



October 5, 2009

The Honorable Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue N.W.
Washington, D.C. 20224
CC:PA:LPD:PR (Announcement 2009-51 and Notice 2009-62)

Dear Commissioner Shulman:

The American Benefits Council (the "Council") is writing to urge guidance with respect to foreign financial account reporting (Form TD F 90-22.1 (Report of Foreign financial and Financial Accounts, or FBAR)), to the effect that foreign accounts held in connection with retirement plan trusts are not considered "financial accounts" for FBAR reporting purposes. We further request clarification that executives and managers who serve as trustees, fiduciaries, investment advisors or in other management or administrative capacities with respect to retirement plan trusts are exempt from FBAR reporting requirements with respect to those activities. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

1. Foreign accounts held by retirement plan trusts should not be considered "financial accounts" for FBAR reporting purposes.

Form TD F 90-22.1 recites Treasury's legal authority for collecting requested information. In particular, the Form says, "The principal purpose for collecting the information is to assure maintenance of reports where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." We applaud and support the Service in its efforts to enforce Federal tax laws. However, utilization of foreign accounts within retirement plan trusts cannot reasonably be expected to create the opportunity for tax evasion. It is difficult for us to construe how information related to retirement plan trusts would have a "high degree of usefulness" in the enforcement of the Federal tax code or in criminal or regulatory investigations or proceedings.

Retirement plan trusts are exempt from current income taxation. In addition, use of assets deposited in these trusts is restricted to the sole purpose of providing benefits that are payable under the terms and conditions of the associated retirement plans. In addition, contributions and distributions from retirement plan trusts are strictly regulated which precludes use of these plans for money laundering. Foreign accounts used by retirement plan trusts exist solely as vehicles to aid in the management and diversification of assets. Furthermore, U.S. retirement plan trusts are already subject to very strict and thorough reporting obligations which would include the information requested as part of the FBAR reporting regime. It is our belief that FBAR reporting in these situations would result in maintenance of large volumes of data that would be of little or no enforcement value to the Service.

2. Individuals with "signature or other authority" over accounts of retirement plan trusts should be exempt from FBAR reporting requirements.

The instructions require FBAR reporting from all U.S. persons having a financial interest in, or signature authority or "other authority" over, foreign financial accounts. Read broadly, this requirement could now require annual disclosure from large numbers of individuals involved in the management, oversight or administration of retirement plan trusts. Among other things, the words, "or other authority" might cover any person who, by virtue of their position in a company, could cause a transaction to be made with respect to a foreign account, perhaps even including individuals who supervise other individuals with such authority. This might include executives and managers who serve as trustees or otherwise serve in an oversight or administrative capacity with respect to assets of retirement plan trusts.

In Notice 2009-62, the Department of the Treasury requested comments regarding:

when a person with signature authority over, but no financial interest in, a foreign financial account should be relieved of filing an FBAR for the account. For example, comments are requested regarding whether relief from filing would be appropriate if a person with a financial interest in the account has filed an FBAR.

If the Treasury Department continues to maintain that a United States-based retirement plan trust's financial interest in foreign financial accounts is FBAR reportable, we respectfully ask that the Department of the Treasury nonetheless consider that individuals with "signature or other authority" over, but no financial interest in, such accounts should not be required to file an FBAR. In addition, we request that Treasury clarify that the plan trustees or plan sponsors financial interest in the foreign financial account related solely to retirement plan assets does not create a FBAR reporting requirement for the trustee, plan sponsor, or any of their respective employees. Further, we also ask that the Department of the Treasury clarify that benefit plan trusts that are funded and maintained outside the United States primarily for citizens and residents of foreign countries, are not foreign

financial accounts for FBAR reporting purposes even when a U.S. person has signature or other authority.

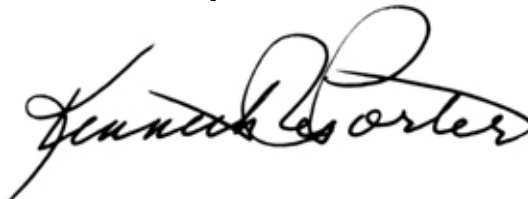
Notice 2009-62 notes that the “governmental need for information” as described above “is balanced with the administrative concerns presented by the filing of the information by U.S. persons.” We are also concerned that this reporting requirement could impose a material burden on certain affected individuals connected with employee benefit plan trusts, if it is construed to require a U.S. person to report with respect to retirement plan trusts that are funded and maintained outside the United States. The Form estimates the collection of information to require “... 20 minutes per respondent or record keeper...”

An employee or group of employees of a U.S.-based multinational company might have corporate oversight responsibility related to retirement plan trusts in dozens of countries around the world. Although each foreign trust would be managed locally in accordance with the sovereign laws of the nation in which it resides, we are concerned that a U.S. person with oversight responsibility could be viewed as having “other authority” for purposes of the FBAR reporting requirement. Each such foreign plan trust might have dozens of foreign accounts, depending on the complexity of each trust. For example, a large plan with global investment diversification generally has a separate financial account in each sovereign country in which investments are made. For illustration purposes, if a company sponsored retirement plans in 40 countries and there were an average of, say, 30 foreign financial accounts per trust, a U.S. person with corporate oversight responsibility might need to collect information with respect to 1200 accounts for the FBAR report. Because retirement plan trusts are managed locally around the world, there is no reason to expect that the required account details will be readily available in any centralized location. If the FBAR reporting requirement were to be interpreted to cover all such situations, the reporting requirement would be significant even though the likelihood of such disclosure producing actionable enforcement information appears remote.

Finally, the Council requests that additional guidance be provided by December 31, 2009, or as soon thereafter as possible in order to provide potential filers sufficient time to prepare for the June 30, 2010 filings.

Thank you for your consideration of these matters. We look forward to working with the Service on this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth Porter". The signature is fluid and cursive, with the first name "Kenneth" written in a larger, more prominent script than the last name "Porter".

Kenneth Porter
Senior Vice President,
International Benefits & Chief Actuary