

ARBEITSGEMEINSCHAFT
BERUFSSTÄNDISCHER
VERSORGUNGSEINRICHTUNGEN e.V.

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ABV

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BRANCH

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GESCHÄFTSFÜHRUNG

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Comments of the Arbeitsgemeinschaft berufsständischer Versorgungseinrichtungen e.V. ("ABV") in Response to IRS Notice 2011-34

Arbeitsgemeinschaft berufsständischer Versorgungseinrichtungen e.V. ("ABV") represents the pension schemes of the liberal professions for mandatory members of professional associations in Germany.

ABV is pleased to submit the following comments regarding guidance to be issued by the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") in respect to the implementation of the Foreign Account Tax Compliance subtitle of the Hiring Incentives to Restore Employment Act of 2010 (referred to herein as "FATCA"). Our comments are in response to the request for comments in Notice 2011-34 (the "Notice"), specifically Section III.D, which provides that Treasury and the IRS are considering the types of foreign retirement plans that should be treated as posing a low risk of tax evasion under section 1471(f).

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As described herein, we believe that German pension schemes of the type we represent should qualify as posing a low risk of tax evasion and should be exempt from FATCA by inclusion under section 1471(f) as being low-risk persons or classes of persons (referred to herein as "low-risk persons").

With respect to the submission of comments, we are aware of the July 11, 2011, comment letter submitted by APG Algemene Pensioen Group NV ("APG"), which contains a proposed draft regulatory definition of low-risk persons, specifically as applicable to foreign pension funds and employee benefit plans. We believe that APG's definition appropriately balances the need to ensure that financial institutions that could be used for tax evasion be required to participate in FATCA with the equally important need for a definition of low-risk persons broad enough to exempt from FATCA those institutions that truly present a low risk of being used for tax evasion. However, we believe further refinement of the rules may be necessary to ensure that the German pension schemes we represent may qualify as low-risk persons.

This letter is organized into the following sections: (1) a brief description of ABV; (2) a description of the pension schemes ABV represents; and (3) comments addressing specific issues.

1. Description of ABV

ABV is the representative body of 89 pension schemes of the liberal professions (e.g., doctors, pharmacists, architects, notaries, attorneys, tax advisors, veterinarians, dentists, engineers, psychotherapists, and accountants) for members of professional associations (known as "Berufskammern") in Germany.¹ ABV's purpose is to protect the common interests of our member pension schemes. We represent, with the exception of one pension scheme for engineers organized in Bavaria and one pension scheme for engineers organized in Mecklenburg-Western Pomerania, all German pension schemes of the liberal professions for members of professional associations in Germany.

Our member pension schemes function as the chief vehicles for retirement savings for individuals working in the liberal professions. At the end of 2009, our member pension schemes had approximately 730,000 members paying contributions, over 797,000 members with pension rights, and approximately 178,000 members receiving pension benefits.

2. Description of ABV's Member Plans

In Germany, there are no mandatory employer-sponsored retirement or pension plans. Instead, the German government operates a pension scheme in which all German employees generally must participate. However, for historical reasons, parallel to the government pension scheme, German law authorizes the creation of pension schemes for members of certain professional associations. Germany requires participation in either the government plan or, for eligible individuals, one of the pension schemes for members of professional associations (hereafter referred to as "professional pension plan"²). However, in order to be eligible to participate in one of the plans we represent, an individual must be licensed by the applicable professional licensing body in the responsible Bundesstaat, or German state. For example, if an individual becomes licensed as an attorney in Bavaria by the Bavarian licensing body for attorneys (analogous to a state bar in the United States), only then does the individual become eligible to participate in the pension scheme for attorneys in Bavaria. Once the individual becomes eligible to participate in a professional pension plan, he has the option to no longer participate in the government-sponsored pension scheme. If a person who becomes eligible to participate in a professional pension plan is also an employee, he must participate in the professional pension plan even if he decides to remain in the government plan, although his contributions to the professional pension plan will in this case be reduced.

