

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
AMERICAN BENEFITS COUNCIL, EUROPEAN ASSOCIATION OF PARITARIAN
INSTITUTIONS, MULTI-EMPLOYER BENEFIT PLAN COUNCIL OF CANADA AND
NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS]

July 25, 2011

CC:PA:LPD:PR (NOT-121556-10)

Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Also sent to Federal eRulemaking Portal at
Notice.Comments@irs.counsel.treas.gov
(NOT-121556-10)
Department of the Treasury
Internal Revenue Service

Re: Comment on *Notices 2010-60, 2011-34 and 2011-53* and Exemption for
Foreign Retirement Plans under FATCA

Dear Sir or Madam:

This letter is to provide comments on *Notices 2010-60, 2011-34 and 2011-53* requesting the Internal Revenue Service consider exercising its authority under *Internal Revenue Code* (“Code”) *section 1471(f)(4)* as added by the Foreign Account Taxpayer Compliance Act (FATCA), enacted in 2010 as part of the Hiring Incentives to Restore Employment (HIRE) Act, to exempt payments beneficially owned by certain foreign retirement plans from withholding under *section 1471(a)* because such plans pose a low risk of tax evasion as described in *section 1471(f)(4)*. The undersigned organizations jointly represent the interest of retirement plans covering a substantial portion of workers in Europe, Canada and the United States.

The **American Benefits Council** (ABC) is a trade association representing primarily large employers and other organizations in the United States that directly sponsor or provide services to health and retirement benefit plans serving over 100 million Americans as well as foreign retirement plans in numerous countries.

The **European Association of Paritarian Institutions** (AEIP), founded in 1997, represents social protection institutions and social schemes which are jointly set up and managed by the social partners (a.k.a. “paritarian” model). Thanks to its 25 members and 29 affiliates coming from 19 European countries, AEIP has the opportunity to represent coordinated retirement schemes, pension funds,

healthcare plans, unemployment schemes, paid holiday schemes and health and safety plans. Today AEIP represents about 75 million European citizens and has a portfolio of about 1 trillion euro.

The **Multi-Employer Benefit Plan Council of Canada** (MEBCO) was established in 1992 as a federal no-share capital corporation, operating on a not-for-profit basis. MEBCO represents the interests of Canadian multi-employer pension and benefits plans with provincial and federal governments regarding proposed or existing legislation and policies affecting these plans.

The **National Coordinating Committee for Multiemployer Plans** (NCCMP) is a non-profit membership organization founded in 1974 in response to a clear lack of understanding of multiemployer plans that was demonstrated by lawmakers during the enactment of ERISA. It is dedicated exclusively to the advocacy and protection of multiemployer plans, their participants and their families.

Introduction

Notice 2010-60 provides that “Treasury and the IRS anticipate that a foreign retirement plan will be identified as posing a low risk of tax evasion only if the retirement plan (i) qualifies as a retirement plan under the law of the country in which it is established, (ii) is sponsored by a foreign employer, and (iii) does not allow US 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. Comments are requested on the definition of a retirement plan for this purpose, and on how such a plan could appropriately identify or document itself to a withholding agent to verify its compliance with any such definitional requirements. In addition, comments are requested as to whether other categories of foreign employee benefit or deferred compensation plans should be subject to the same treatment as foreign retirement plans for chapter 4 purposes.”

We respectfully suggest that the following plans pose a low risk of tax evasion and be relieved from the reporting requirements of *section 1471(a)* pursuant to *section 1471(f)(4)*:

1. “Corresponding” plans under tax treaties. Foreign retirement plans that are designated as “corresponding pension plans” (or corresponding pension schemes, in some jurisdictions) under a tax treaty between the US and another country pose a low risk of tax evasion. These plans, which are listed in the materials at the US Treasury website at

<http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/default.aspx> are regulated by the other country and are comparable to tax-qualified plans in the US. Because these types of plans have previously been scrutinized by the US Treasury prior to designation as corresponding pension plans, are overseen by pension regulators in the other country, and are covered by the information sharing mechanisms generally available under US tax treaties, these plans pose a low risk of tax evasion. n1

2. Foreign plans with de minimis US taxpayer participation. Foreign retirement plans may be sponsored by non-US employers for their employees, but also may be sponsored by (1) associations or groups of non-US employers and/or employees, and in some cases a non-US institution based on equal representation of employees (such as through a labor or trade union) and employers in their governing bodies (which would include what are known as multiple employer plans in the US and sometimes as

paritarian plans in other countries) for employees, (2) non-US associations of employees for such employees, (3) non-US labor or trade unions for members of such unions, (4) managing boards composed of employee representatives and employer representatives, whether pay-as-you-go, partially funded or fully-funded and that fall under European Directive 2003/41/EC, European Directive 2002/83/EC, European Directive 1998/49/EC or European Regulation (EC) 883/2004 n2 or (5) insurance companies or similar financial institutions subject to regulation by the other country and made available for participation by employees in the jurisdiction where offered. It is also rare for such foreign retirement plans to cover US citizens or taxpayers, but on occasion a member of the plan may be a US expatriate performing services in such other country, or a nonresident alien performing service in the US on a temporary basis (for example, fewer than 183 or another number of days pursuant to a tax treaty). In addition, any such US taxpayers might be providing services in one or more countries other than the country in which the plan is established, which may be common in Europe, for example. We would suggest that the enumerated types of foreign retirement plans be exempted under *section 1471(f)(4)* as providing a low risk of tax evasion, provided that no more than a de minimis portion of plan members are US citizens or performing services in the US, and provided that the contributions or benefits under such plan be subject to reasonable limitations on the amount of benefits or contributions under applicable law.

