

February 16, 2010

MEMORANDUM TO CLIENTS

RE: FBAR Update: Plan Fiduciaries May Have to Disclose Plan Foreign Financial Accounts on Their Personal Income Tax Returns

As you know, Groom has been monitoring developments related to foreign bank account reporting requirements as applied to employee benefit plans. Now that tax filing season has again arrived, it is important to note that pension plan fiduciaries with an "interest in" or "signature or other authority over" a Plan's foreign financial accounts (*e.g.*, foreign bank accounts, securities accounts, or mutual funds) may have to disclose their relationship to such accounts on their personal income tax returns. Specifically, Form 1040, Schedule B, Line 7a requires a taxpayer to affirmatively check a box if (i) the taxpayer has an "interest in" or "signature or other authority over" a foreign financial account and (ii) the combined value of such account(s) was greater than \$10,000 at any point during the tax year. The taxpayer must also report the name of the country in which each account is located on Line 7b.

The obligation for certain plan fiduciaries to disclose their relationship to plan-related foreign financial accounts on Form 1040 parallels the requirement that U.S. persons with a covered relationship to a foreign financial account file a "Report of Foreign Bank and Financial Accounts" (Form TD F 90-22.1, or "FBAR"). In recent years, the Internal Revenue Service ("IRS") has stepped-up enforcement of foreign account reporting requirements. In addition, the IRS changed the FBAR filing instructions and issued informal "guidance" indicating that FBAR filings are required with respect to, among other things, investments in certain types of offshore entities, such as offshore hedge funds. These new interpretations caused widespread confusion among pension plan fiduciaries, pension plan service providers, and the investment community.

In response to this widespread confusion, the IRS issued Notice 2009-62, which extended the deadline to file FBAR for 2008 and prior calendar years for many pension plan-related filings. The IRS also requested comments on the FBAR filing requirement and indicated that the U.S. Treasury Department ("Treasury") may revise the FBAR regulations. Groom and other groups requested that Treasury exempt fiduciaries from reporting plan-related accounts on both FBAR and Form 1040.

During recent informal conversations, Treasury staff indicated to us that short-term FBAR guidance is expected to be released before income tax returns are due to be filed on April 15, 2010. Although it is not clear what the guidance will address, the close connection between FBAR and Form 1040 suggests that any changes to the FBAR filing requirements could also affect plan fiduciaries' obligation to disclose their relationship to plan-related foreign financial accounts on their personal income taxes. Given the uncertainty around when the guidance will be issued, and what it will address, plan fiduciaries may wish to begin gathering information on the plan's foreign accounts in order to be prepared to disclose the accounts on their Form 1040. At the same time, such persons may want to consider waiting to file their returns until guidance is issued.

Congress is also currently considering changes to the foreign account reporting and disclosure rules. For example, the jobs creation package introduced by Senate Majority Leader Harry Reid (D-NV) on February 11, 2010, contains a number of foreign account-related provisions, as does the "Tax Extenders Act of 2009" (H.R. 4213) passed by the House.

For more information about the foreign account reporting requirements, the following resources are available on the Groom website:

- *Groom Comments on FBAR Filing Requirement for Pension Plans* (October 6, 2009), available at <http://www.groom.com/resources-429.html>
- *IRS Extends FBAR Deadline Until October 15, 2009 for Certain Filers* (September 22, 2009), available at <http://www.groom.com/resources-427.html>
- *FBAR Filing Deadline Extended Until June 30, 2010, in IRS Notice 2009-62* (Aug. 11, 2009), available at <http://www.groom.com/resources-413.html>
- *Groom Comments on FBAR Filing Requirement for Plans* (July 30, 2009), available at <http://www.groom.com/resources-411.html>
- *Plans May Be Required to Make FBAR Filing for Offshore Investments by September 23, 2009* (June 25, 2009), available at <http://www.groom.com/resources-404.html>

When Treasury issues the interim guidance, we will determine whether to hold a dial-in to discuss the implications and help our clients prepare for any FBAR reporting that may be required. We may also re-activate the FBAR Comment Group if there are significant issues raised by the interim guidance.

As always, if you would like to discuss the foreign account reporting requirements, please contact Jennifer Eller ((202) 861-6604, jee@groom.com), Michael Kreps ((202) 861-0182, mkreps@groom.com), or your regular Groom attorney.