature authority over, a foreign commingled fund (other than a foreign commingled fund that is a mutual fund) with respect to that account for calendar year 2009 and earlier. Importantly, Notice 2010-23 provides that a financial interest in, or signature authority over, a foreign hedge fund or private equity fund is included in the administrative relief described in the previous sentence.

In addition to Notice 2010-23, proposed regulations were issued on February 26, 2010, which if finalized, would exclude public pension plans from the FBAR filing requirement. Specifically, proposed regulation Section 103.24(c)(4) provides that an "account of a department or agency of the United States, an Indian Tribe, or any State or any political subdivision of a State, or a wholly-owned entity, agency or instrumentality of any of the foregoing is not required to be reported." The proposed regulations also include proposed revisions to the instructions for the FBAR, which go further to clarify that a governmental entity not required to file a FBAR with respect to its foreign financial accounts includes "an employee retirement or welfare benefit plan of a governmental entity."

In addition, the proposed regulations reserve on the issue of whether private equity funds and hedge funds fall within the scope of "other financial accounts" for which reporting is generally required. Therefore, if finalized, there would be no FBAR filing requirement with respect to a financial interest in or signatory authority over a private equity or hedge fund. The preamble to the proposed regulations does point out, however, that part of the reason for the Treasury's reservation on the issue of private equity and hedge funds is because of pending regulatory and legislative reform targeted at those and other privately offered investment funds.

If you would like to discuss any of the issues addressed in this Client Alert or would simply like to find out more about Chapman, please contact Mike Barrett, Kelley Bender, Steve Frost, Van Holkeboer, or visit us at chapman.com.

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