While the plans we represent are individually organized, they are organized under German state law as public bodies. The legal construct of a "public body" found in German law requires that professional pension plans fulfill a public purpose. In order for a professional pension plan to be formed, an act of the relevant German state's parliament is required. Most of the plans we represent each only operate in one German state (e.g., there is one professional pension scheme for dentists licensed in Saxony and there is a separate professional pension scheme for dentists licensed in Schleswig-Holstein).³ Professional pension plans, while technically subject to tax liability, are legally exempt from income tax because all their income will be distributed to their beneficiaries, who will be taxed. Moreover, professional pension plans are subject to rigid oversight by the German states. Each German state has a responsible governmental unit that monitors the German benefit funds.

¹ We have attached as Appendix I a list of our member organizations.

² Our plans are known in Germany as "berufsständische Versorgungswerke."

³ A few plans operate in multiple German states..

All but four of the plans we represent are in essence defined contribution plans,⁴ meaning that distributions upon retirement depend on the amount of contributions made by the individual. Because professional pension schemes are authorized by the German government to fulfil a similar purpose as the government-sponsored pension scheme, professional pension schemes have similar strict restrictions on contributions and distributions. Contributions to professional pension schemes are limited to an annual amount, which is annually adjusted to reflect inflation and other factors. Plan members who are also employees are required to contribute the same amount that participants in the government plan contribute, at a rate that is set by the federal government. In addition, employee plan members may elect to contribute an additional amount, the limit of which is set by each plan, but is usually capped at approximately 30 percent of the mandatory contributions. Plan members who are self-employed also have mandatory minimum contributions. They are not set by the Federal government, but set by the statute of each pension scheme. An elected counsel of plan members decides the maximum contributions self-employed plan members may make each year. This amount, expressed as a factor of the maximum mandatory contributions into the government plan, is usually approximately 1.3 times the mandatory contribution set for the government plan, but in rare cases 2.5 times the mandatory contribution set for the government plan .

Full distributions may be made from a professional pension scheme only at retirement age, which is generally 67 years of age,⁵ or in case of long-term disability, as well as providing survivor benefits to widows/widowers and orphans. However, some plans permit an individual to receive distributions up to 5 years earlier than the retirement age, but in such case, the individual will receive reduced distributions. All professional pension plans are financed entirely by contributions without any subsidies from the government.

One of the key features of professional pension plans in Germany is that they are not tied to being an employee. While many participants in professional pension plans are employees (such as an attorney working at a law firm), self-employed persons (such as an attorney who works as a solo practitioner) may also participate in professional pension plans, as long as they are members of the applicable professional organizations.

In summary, professional pension plans in Germany such as the plans we represent essentially operate as a parallel scheme to the government-sponsored pension scheme. They are highly regulated, participation is restricted to members of their respective professional asso-

⁴ There are four plans for notaries who are members of the civil service that are defined benefit plans.

ciations, and they have strictly defined contribution limits and distribution rules. As such, ABV believes that German professional pension schemes present an extremely low risk of use for tax evasion by U.S. persons. In fact, the only way that a U.S. person would be able to participate in such a plan is if that person not only worked in Germany in the relevant profession, but if that person also became a licensed member of the relevant professional association.⁶ We therefore believe that German professional pension plans are appropriate candidates for exemption from FATCA as low-risk persons.

3. Specific Comments

As we have stated in the introduction to this letter, we strongly believe in the need for a flexible definition of low-risk owner that generally permits retirement plans, pension schemes, and employee benefit plans that genuinely present a low risk of use for tax evasion to be exempt from FATCA. We believe that the definition proposed by APG in the form of draft regulatory language in its comment letter of July 11, 2011, meets this goal and we generally endorse it. If the APG proposal is adopted in FATCA guidance issued by the IRS and Treasury, we believe that the professional pension plans we represent would qualify for exemption from FATCA as plans “established by a professional association or an association of persons skilled in a particular craft.”⁷ However, we would like to highlight a few additional issues that could arise in the context of German professional pension plans.

3.1. Plan Members Who Cease to Be Members of the Professional Association

We note that APG’s proposed definition provides that plans established by a professional association permit only participants “who are members of the association.” However, other plans included in the APG proposal permit, e.g., employees who “worked” for an employer that created an employer plan. We believe that to the extent future guidance provides that plans established by professional associations are low-risk persons, such definition should

⁵ However, because Germany used to have a retirement age of 65 years, some plans are still transitioning and permit retirement distributions beginning at 65.

⁶ For instance, a U.S. attorney would not only have to work in Germany, he would also have to pass the equivalent bar exam in Germany and become a licensed member of a German state bar.