3. Broad-based foreign retirement plans. The Internal Revenue Service has previously exempted from the provisions regarding taxation of certain executive compensation under Code *section 409A* certain “broad-based” foreign retirement plans, a group of plans which could overlap with the foreign plans described in item 2, above, but is a somewhat different definition as the interest of the Service in taxing US taxpayers on executive compensation should be somewhat broader than the policy interest of FATCA in preventing tax evasion. However, we suggest that such broad-based foreign plans be exempted from FATCA as well because of their low risk for tax evasion. The regulations under Code *section 409A* generally define such plans to include a scheme, trust, arrangement, or plan (regardless of whether sponsored by a US person) that is written and that, in the case of an employer-maintained plan, satisfies the following conditions:

(A) The plan is nondiscriminatory insofar as the employees who, under the terms of the plan (alone or in combination with other comparable plans) and without further amendment or action by the employer, are eligible to make or receive contributions or accrue benefits under the plan other than earnings (regardless of whether the employee has elected to participate in the plan), are a wide range of employees, substantially all of whom are nonresident aliens, resident aliens classified as resident aliens solely under Code *section 7701(b)(1)(A)(ii)* (and not Code *section 7701(b)(1)(A)(i)*); or bona fide residents of a possession (within the meaning of Code *section 937(a)*), including rank and file employees.

(B) The plan (alone or in combination with other comparable plans) actually provides significant benefits for a substantial majority of such covered employees.

(C) The benefits actually provided under the plan to such covered employees are nondiscriminatory.

(D) The plan contains provisions or is the subject of tax law provisions or other legal restrictions that generally discourage employees from using plan benefits for purposes other than retirement or restrict access to plan benefits before separation from service, including (but not limited to), restricting in-service distributions except in events similar to an unforeseeable emergency (as defined in *Treas. Reg. section 1.409A-3(i)(3)(i)*) or hardship (as defined for purposes of Code section 401(k)(2)(B)(i)(IV)), or for educational purposes or the purchase of a primary residence. n3

4. Foreign retirement plans may pay other benefits as well, including disability, death, severance or health benefits. (Even in the US, tax-qualified retirement plans are often permitted to provide other benefits incidental to pensions. n4) The provision of other incidental employee benefits should not cause a retirement plan to fail to meet any foreign retirement plan exemption under *section 1471(f)(4)*.

We hope that you find these comments useful. Please contact us if you have any questions.

Thank you very much for the opportunity to comment on this very important topic. Please contact us if you require any additional information.

Best regards.

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FOOTNOTES:

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The exemption from the rules for executive compensation plans under Code *section 409A* define such plans as “any scheme, trust, arrangement, or plan maintained with respect to such individual, to the extent contributions made by or on behalf of such individual to such scheme, trust, arrangement, or plan, or credited allocations, accrued benefits, earnings, or other amounts constituting income, of such individual under such scheme, trust, arrangement, or plan, are excludable by such individual for Federal income tax purposes pursuant to any bilateral income tax convention, or other bilateral or multilateral agreement, to which the United States is a party.” *Treas. Reg. section 1.409A-1(a)(3)(iii)*. However, we note that one issue with such a description is that such treaties typically require some inclusion in income where the limit on contributions or benefits in one country may exceed the limits in another country. Typically, the taxable excess will be small, as a plan with an exceedingly high limit would not have been approved by the US Treasury as a corresponding plan in the first instance. There is also some uncertainty as to how the “lesser of” the limits rule applies, as the limits are often not readily comparable. For example, the US generally limits defined contribution plan contributions to \$ 49,000 per year, and defined benefit accruals to the value of an annuity of \$ 195,000 a year commencing at age 62, while the UK limits defined contribution plan contributions and defined benefit accruals in the aggregate is currently £50,000 with a lifetime limit of £1.8M. We would recommend that any exemption from FATCA for corresponding plans not fail to apply merely because there is some nominal inclusion in income due to the foreign plan limits slightly exceeding US contribution or benefit limits, because notwithstanding such nominal tax inclusion the plans still present a low risk of tax evasion.

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See also the comment letter sent by the European Federation for Retirement Provision (EFRP) on October 29, 2010 in response to *Notice 2010-60*.

n3

See, *Treas. Reg. section 1.409A-1(a)(3)(v)*.

n4

See, *Treas. Reg. section 1.401-1(b)*.