

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED ON BEHALF OF THE WESTERN CONFERENCE OF TEAMSTER'S PENSION TRUST FUND]

July 30, 2010

Kathryn T. Holman
Office of Associate Chief Counsel (International)
CC:PA:LPD:PR (REG-146097-09)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Announcement 2010-22 ~ Relief for Trustees and Fiduciaries of Large Employee Benefit Plans from Section 6038D Reporting Requirements

Dear Ms. Holman:

We are pleased to respond, on behalf of the Western Conference of Teamsters Pension Trust Fund (the "WCT Fund"), to the request for comments in Announcement 2010-22 concerning Subtitle A of Title V of the Hiring Incentives to Restore Employment Act of 2010, which includes new section 6038D of the Internal Revenue Code (the "Code").

The WCT Fund is an employee benefit plan governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the Labor Management Relations Act of 1947, as amended (the "Taft-Hartley Act"), and a qualified pension plan under section 401(a) of the Code that is tax-exempt under section 501(a) of the Code. The WCT Fund is the largest multiemployer pension plan in the United States, with over \$ 25 billion in assets, over 500,000 participants and almost 2,000 contributing employers employing over 240,000 workers in 50 different industries within the 13 western United States.

On behalf of the WCT Fund, we write to request that the Treasury Department and the IRS exclude from the reporting requirements imposed by new section 6038D foreign financial assets held by an individual solely in his or her capacity as a trustee or fiduciary of an "ERISA Plan." An ERISA Plan for this purpose means a funded pension or retirement benefit plan, such as the WCT Fund, as well as a health and welfare benefit plan that provides benefits through a voluntary employees' beneficiary association (a "VEBA").

Under the literal language of section 6038D(a), individuals serving as ERISA Plan trustees and fiduciaries may be considered to hold an interest in foreign financial assets of the plan. Requiring these individuals to report ERISA Plan assets would be burdensome and would merely duplicate existing disclosure requirements without identifying assets that produce income subject to U.S. federal income taxation. We therefore request that the IRS and Treasury exercise their authority under section 6038D(h) to provide a reporting exception for foreign financial assets of ERISA Plans.

The Language of Section 6038D(a) Imposes Reporting Requirements on ERISA Plan Trustees and Fiduciaries

ERISA Plans are organized as trusts. n1 Under the common law of trusts, trustees hold legal title to trust assets on behalf of the beneficiaries of the trust. n2 Section 6038D(a) generally requires "[a]ny individual who, during any taxable year, holds any interest in a specified foreign financial asset" to disclose the asset in a form to accompany the individual's federal income tax return. "Specified foreign financial assets" include foreign bank accounts and certain other types of foreign investments.

Under the literal language of section 6038D(a), the individual trustees of an ERISA Plan that owns specified foreign financial assets must report those assets on Form 1040, even though the assets are held for the benefit of plan beneficiaries.

Given the breadth of the statute, it is conceivable that ERISA Plan fiduciaries who supervise the plan's foreign investments also could be considered to hold a reportable interest in plan investments because of their strategic control and authority over those investments.

Requiring Individual Reporting of Plan Assets Is Unnecessary

Requiring ERISA Plan trustees and fiduciaries to report plan assets under section 6038D would be unnecessary because ERISA Plans already must disclose their foreign investments to the IRS and Department of Labor on Form 5500. In addition, VEBA's must file Form 990 with the IRS. Requiring plan trustees and fiduciaries individually to report an ERISA Plan's foreign accounts thus would do little to advance the objective of section 6038D, which is to require reporting of foreign assets that might otherwise remain hidden from the IRS. n3

Reporting these assets also is unnecessary because ERISA Plans are generally tax-exempt entities under sections 501(a). They have little incentive to undertake foreign investments for the purpose of avoiding or evading U.S. federal income taxation. To the contrary, ERISA Plan trustees and fiduciaries are subject to broad fiduciary requirements, including the duty to act solely in the interest of plan participants and beneficiaries, the duty to act for the exclusive purpose of providing benefits to participants and their beneficiaries, and the duty of loyalty prohibiting them from dealing with plan assets in their own self-interest. n4 To direct an ERISA Plan purposefully to engage in tax evasion would constitute a breach of fiduciary duty, exposing the plan trustees and fiduciaries to potential civil and criminal liability.

Individual Reporting of Plan Assets Would Be Highly Burdensome

The WCT Fund maintains a diversified investment portfolio of over \$ 25 billion in assets invested in a broad range of investment categories with different risk and return characteristics. Although foreign investments represent a relatively small portion of the WCT Fund's investment portfolio, these investments form an important element in its diversification strategy and therefore help to safeguard the retirement security of over 500,000 American workers by reducing the volatility and risk profile of the WCT Fund's overall investment portfolio. The WCT Fund's foreign investment assets are held in non-U.S. bank accounts which are maintained by U.S. custodial banks. It would be unreasonable to require the 28 individual trustees of the WCT Fund to account for and report specified foreign financial assets held by the WCT Fund on their individual income tax returns. Such reporting would also be duplicative of the WCT Fund's Form 5500, which includes detailed information about its investment assets.

Many ERISA Plan trustees and fiduciaries serve as volunteers. If they are required to report plan assets in this manner as a condition of their service to the plan and are subject to significant penalties for failing to disclose information to which they may not have ready access, they will be deterred from serving as trustees and fiduciaries. Without remedial guidance, section 6038D will make it more difficult to retain qualified individuals to administer ERISA Plans on behalf of the millions of Americans who benefit from such plans during their working lives and in retirement.

The IRS and Treasury Can and Should Address this Issue in Published Guidance

Section 6038D(h) authorizes the IRS and Treasury to issue regulations or other guidance to "provide appropriate exceptions" from the reporting requirement for certain classes of assets, "including any assets with respect to which the Secretary determines that disclosure under this section would be duplicative of other disclosures." As discussed above, separate disclosure of an ERISA Plan's foreign financial assets would be duplicative of disclosures made to the IRS on Forms 5500 and 990 and would be highly burdensome. We therefore request that the IRS and Treasury issue guidance excluding from the definition of specified foreign financial assets those assets held in trust for beneficiaries of ERISA Plans.

The following language would be one way to phrase such an exception:

The term "specified foreign financial asset" does not include the assets of any trust that forms part of a qualified retirement plan described in section 401(a) or any trust that forms part of a welfare benefit

plan described in section 501(c)(9) which is exempt from taxation under section 501(a).

* * *

Please contact me with any questions you may have or any additional information you may require. We look forward to working with Treasury and the IRS in addressing this important issue.

Sincerely yours,

Dirk Suringa
Covington & Burling LLP
Washington, DC

cc:

Ms. Manal Corwin,
International Tax Counsel,
Department of the Treasury

Mr. Steven A. Musher,
Associate Chief Counsel (International),
Internal Revenue Service

Mr. John Sweeney,
Office of Associate Chief Counsel (International),
Internal Revenue Service

FOOTNOTES:

n1

See I.R.C. section 401(a).

n2

See Restatement (Third) of Trusts section 3b (2003).

n3

See Staff of Joint Comm. on Taxation, 111th Cong., Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," under Consideration by the Senate 59 (Comm. Print 2010). The withholding tax imposed by the same legislation on foreign financial institutions that fail to report accounts of "specified United States persons" does not require such institutions to report accounts owned by "any organization exempt from taxation under section 501(a) or an individual retirement plan." I.R.C. section 1473(3)(C). The exception we request would be consistent with this provision.

n4

See 29 U.S.C. section 1104(a), 1106.