⁷ See § 1.1471-3(b)(iii)(e) of APG’s proposed definition. While we believe that this definition most appropriately represents professional pension plans in Germany, German benefit plans are in their legal form a public body, and thus have a quasi-governmental aspect. Therefore, if future guidance interprets the definition in § 1471(f)(1) of a “foreign government, any political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one or more of the foregoing” broadly, German professional pension plans may also qualify as low-risk persons under § 1471(f)(1).

make clear that the plans may permit not only persons who are current members of the association, but also persons who are former members.

Such a rule is necessary in Germany (and, we anticipate, in numerous other jurisdictions) because professional pension plans, while only permitting members of the relevant professional organizations to enroll in the plans, do not as a general rule terminate plan membership if an individual ceases to be an active member of the professional association. For instance, a person cannot become a member of the professional pension plan for dentists in Saxony unless he is licensed as a dentist by the professional association for dentists in Saxony. If, however, that person then decides to leave the profession of dentistry, or decides instead to work in another German state and becomes a member of that state's professional association, his membership in the plan is not terminated. While this means that technically, a U.S. person who works in Germany and joins a professional pension plan may continue to participate in the plan after returning to the United States, we believe that this presents an insignificant risk of tax evasion because (as discussed above) the licensing requirements that are prerequisites for plan participation make it extremely rare that U.S. persons who are only temporarily present in Germany will join a professional pension plan and, even if it would be possible for a significant number of U.S. persons to join such a plan, the strict contribution limits make it unlikely that such a plan would be used for U.S. tax evasion.

3.2. Rollover Contributions

APG's proposed definition provides that in order to be a low-risk person, a plan must prohibit rollover contributions into the plan, except for rollover contributions from other plans that are low-risk persons.⁸ We believe that such a requirement is generally appropriate to ensure that individuals cannot use a pension plan to park assets that may have been hidden from tax authorities. There are no rollover contributions from the government-sponsored pension plan into German professional pension plans. However, there may be rollovers from one professional pension plan to another (e.g., a tax consultant who additionally becomes a German CPA may roll over from the tax consultant pension plan to the accountant pension plan).

However, we believe that future guidance in this area should be sensitive to legal realities, so long as such legal realities do not create an environment conducive to tax evasion. For example, in Germany, although rollover contributions are generally quite restricted, it is possible in a divorce settlement, if both parties agree, to transfer funds from the plan of one

spouse to that of the other. Such a transfer, as long as it is from another plan that meets the requirements of being a low-risk person, should not be in violation of any rollover restrictions.

3.3. Requirement to Make Information Available to Participants

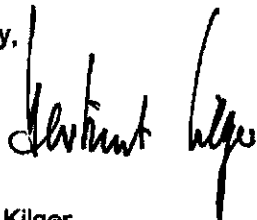
APG's proposed definition requires that *"local law requires the plan to periodically make available to its members or participants information regarding the administration of the plan..."*⁸ While we generally support the policy behind permitting plan members to have access to plan information, we suggest that requiring local law to mandate this may be too restrictive. We believe that it should be sufficient if the plan's organizational documents provide for member access to information, or even if the plan has a standing practice to provide information (or access to information) to its members.

In Germany, for example, some states' laws require professional pension plans to periodically provide certain information to plan participants, but this is not required in every state. In practice, however, all the plans we represent provide information to their members on at least an annual basis. Further, plan members generally have the right to request information according to general German law. We believe that it would be inappropriate to disqualify one of the plans we represent from the definition of low-risk owner on the basis that local law does not mandate that access to such information be provided although all the plans we represent actually provide such information, and the members generally have the right to request such information.

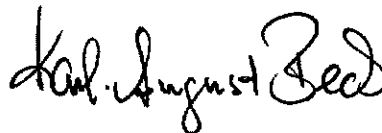
4. Conclusion

We appreciate the opportunity to provide you with these comments. We would be interested in meeting with representatives of your FATCA guidance team to discuss our comments in more detail.

Sincerely,



Hartmut Kilger



Karl-August Beck

⁸ See § 1.1471-3(b)(vii) of APG's proposed definition.
⁹ See § 1.1471-3(b)(viii) of APG's proposed definition.

