January 31, 2017

Robert Stack, Deputy Assistant Secretary (International Tax Affairs)
Office of the International Tax Counsel
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington DC 20220

Re: Comment on FIRPTA Requirements for Exemption for Qualified Foreign Pension Funds

Dear Mr. Stack,

We are writing on behalf of the Regulatory Policy Committee of the International Pension and Employee Benefit Lawyers Association ("IPEBLA"), to comment on possible guidance under the changes to the Foreign Investment in Real Property Tax Act ("FIRPTA") as amended by the Protecting Americans from Tax Hikes Act of 2015 (the "PATH Act") regarding the definition of a "qualified foreign pension fund" ("QFPF") under Section 897(l)(2) of the U.S. Internal Revenue Code (the "Code").

IPEBLA is an association of approximately 240 pension and benefits lawyers from about two dozen countries around the world organized in 1987 to promote awareness internationally of the role of law in the provision of pensions and other employee benefits; to promote understanding internationally of the legal relationships between employers, employees and others involved in pensions and other employee benefits plans; and to assist lawyers affecting pension and employee benefits law and design in different countries.

FIRPTA Exemption for QFPFs

As you know, FIRPTA generally treats income of a foreign investor from the sale or disposition of U.S. real property interests as effectively connected with the operation of a trade or business in the U.S. Such income is generally taxed at regular U.S. rates and withholding obligations are imposed on payors of the income. However, Section 323 of the PATH Act amended the Code to exempt from the withholding rules any U.S. real property interest held directly (or indirectly through one or more partnerships) by, or to any distribution received from a real estate investment trust by, a QFPF or by a foreign entity wholly-owned by a QFPF.

In furtherance of the policy objective of that exemption, on behalf of IPEBLA, we would like to offer the following suggestions concerning the definition of a QFPF exempt under Code section 897(l).

The Annual Information Reporting Requirement to be a QFPF

The definition of QFPF under Code section 897(l)(2) includes an number of elements, but the one which we wish to address in particular in this letter is the requirement that, to be a QFPF, the non-U.S. retirement or pension fund, trust, corporation or other organization or arrangement be **"subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in the country in which it is established or operates...."** See, Code section 897(l)(2)(D).

We observe that this phrase, though recent and not previously defined, is not original to the PATH Act. A similar provision can be found in regulations under the Foreign Account Tax Compliance Act ("FATCA") for purposes of defining "broad participation" and "narrow participation" retirement funds which may be treated as "exempt beneficial owners" eligible to claim an exemption from Chapter 4 withholding using IRS Form W-8BEN-E. Those FATCA exemptions similarly include a requirement that the fund "is subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in the country in which the fund is established or operates". See, Treas. Reg. §1.1471-6(f)(2) and (3).

The meaning of that phrase in the FATCA regulations has also not been clarified to date, but now that the clause has been used again in FIRPTA, the question of how it should be interpreted has become more urgent. Depending upon how narrowly it is interpreted, it is possible that almost no pension fund, even one that meets U.S. ERISA requirements, could satisfy the QFPF exemption. That would not seem to be the intended result of the PATH Act change, which is to encourage non-U.S. tax-advantaged pension funds to invest in U.S real property.

The issue is essentially what it means for a plan to "provide annual information reporting about its beneficiaries to the relevant tax authorities". Simply put, if this phrase means that information about each individual participant or beneficiary in the plan and the value of each of their benefits must be reported by the plan to the tax authorities each year, whether they are currently receiving benefits or not, then we believe few pension funds in the world can meet the definition of QFPF.[1] Even pension funds in the U.S. would not meet this definition.

However, if the phrase means that:

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[1] The one exception identified to date is Belgium, where qualified pension funds must annually report all collective and individual pension contracts, and all acquired and vested benefits to participants, on an individual level (by name) for pensioners, deferred members and active members to a division of the Departments Labor, Pensions, Employment and Social Security (referred to as Sigedis). Non-respect of this disclosure obligation implies the non-deductibility of the employer's pension contributions.

