



April 22, 2010

Department of the Treasury
Financial Crimes Enforcement Center
RIN 1506-AB08
P.O. Box 39
Vienna, VA 22183

VIA ELECTRONIC MAIL

Subject: (RIN 1506-AB08) FBAR Exception for State and Local Government Pension Plans

On behalf of the National Association of State Retirement Administrators (NASRA), the National Conference on Public Employee Retirement Systems (NCPERS), and the National Council on Teacher Retirement (NCTR), which collectively represent State and local public employee retirement systems that hold over \$2.5 trillion in trust for nearly 20 million public employees, retirees and their beneficiaries, we are writing in response to your solicitation of comments on the Amendment to the Bank Secrecy Act Regulations outlined in the Notice of Proposed Rulemaking promulgated on February 26, 2010, Docket Number Fincen 2009-0008.

We believe it is important to recognize at the outset that the proposed rule is a significant step in the direction of clarifying the inapplicability of Foreign Bank and Financial Accounts (FBAR) reporting requirements to our nation's governmental pension plans. In our comment letter to the Internal Revenue Service, dated October 5, 2009, we listed a number of reasons why governmental plans should not be covered by the FBAR reporting requirements. We are gratified that our comments and those from our colleagues in the governmental plan community were given due consideration.

We write today on two issues related to the proposed rulemaking. Specifically, we are requesting further clarification on: (1) the exception for governmental plans found in proposed 31 CFR §103.24(c)(4); and (2) a potential unintended gap in the temporary administrative relief issued by the Internal Revenue Service in conjunction with the proposed rulemaking.

Exception for Governmental Plans

The draft revised instructions to Form TD F 90-2.1 (the "FBAR form") clearly state that under the proposed rulemaking no FBAR will be required to be filed with respect to a foreign financial account of a state or local government retirement or welfare benefit plan:

Governmental Entity. A foreign financial account of any governmental entity is not required to be reported on an FBAR by any person. For purposes of this form,

governmental entity includes: (1) a college or university that is an agency or instrumentality of, or owned or operated by, a governmental entity; and (2) an employee retirement or welfare benefit plan of a governmental entity. (emphasis added).

However, the wording of the actual proposed regulation is less clear:

G. Section 103.24(c)(4)—Exceptions for Certain Accounts

...The following accounts are proposed to be excepted from reporting.

- 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. In addition, reporting is not required with respect to an account of an entity established under the laws of the United States; of an Indian Tribe; of any State; or of any political subdivision of any State; or under an intergovernmental compact between two or more States or Indian Tribes that exercises governmental authority on behalf of the United States, an Indian Tribe, or any such State or political subdivision. For this purpose, an entity generally exercises governmental authority on behalf of the United States, an Indian Tribe, a State, or a political subdivision only if its authorities include one or more of the powers to tax, to exercise the power of eminent domain, or to exercise police powers with respect to matters within its jurisdiction (emphasis added).

The third sentence provides a definition of “governmental authority.” This sentence can be read to refer only to the second sentence, which uses the term “governmental authority.” In this case, we believe governmental pension plans were intended to be excepted under the first sentence as governmental plans are typically thought to be part of a state or political subdivision, or an agency or instrumentality thereof. However, some commentators have suggested that the requirements of the last sentence could be read more expansively to cover both the first and second sentences. Assuming that interpretation were correct, governmental pension plans may not meet the requirements of the exception, because they themselves do not exercise the powers to tax, to exercise the power of eminent domain, or to exercise police powers with respect to matters within its jurisdiction, a result that we do not believe was intended by the drafters.

In any event, even if the third sentence is read as qualifying only the second sentence (as we believe it is intended to be), the first sentence itself, if read literally, arguably falls short of covering some governmental pension plans. Some governmental pension plans are not considered political subdivisions, state agencies or instrumentalities under the laws establishing them and legal framework within which they operate. It is possible that some governmental plans might be considered “entities,” but in that event it is

possible that some of those plans may not be viewed as “wholly owned” by their sponsoring jurisdictions.

Therefore, we respectfully request that the Department clarify the proposed rule to state, as the instructions state perfectly, that an employee retirement or welfare benefit plan of a governmental entity is not required to report under FBAR.

Potential Gap in IRS Temporary Relief

The delayed FBAR filing deadline of June 30, 2011 contained in Notice 2010-23 provides temporary relief for persons with signature authority over, but no financial interest in, a foreign financial account, and for persons with financial interests in foreign commingled funds that are not mutual funds; however, it does not, by its terms, appear to apply to a governmental plan that has an interest in a foreign financial account that is not a commingled fund other than a mutual fund (e.g., a bank account at an overseas branch of a United States bank). Since Notice 2010-23 clearly seems intended to postpone until June 30, 2011 any FBAR filings that may not be required if the proposed rulemaking goes into effect, we respectfully recommend that the Department issue further guidance stating that a governmental plan with a financial interest in, or signature authority over, any foreign financial account will not need to file before June 30, 2011, any FBAR that might otherwise be due before that date.

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If you have any questions or need additional information, please do not hesitate to contact the legislative representatives of our organizations:

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