Enc.**CC:**

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List of the pension schemes of the liberal professions for members of professional associations in Germany

Liberal Profession/s	State
Physicians, dentists and veterinaries	
Baden-Württembergische Versorgungsanstalt für Ärzte, Zahnärzte und Tierärzte	Baden-Wuerttemberg
Bayerische Ärzteversorgung	Bavaria
Physicians and dentists	
Versorgungswerk der Ärztekammer des Saarlandes	Saarland
Physicians and veterinaries	
Sächsische Ärzteversorgung	Saxony
Physicians	
Berliner Ärzteversorgung	Berlin
Ärzteversorgung Land Brandenburg	Brandenburg
Versorgungswerk der Ärztekammer Bremen	Bremen
Versorgungswerk der Ärztekammer Hamburg	Hamburg
Versorgungswerk der Landesärztekammer Hessen	Hesse
Versorgungseinrichtung der Bezirksärztekammer Koblenz	Rhineland-Palatinate

Ärzteversorgung Mecklenburg-Vorpommern	Mecklenburg-Western Pomerania
Ärzteversorgung Niedersachsen	Lower Saxony
Nordrheinische Ärzteversorgung	North Rhine-Westphalia
Ärzteversorgung Sachsen-Anhalt	Saxony-Anhalt
Versorgungseinrichtung der Ärztekammer Schleswig-Holstein	Schleswig-Holstein
Ärzteversorgung Thüringen	Thuringia
Versorgungseinrichtung der Bezirksärztekammer Trier	Rhineland-Palatinate
Ärzteversorgung Westfalen-Lippe	North Rhine-Westphalia
Dentists	
Versorgungswerk der Zahnärztekammer Berlin	Berlin
Versorgungswerk der Zahnärztekammer Hamburg	Hamburg
Hessische Zahnärzte-Versorgung	Hesse
Versorgungswerk der Zahnärztekammer Mecklenburg-Vorpommern	Mecklenburg-Western Pomerania
Altersversorgungswerk der Zahnärztekammer Niedersachsen	Lower Saxony
Altersversorgungswerk der Zahnärztekammer Nordrhein	North Rhine-Westphalia
Versorgungsanstalt bei der Landeszahnärztekammer Rheinland-Pfalz	Rhineland-Palatinate
Zahnärzteversorgung Sachsen	Saxony
Altersversorgungswerk der Zahnärztekammer Sachsen-Anhalt	Saxony-Anhalt
Versorgungswerk der Zahnärztekammer Schleswig-Holstein	Schleswig-Holstein
Versorgungswerk der Landeszahnärztekammer Thüringen	Thuringia

Versorgungswerk der Zahnärztekammer Westfalen-Lippe	North Rhine-Westphalia
Veterinaries	
Versorgungswerk der Landestierärztekammer Hessen	Hesse
Versorgungswerk der Landestierärztekammer Mecklenburg-Vorpommern	Mecklenburg-Western Pomerania
Tierärzteversorgung Niedersachsen	Lower Saxony
Versorgungswerk der Tierärztekammer Nordrhein	North Rhine-Westphalia
Versorgungswerk der Landestierärztekammer Thüringen	Thuringia
Versorgungswerk der Tierärztekammer Westfalen-Lippe	North Rhine-Westphalia
Pharmacists	
Bayerische Apothekerversorgung	Bavaria
Apothekerversorgung Berlin	Berlin
Versorgungswerk der Landesapothekerkammer Hessen	Hesse
Apothekerversorgung Mecklenburg-Vorpommern	Mecklenburg-Western Pomerania
Apothekerversorgung Niedersachsen	Lower Saxony
Versorgungswerk der Apothekerkammer Nordrhein	North Rhine-Westphalia
Sächsisch-Thüringische Apothekerversorgung	Saxony, Thuringia
Apothekerversorgung Schleswig-Holstein	Schleswig-Holstein
Versorgungswerk der Apothekerkammer Westfalen-Lippe	North Rhine-Westphalia