(1) the plan provides annual information reporting on the plan as a whole to the relevant government pension regulator; and

(2) when participants and beneficiaries receive pension distributions or receive benefits from such pension funds, the amount of such distributions and the identities of the recipients are reported to the tax authorities or the relevant government pension regulator;

then this occurs in many jurisdictions with respect to tax-advantaged and well-regulated pension funds. We would propose that defining the phrase in question under future Treasury Regulations or other guidance consistent with these two prongs would be more consistent with the purpose of the PATH Act while avoiding potential for abuse of the provision. Further, such a definition would be consistent with U.S. pension plan reporting requirements.

We provide the following description of how such annual information reporting is performed in the U.S. to illustrate what should be a sufficient standard, and then provide examples in certain other countries:

United States

In the U.S., a tax-qualified pension fund under Code sections 401(a), 403(b) or 457(b) must report distributions to participants on an IRS Form 1099-R (Form 1042-S in the case of distributions to nonresidents). For plans subject to the comprehensive U.S pension regulation known as ERISA, which excludes plans for governmental and church employees, the plan must file a comprehensive annual Form 5500 with the IRS and the Department of Labor. However, the Form 5500 provides plan-level information, not information on individual participants (except for certain participants who are vested and have terminated employment in a year, who are reported on a Form 8955-SSA for that year).

Australia

Australian superannuation funds are regulated at a Commonwealth (federal) level and the main designated regulators are:

- The Australian Prudential Regulation Authority; (for prudential matters)
- The Australian Securities and Investment Commission (for consumer protection and disclosure); and
- The Australia Taxation Office (ATO) (taxation matters).

Australian superannuation funds are required to provide the ATO with annual reporting information in respect of benefits paid, contributions received, and movements in balances. For defined benefit funds (noting that the majority of funds are accumulation funds), the required contribution reporting extends to the "notional" or actuarially calculated value of contributions implicit in the increase in defined benefit balances.

However, the annual reporting by Australian superannuation funds, will not necessarily encompass or identify all individual beneficiaries, particularly if the fund did not receive a contribution in respect of member, or a benefit was not paid.

United Kingdom

In the UK, a tax qualified pension fund is one which is a "registered pension scheme" (registered under Section 153 of the UK Finance Act 2004).

The scheme administrators (generally trustees or managers of the registered pension scheme) only have a reporting duty to HM Revenue & Customs (UK tax authorities) in relation to beneficiaries where, in general, a plan member's benefits commence payment. In that situation, the scheme administrator will be under a duty to withhold tax on payments to that plan member which are classified as income from the registered pension scheme for UK tax purposes. There are certain specified events that trigger additional reporting requirements by the scheme administrators to HM Revenue & Customs and are, in general, linked to a particular plan member.

There is a reporting duty on the scheme administrators of registered pension schemes to inform HMRC, on an annual basis, if scheme membership as a whole falls within a different band at the tax year end compared with the previous year. This is primarily aimed at identifying smaller schemes as there are bands of zero members, 1-10 members, 11-50 members, then 51-10,000 members, and more than 10,000 members.

Under the UK Pensions Act 2004 (Sections 59 to 65), there is an obligation on the trustees or managers of an occupational or personal pension scheme to provide "registerable information" about the pension scheme to the UK Pensions Regulator and to provide a scheme return to the Pensions Regulator on an annual basis (see Section 64 of the UK Pensions Act 2004). This includes information about the total number of beneficiaries under the scheme but not information about individual beneficiaries.

In summary, a UK registered pension scheme:

- is subject to an annual reporting requirement to the UK Pensions Regulator,

- is subject to Government regulation via a number of UK Acts of Parliament, including the Pensions Act 2004, and

- is subject to an obligation to make reports to HM Revenue & Customs by reference to specified events generally linked to individual plan members of which the most common is where the plan member's benefits from the plan are in payment.

However, there is no annual reporting requirement as such to HM Revenue & Customs or any other UK Pensions Regulator or any other Government Department that is on a plan member by member basis.

