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Re: Notice 2010-60

October 12, 2010

Dear Ms. Corwin and Messrs. Caballero, Danilack, Mundaca, Musher, Shay, and Shulman:

We are pleased to provide you with the following comments to the Foreign Account Tax Compliance Act (“FATCA”) provisions of the Hiring Incentives to Restore Employment Act. Our comments focus particularly on the potential application of the FATCA provisions, in light of the preliminary guidance provided in Notice 2010-60 (“Notice”),¹ to foreign pension and retirement funds.

I. Overview

The substantive FATCA rules of section 1471 apply to *foreign financial institutions* (“FFIs”). An FFI is broadly defined² and generally appears to encompass foreign retirement accounts, including pension funds. Accordingly, absent specific guidance to the contrary the obligations of section 1471 can apply to most types of foreign retirement funds. Section 1471 does not apply, however, to the extent that the beneficial owner of a subject payment is part of a class of persons posing a low risk of tax evasion as identified by the Secretary.³

¹ IRB 2010-37 (September 13, 2010).

² 1471(d)(4) and 1471(d)(5)

³ 1471(f)(4).

A foreign entity that is not an FFI is a nonfinancial foreign entity (“NFFE”). NFFEs are subject to substantive FATCA provisions found principally in section 1472.⁴ Similar to the section 1471 provisions, the section 1472 provisions do not apply to the extent that the beneficial owner is part of a class of persons identified by the Secretary as posing a low risk of tax evasion.⁵

II. Notice

Pursuant to the Notice, Treasury identified certain retirement funds as posing a low risk of evasion for purposes of section 1471.⁶ Funds satisfying the requirements in the Notice therefore will not be subject to the terms of section 1471. This is a positive step which provides some desired clarity. The class of retirement funds identified in the Notice, however, is very limited in scope and may not apply to many typical retirement funds that exist in foreign countries. Specifically, only retirement funds which satisfy the following three requirements are *identified* by the Notice for purposes section 1471(f)(4):

- (i) the fund qualifies as a retirement plan under the law of the country in which it is established;
- (ii) the fund is sponsored by a foreign employer; and
- (iii) the fund must not allow U.S. participants or beneficiaries other than employees that worked for the foreign employer in the country in which such retirement plan is established during the period in which benefits accrued.

The Notice therefore limits the identification to *employer* sponsored plans. Employer sponsored plans are an important category of retirement plans, and their identification for purposes of section 1471(f)(4) is warranted. Most countries, however, have additional categories of retirement plans including government, multi-employer and employee sponsored retirement plans. Further, in many countries large pension and retirement plans may be sponsored by trade associations or employment unions rather than private employers. Often, the non-employer sponsored funds can be larger and more common than employer sponsored funds. We believe that Treasury can expand the types of retirement funds identified for purposes of section 1471(f)(4) without impeding Treasury’s goal of increased taxpayer compliance.

III. Suggested Expansion of Section 1471(f)(4)

Non-employer sponsored pension plans should generally be treated similarly to employer sponsored plans. As such, those plans should generally also be identified by Treasury as

⁴ Section 1471(d)(5).

⁵ Section 1472(c)(2).

⁶ Notice, Section II, C. Classes of Persons Posing a Low Risk of Tax Evasion Under Section 1471(f)(4) – Retirement Plans.

posing a low risk of evasion under section 1471(f)(4). Accordingly, Treasury should eliminate requirement (ii) above, such that foreign retirement funds otherwise satisfying, e.g., requirement (i) and a modified version of requirement (iii) are identified for purposes of section 1471(f)(4).

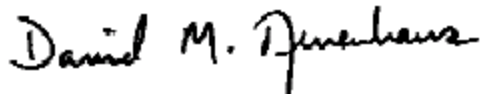
To this end, we note that the FATCA provisions provide special treatment to U.S. individual retirement accounts (i.e., U.S. employee sponsored accounts).⁷ The proposed expansion of the class of retirement funds identified for purposes of section 1471(f)(4) is consistent with FATCA's special treatment of U.S. employee sponsored plans.

IV. Suggested Expansion of Section 1472(c)(2)

As described, removing foreign retirement funds (as broadly defined) from FFI treatment could result in application of the NFFE rules to such retirement funds. Treasury should therefore identify foreign retirement funds (as defined consistently with a revised section 1471(f)(4) definition) as posing a low risk of evasion for purpose of the NFFE substantive provisions.

We appreciate Treasury's invitation to comment on these important FATCA provisions. We would be pleased to discuss these suggested revisions in greater detail at your convenience.

Sincerely,



David M. Neuenhaus
Principal, WTS

cc: F. Helverson, WTS

⁷ Section 1473(3)(C), excepting, inter alia, individual retirement accounts from the definition of "specified U.S. person".