

MEMORANDUM TO CLIENTS

RE: IRS Extends FBAR Deadline until June 30, 2010, for Certain Filers

The Internal Revenue Service ("IRS") has extended until June 30, 2010, the deadline by which certain U.S. persons must file a Report of Foreign Bank and Financial Accounts, Form TD F 90-22.1 ("FBAR"). IRS Notice 2009-62, which will appear in I.R.B. 2009-35 (Aug. 31, 2009), extends the FBAR filing deadline for the 2008 calendar year *and prior years* for U.S. persons with (i) signature or other authority over, but no financial interest in, a foreign financial account or (ii) a financial interest in, or signature or other authority over, a foreign commingled fund.

Notice 2009-62 provides welcome relief with respect to numerous U.S. persons that may have otherwise been required to file FBAR in connection with employee benefit plans and individual retirement accounts ("IRAs"). The extended filing deadline is a particularly positive development for investment fiduciaries of employee benefit plans many of whom will likely be eligible for a complete reprieve from any FBAR filing obligation until June 30, 2010. The extension is similarly helpful in connection with plans and IRAs where foreign investments are limited to commingled funds. Unfortunately, however, the new extension does not apply to all plan- or IRA-related filings. Thus, some plans, plan sponsors and service providers may be required to file or, in some cases, make partial filings on or before September 23, 2009.

I. Background

As discussed in our June 25, 2009 memorandum (*available at* <http://www.groom.com/resources-404.html>), the FBAR filing requirement has been in existence for a number of years, but plan fiduciaries have rarely considered it necessary to file FBAR with respect to most foreign investments. However, recent changes to the FBAR filing instructions and informal guidance from the IRS indicate that FBAR filings may need to be made by each U.S. person with a covered relationship to a plan's "foreign financial accounts" (*e.g.*, foreign mutual funds). Specifically, a U.S. Person with a "financial interest in" (*i.e.*, owner of record or holder of legal title) or "signature or other authority over" (*i.e.*, the ability to control the disposition of money or other property) any foreign financial account must file FBAR with respect to that account.

FBAR filings generally must be received by June 30. However, the IRS announced on June 24, 2009, that filers have until September 23, 2009, to file FBAR for the 2008 calendar year if they have (i) only recently learned of their obligation to file FBAR, (ii) insufficient time to gather the necessary information, and (iii) reported and paid all 2008 taxable income, if any.

Notice 2009-62 further extends the filing deadline for certain U.S. persons and comes in response to a number of requests to temporarily delay the FBAR filing deadline due to widespread confusion among investment providers and international investors, including retirement plans. One such request was filed by Groom on behalf of a coalition of retirement plan and service provider clients (*available at* <http://www.groom.com/resources-411.html>) specifically requesting relief from the FBAR filing requirements for investments made in connection with employee benefit plans and IRAs.

II. Notice 2009-62 – Application to Plans and IRAs

The deadline extension announced in Notice 2009-62 covers all FBAR filing requirements applicable to persons whose only relationship with a foreign financial account is by reason of having signature or other authority over the account. Thus, regardless of the type of foreign financial account, a plan fiduciary, such as an investment committee member, typically need not file FBAR for 2008 or prior years until June 30, 2010. The IRS noted that such persons may need to make filings for 2008 and prior years on or before June 30, 2010, to the extent required by future guidance.

Notice 2009-62 also applies in a more limited fashion to persons deemed to have a "financial interest" in a foreign financial account – such as trustees, custodians, trusts and plan sponsors – if the account is a "commingled fund." Under the FBAR instructions, a person has a "financial interest" in an account if, among other things, the person is (i) the record owner or holder of legal title of the account or (ii) a person for whom another person, acting on his or her behalf, is the record owner or holder of legal title. Examples of persons with this type of "financial interest" may include trustees (or custodians) and plan trusts where the trustee (or custodian) is acting on behalf of the trust, which is the record owner or holder of legal title to the account. As the "settlor" of the trust, a plan sponsor may also have a "financial interest" in a plan's foreign account. The term "commingled fund" is defined by the FBAR instructions as 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)."

Because the relief for those with a "financial interest" is limited to commingled funds, trustees, custodians, trusts and plan sponsors may need to differentiate between foreign financial accounts that are "commingled funds" and foreign financial accounts that are not in order to determine which accounts are eligible for the extended June 30, 2010 filing deadline. This could result in partial FBAR filings. Consider the following example:

In 2008, an employee benefit plan trust (i) invested in an offshore commingled fund and (ii) held foreign securities in a foreign custody account. Both the commingled fund and the foreign securities account are arguably foreign financial accounts. While the trust could be deemed to have a "financial interest in" each of the foreign financial accounts, the relief provided by Notice 2009-62 may be available to the trust only with respect to the commingled fund. An FBAR filing with respect to the foreign securities account would not be eligible for the extended deadline and would, in fact, already be considered delinquent (but potentially eligible to file by September 23, 2009, without incurring penalties).

A similar situation arises in the IRA context where, for example, an IRA custodian may have to first identify which of its IRA clients invested in foreign accounts at any time during the calendar year and then determine which of those foreign financial accounts are "commingled funds" in order to determine the extent to which the June 30, 2010 FBAR filing deadline applies.

III. Open Comment Period

Notice 2009-62 indicates that Treasury is considering issuing FBAR-related regulations and requests comments on the FBAR filing requirements. In particular, IRS has asked for comments on the following issues:

- When the FBAR filing obligation should be eliminated for persons with signature authority over, but no financial interest in, a foreign financial account;
- Whether the exceptions for officers and employees of banks and certain publicly traded companies should be expanded to apply to all officers and employees with signature authority, and no financial interest in, a foreign financial account;
- Whether certain definitions in the rules for "passive foreign investment companies" in Code sections 1297 and 1298(b) should be made applicable for FBAR reporting purposes, which would exclude certain passive investments;
- When an interest in a foreign entity (*e.g.*, corporation, partnership, or trust) should be subject to FBAR reporting; and
- Whether a person should be relieved of his or her FBAR filing obligation with respect to foreign commingled funds in other circumstances (*e.g.*, where it would be duplicative of filings made by the same investment fund).

The comment period runs closes on October 6, 2009.

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If you would like to discuss the FBAR filing requirements or are interested in submitting comments, please contact Jennifer Eller ((202) 861-6604, jee@groom.com), Michael Kreps ((202) 861-0182, mkreps@groom.com), or your regular Groom attorney.