

February 26, 2010

## MEMORANDUM TO CLIENTS

### RE: **FBAR Update – FinCEN Releases Proposed Regulations and Requests Comments**

Today's Federal Register (75 Fed. Reg. 8894) contains proposed regulations that would amend the foreign financial account reporting rules, including the "Report of Foreign Bank and Financial Accounts" (Form TD F 90-22.1, or "FBAR"). The proposed regulations provide welcome filing relief for governmental plans, retirement plan participants and IRA owners, and for individual employees of registered investment advisors advising registered mutual funds. However, the proposed regulations do not provide any relief for plan investment fiduciaries and fail to provide any guidance relevant to the reporting of plan foreign accounts on fiduciaries' personal income tax returns – an issue that must be resolved before the April 15, 2010 federal income tax filing deadline.

Because of the importance of this issue to our clients and friends, we will be holding a dial-in on Thursday, March 4, 2010, from 11 to 12 (EST) to discuss the proposed regulations. We expect to discuss, among other things, (i) the key proposed changes that would affect employee benefit plans and IRAs, (ii) the reporting of plan accounts on personal income tax returns, 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 also are reopening the FBAR Comment Group to provide comments on the proposed regulations by the April 27 deadline.

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.
- **No Clear Guidance for Income Tax Reporting.** As we noted in our February 16, 2010 client memorandum, because there is a close connection between FBAR and the foreign account disclosure requirement on Schedule B of Form 1040, changes to the FBAR rules could affect plan fiduciaries' obligation to disclose their relationship to plan-related foreign financial accounts on their personal income taxes. However, the proposed

regulations raise more questions than they answer with regard to income tax reporting, and it is not clear whether the IRS will provide any guidance to aid plan fiduciaries before April 15.

- **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."

As noted above, we are holding a dial-in to discuss FBAR and the parallel income tax reporting requirement on 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).

Additionally, we are re-activating the FBAR Comment Group and opening the group to new membership. 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.