Architects	
Versorgungswerk der Architektenkammer Baden-Württemberg	Baden-Württemberg
Bayerische Architektenversorgung	Bavaria
Versorgungswerk der Architektenkammer Berlin	Berlin
Architektenversorgung Nordrhein-Westfalen	North Rhine-Westphalia
Versorgungswerk der Architektenkammer Sachsen	Saxony
Lawyers and tax consultants:	
Bayerische Rechtsanwalts- und Steuerberaterversorgung	Bavaria
Lawyers:	
Versorgungswerk der Rechtsanwälte in Baden-Württemberg	Baden-Wuerttemberg
Versorgungswerk der Rechtsanwälte in Berlin	Berlin
Versorgungswerk der Rechtsanwälte in Brandenburg	Brandenburg
Hanseatische Rechtsanwaltsversorgung Bremen	Bremen
Versorgungswerk der Rechtsanwältinnen und Rechtsanwälte in Hamburg	Hamburg
Versorgungswerk der Rechtsanwälte im Lande Hessen	Hesse
Versorgungswerk der Rechtsanwälte in Mecklenburg-Vorpommern	Mecklenburg-Western Pomerania
Niedersächsisches Versorgungswerk der Rechtsanwälte	Lower Saxony
Versorgungswerk der Rechtsanwälte im Lande Nordrhein-Westfalen	North Rhine-Westphalia

Versorgungswerk der rheinland-pfälzischen Rechtsanwaltskammern	Rhineland-Palatinate
Versorgungswerk der Rechtsanwaltskammer des Saarlandes	Saarland
Sächsisches Rechtsanwaltsversorgungswerk	Saxony
Versorgungswerk der Rechtsanwälte in Sachsen-Anhalt	Saxony-Anhalt
Schleswig-Holsteinisches Versorgungswerk für Rechtsanwälte	Schleswig-Holstein
Versorgungswerk der Rechtsanwälte in Thüringen	Thuringia
Notaries	
Notarversorgungswerk Hamburg	Hamburg
Notarversorgungskasse Koblenz	Rhineland-Palatinate
Notarversorgungswerk Köln	North Rhine-Westphalia
Versorgungswerk der Saarländischen Notarkammer	Saarland
Ländernotarkasse AdöR – Leipzig	Saxony
Notarkasse AdöR – München	Bavaria
Tax consultants and chartered accountants	
Versorgungswerk der Steuerberater/Steuerberaterinnen und Wirtschaftsprüfer/Wirtschaftsprüferinnen im Saarland	Saarland
Tax consultants	
Versorgungswerk der Steuerberater in Baden-Württemberg	Baden-Wuerttemberg
Versorgungswerk der Steuerberater und Steuerbevollmächtigten im Land Brandenburg	Brandenburg

burg	
Versorgungswerk der Steuerberater in Hessen	Hesse
Versorgungswerk der Steuerberater und Steuerbevollmächtigten in Mecklenburg-Vorpommern	Mecklenburg-Western Pomerania
Steuerberaterversorgung Niedersachsen	Lower Saxony
Versorgungswerk der Steuerberater im Land Nordrhein-Westfalen	North Rhine-Westphalia
Versorgungswerk der Steuerberaterinnen und Steuerberater in Rheinland-Pfalz	Rhineland-Palatinate
Versorgungswerk der Steuerberater und Steuerbevollmächtigten im Freistaat Sachsen	Saxony
Versorgungswerk der Steuerberaterinnen, Steuerberater und Steuerbevollmächtigten in Sachsen-Anhalt	Saxony-Anhalt
Versorgungswerk der Steuerberaterinnen und Steuerberater im Land Schleswig-Holstein	Schleswig-Holstein
Chartered accountants	
Versorgungswerk der Wirtschaftsprüfer und der vereidigten Buchprüfer im Lande Nordrhein-Westfalen	North Rhine-Westphalia
Psychotherapists	
Versorgungswerk der Psychotherapeutenkammer NRW	North Rhine-Westphalia
Versorgungswerk der Psychotherapeutenkammer Schleswig-Holstein	Schleswig-Holstein
Psychotherapeutenversorgungswerk (Niedersachsen mit Bremen, Hamburg, Hessen und Rheinland-Pfalz)	Lower Saxony with Bremen, Hesse and Rhineland-Palatinate

Engineers	
Versorgungswerk der Ingenieurkammer Niedersachsen	Lower Saxony
Ingenieurversorgung Baden-Württemberg	Baden-Wuerttemberg
Ingenieurversorgung Mecklenburg-Vorpommern	Mecklenburg-Western Pomerania
Bayerische Ingenieurversorgung-Bau	Bavaria