GROOM LAW GROUP

March 1, 2010

MEMORANDUM TO CLIENTS

RE: FBAR Update – Deadline Extension and Proposed Regulations

On February 26, 2010, two important pieces of guidance were issued relating to the "Report of Foreign Bank and Financial Accounts" (Form TD F 90-22.1, or "FBAR"). First, the Financial Crimes Enforcement Network ("FinCEN") issued proposed regulations clarifying what U.S. persons need to (and do not need to) file FBAR. Second, the Internal Revenue Service ("IRS") released Notice 2010-23, which extends the deadline to file FBAR until June 30, 2011, for certain filers and provides guidance with regard to reporting foreign financial accounts on individual income tax returns. Notice 2010-23 and the proposed FBAR regulations are discussed below.

Because of the importance of the FBAR-related guidance, we will be holding a dial-in for our clients and friends on Thursday, March 4, 2010, from 11 to 12 (EST). We expect to discuss, among other things, (i) the effect of Notice 2010-23, including its guidance on the reporting of plan accounts on personal income tax returns, (ii) the key regulatory changes proposed by FinCEN that would affect employee benefit plans and IRAs, and (iii) practical steps plan fiduciaries and services providers should take to attempt to comply with the foreign account reporting rules while the regulations are pending. We have also reopened the FBAR Comment Group to provide comments with respect to the proposed regulations.

I IRS Notice 2010-23

Of greatest immediate interest to plans, fiduciaries, and service providers is IRS Notice 2010-23, which:

- Delays FBAR filing requirements for certain persons until June 30, 2011;
- States that persons subject to the delayed FBAR filing deadline need not to report the existence of foreign accounts on their 2009 personal income tax returns (Form 1040); and
- Announces that IRS will not enforce the FBAR reporting rules with respect to persons with investments in foreign hedge funds or private equity funds for 2009 and earlier years.

The relief granted in Notice 2010-23 will be extremely helpful to persons whose relationship to a foreign financial account is limited to having signature or authority over the account. For these persons, the FBAR filing deadline for the 2009 calendar year has been extended until June 30, 2011. Perhaps more importantly, a person to whom the FBAR extension applies is not required to report his or her relationship to such foreign financial accounts on his or her 2009 personal income tax return (i.e., the Form 1040).

In addition, persons with either a financial interest in, or signature or other authority over any type of foreign commingled account, other than a foreign mutual fund, do not need to file

FBAR for 2009 and prior years. This appears to be an interpretive and enforcement exemption rather than a deadline extension, and applies specifically to foreign hedge funds and foreign private equity funds. Notably, investments in foreign mutual funds are not subject to this exemption, and persons with a financial interest in a foreign mutual fund must file FBAR on or before June 30, 2010 for the 2009 calendar year, and would presumably also have to report the existence and location of the foreign mutual funds on his or her 2009 Form 1040.

As with IRS Notice 2009-62, issued in August 2009, the relief in Notice 2010-23 is helpful, yet incomplete. Specifically, persons with a financial interest in a foreign account that is either a mutual fund or a non-commingled fund must file FBAR by June 30, 2010 for the 2009 calendar year and must report the existence of the account, and its location, on their 2009 Form 1040.

II. FinCEN Proposed FBAR Regulations

The regulations proposed by FinCEN would make important changes to the FBAR reporting rules. 75 Fed. Reg. 8894. As proposed, the regulations would completely relieve governmental plans, retirement plan participants and IRA owners, and individual employees of registered investment advisors advising registered mutual funds from the responsibility for making FBAR filings. However, the proposed regulations generally would not provide any relief for plan investment fiduciaries.

The following is a summary of some of the key provisions of the proposed regulations as they relate to employee benefit plans and IRAs:

- **Pension Plans Must File.** The proposed regulations make clear that FBAR must be filed with respect to plan-related foreign financial accounts (subject to the exceptions below).

- **Exception for Governmental Plans.** Proposed revisions to the FBAR instructions – which accompany the proposed regulations – expressly state that the foreign financial account of any employee retirement or welfare plan of a government entity is not required to be reported on FBAR *by any person*. This is a positive development and is something we asked for in our FBAR comment letter.

- **Exception for Plan Participants and IRA Owners.** Participants and beneficiaries in qualified retirement plans and IRA owners and beneficiaries would not be required to file FBAR with respect to foreign financial accounts held by or on behalf of the plan or IRA. This, too, is a positive development and was an issue we raised with Treasury.

- **Annuities and Mutual Funds Included in Definition of Financial Account.** The proposed regulations would treat an annuity, or any other insurance policy with a cash surrender value, including a variable annuity, or whole life policy, issued outside of the U.S. as a foreign financial account. Foreign mutual funds and similar funds offered to the general public would also be treated as foreign financial accounts. Meanwhile, pending the resolution of this issue, certain alternative investments may need to be reported.

- **Rabbi Trusts Included**. The proposed regulations provide that grantor trusts (as defined for U.S. tax purposes under sections 671-79 of the Internal Revenue Code) are subject to FBAR if the settlor is a U.S. person and they have a financial account. Thus, FBAR may have to be filed with respect to Rabbi trusts and Rabbi trust investments.

- **FinCEN Still Considering Alternative Investment Reporting.** One of the most controversial issues raised by FBAR is whether or not foreign private equity and hedge fund investments need to be reported. The preamble to the proposed regulations states that FinCEN has "determined that, at this time, the [proposed regulations] should reserve the treatment" of private equity and hedge funds, and FinCEN "will continue to study this issue."

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We will be holding a dial-in for our clients and friends on Thursday, March 4, 2010, from 11 to 12 (EST). If you would like to register for the dial-in, please contact Dorothy Rudd (202-861-6327, drudd@groom.com).

We have also are reopened the FBAR Comment Group to provide comments on the proposed regulations by the April 27 deadline. If you are interested in joining, please contact Jennifer Eller ((202) 861-6604, jee@groom.com), Michael Kreps ((202) 861-0182, mkreps@groom.com), or your regular Groom attorney.