Netherlands

In the Netherlands, a tax-qualified pension fund under article 5 Corporate Tax Act must report distributions to participants, irrespective residents or non-residents or exempt or not exempt for income tax purposes. A qualified pension fund under the EU IORP Directive must report all acquired and vested benefits to participants on an aggregate level for pensioners, deferred members and members to the supervisor (the Dutch Central Bank).

South Africa

In South Africa all pension plans registered in terms of the Pension Funds Act 1956 (PFA) must submit annual financial statements to the pensions regulator, the Registrar of Pension Funds in terms of Board Notices 99 of 2008 and 14 of 2009. These annual financial statements are subject to audit unless exempted therefrom, and additionally actuarial valuations may be required every three years. These financial statements, whether or not subject to audit, require extensive reporting on the plan as a whole; but there is no reporting requirement to the pension regulator at an individual level. It should be noted, however, that although almost all pension plans are registered in terms of the PFA, and thus subject to this reporting requirement, there are a few plans which are established in terms of their own legislation, such as the Government Employees Pension Fund and those for some parastatal (state-owned) organizations, and these plans are not required to be registered in terms of the PFA and are thus not required to submit financial statements to the pensions regulator.

Whether or not a pension plan is registered in terms of the PFA, there is a limited exemption for the tax deductibility of contributions to all tax qualified pension plans in terms of the Income Tax Act 1962 (ITA), which plans enjoy full exemption from tax on income and capital gains. This tax exemption of tax qualified plans is subject however to the taxation of every type of benefit paid (whether on death, withdrawal or in retirement) by such plans, which in turn requires the reporting by such plans to the South African Revenue Service (SARS) in respect of any benefit payable at an individual member level so that the correct tax thereon can be paid.

Where benefits are transferred from such a tax qualified plan then in order for such a transfer to be exempt from tax and not reported to SARS, this must be in one of two forms: the one is that the transfer must be to another pension plan which must similarly be tax qualified and may not be from a plan categorized as a pension fund to one categorized as a provident fund (in which event tax will be levied as a withdrawal benefit); and the other to an insurer for the purchase of an annuity where, similarly, reporting is done and tax is levied at an individual level on the annuity payments as made.

Possible Safe Harbors

In addition, to provide certainty and ease administrative burden while avoiding the potential for abuse, we would suggest certain "safe harbors" could be added by regulation or other guidance to cover plans that, by their nature, would have sufficient tax reporting to the local tax or other governmental authorities that they should be deemed to be QFPFs:

1. Pension funds designated as generally corresponding to pension funds in the U.S. entitled to benefits under bilateral tax treaties with the U.S. See, for example, Art. 18, paragraphs 3 and 4, of the 2006 U.S. Model Tax Treaty.

2. Plans for governmental employees under a bilateral tax treaty with the U.S. per Article 19 of the 2006 U.S. Model Tax Treaty, which provides special rules for taxing distributions from governmental plans. This would include "pension and other similar remuneration paid by, or out of funds created by, a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority".

3. Pension funds designated as exempt beneficial owners under a FATCA-related Intergovernmental Agreement (IGA) between the U.S. and the other country. Each of the pension funds so designated will have been already considered by the U.S. Treasury "as posing a low risk of tax evasion." Code section 1471(f)(4).

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We hope that this will assist the Treasury in crafting a definition of "qualified foreign pension fund" that will be consistent with the intent of the legislation and encourage appropriate foreign pension fund investment in U.S. real property while preventing abuse. In addition to the possibility of addressing this in regulations, we would also suggest informal guidance on the QFPF definition along these lines would also be very helpful.

Please contact David W. Powell of the Groom Law Group, Chartered, in Washington, D.C., Chairman of the IPEBLA Regulatory Policy Committee, at 1-202-861-6600 or dwp@groom.com, or Dr. Lisa Butler Beatty, Chair of IPEBLA, in Sydney Australia, at 011-61-7775-3941 or lisa.butler.beatty@cba.com.au if you have any questions or if we can be of assistance or provide additional information.

cc: Danielle E. Rolfes, International Tax Counsel, U.S. Treasury
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