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Extension of Puerto Rico Tax Amnesty Program May Help Puerto Rico Retirement Plans Correct Prior Failures With 1994 PR Code Withholding and Reporting Requirements

On April 19, 2012, Puerto Rico Governor, Luis Fortuño, signed Act 64-2012, which provides for an extension until June 15, 2012, of the tax amnesty program under the Act for the Strengthening of the Public Safety and Health, Act 218-2011 (the "Tax Amnesty Program"), which had originally expired on February 29, 2012. In general terms, the Tax Amnesty Program provides for the waiver of the payment of interest, penalties, surcharges and any other additions to the tax with respect to, among others, income tax liabilities (including withholding taxes) under the former Puerto Rico Internal Revenue Code of 1994, as amended (the "1994 Code").

In order to enjoy the benefits of the Tax Amnesty Program, among certain other requirements, on or before June 15, 2012, the taxpayer must pay the total Puerto Rico income taxes due under the 1994 PR Code and the Puerto Rico Internal Revenue Code of 2011, as amended. We note that the authority the Puerto Rico Secretary of the Treasury had under the Tax Amnesty Program to agree to a payment plan for the payment of the tax due was not extended by Act 64-2012.

Although generally intended for the payment of Puerto Rico income taxes due by individuals and corporations, the Tax Amnesty Program is also available to Puerto Rico qualified retirement plans, both Puerto Rico-only qualified plans and dual-qualified plans (*i.e.*, plans qualified both in Puerto Rico and the U.S.), that may have failed to comply with the 1994 PR Code's tax withholding (*i.e.*, 5%, 10%, 20% Puerto Rico income tax withholdings, as applicable depending on the type and time of distribution) and reporting requirements (*i.e.*, Forms 480.6A and 6B, and Form 480.7C, as applicable depending on the type and year of distribution) on distributions to participants in Puerto Rico. A closing agreement must be negotiated and executed between the Puerto Rico Treasury Department (the "PR Treasury") and the sponsor of the Puerto Rico qualified plan in order to enjoy the benefits of the Tax Amnesty Program.

As we had indicated in our Benefits Brief of February 6, 2012 (available at <http://www.groom.com/resources-650.html>), the Puerto Rico Treasury Department has provided a relief period until the end of the 2012 plan year to amend Puerto Rico qualified plans in compliance with the provisions of the 2011 PR Code, and until the due date of the participating employer's Puerto Rico income tax return for taxable year 2012 to submit plans for Puerto Rico tax qualification, including retroactive qualification under the 1994 PR Code. Although these deadlines fall at the end of 2012 and/or in 2013, plans that have not complied with the 1994 PR Code's withholding and reporting requirements in the past are strongly encouraged to take advantage of the Tax Amnesty Program in order to avoid the payment of interest, penalties and surcharges on any prior failures to withhold and report.

Plans that have not been qualified under the 1994 PR Code must do so prior to entering into a closing agreement under the Tax Amnesty Program. Plans that do have a determination letter under the 1994 PR Code or the 2011 PR Code, even though it might be not up to date, may use the Tax Amnesty Program prior to completing the update of the plan's Puerto Rico tax qualified status under the 1994 PR Code and/or the 2011 PR Code. However, as mentioned above, the Tax Amnesty Program is only available until June 15, 2012, so prompt action is required.

Finally, it is worth mentioning that the closing agreement to be entered by the plan sponsor and the PR Treasury may be drafted in way that the corrections are transparent to participants (e.g., participants would not have to amend their prior years' Puerto Rico income tax returns to include the unreported distributed amounts as taxable income, and would not have to include the payment made by the plan sponsor for the tax not withheld in prior as taxable income in the current year, therefore not incurring any additional Puerto Rico income tax liability for the correction).

We would be pleased to assist you with the closing agreement processes or any other Puerto Rico benefits matters.

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