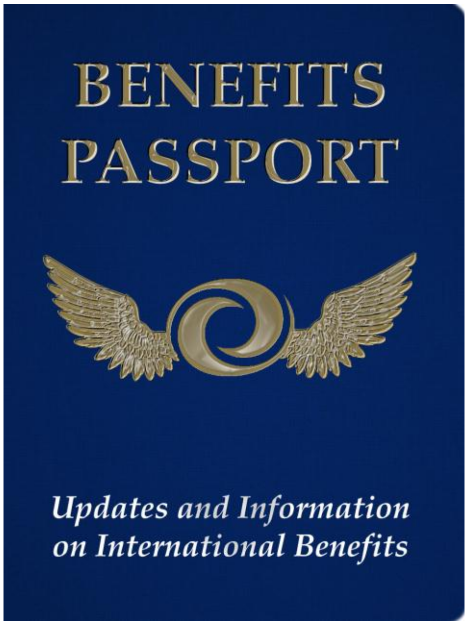

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AMERICAN BENEFITS COUNCIL

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The American Benefits Institute is the education and research affiliate of the American Benefits Council. The Institute conducts research on both domestic and international employee benefits policy matters to enable public policy officials and other stakeholders make informed decisions. The Institute also serves as a conduit for global companies to share information about retirement, health and compensation plan issues.

LATEST DEVELOPMENTS ON FATCA, PUERTO RICO PLANS

THE NEW UNITED STATES-UNITED KINGDOM INTERGOVERNMENTAL FATCA AGREEMENT - EXEMPTIONS FOR U.K. RETIREMENT PLANS

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Many U.K. retirement plan sponsors are now aware that the U.S. Treasury considers non-U.S. retirement plans to be "foreign financial institutions" (FFIs) under the Foreign Account Tax Compliance Act (FATCA), a 2010 U.S. law. Beginning in 2014, unless an exemption applies, FATCA requires 30 percent tax withholding by U.S. payors on U.S.-source dividends, interest and other passive investment income paid to non-U.S. FFI investors unless the investor agrees to provide certain information on its accountholders to the U.S. Treasury and to perform withholding on certain "pass-through" payments.

Consequently, exemptions are important, and the United States and the United Kingdom have entered into an agreement on September 12 that will provide a fairly comprehensive exemption for many types of U.K. retirement plans. U.K. employers will want to review their arrangements and consider whether the list of exempt plans is sufficient.

Background

The U.S. Treasury issued proposed regulations in April, 2012, that would exempt certain non-U.S. retirement plans. However, the exemption was not a blanket one and depended on meeting numerous requirements. Further, under the proposed regulations, to claim the exemption, an exempt non-U.S. retirement plan must file a U.S. tax form with the payor accompanied by as yet unspecified documents proving the requirements are met.

However, it has been known since FATCA was passed that the U.S. Treasury was interested in entering into tax information sharing agreements with other countries in exchange for simplified FATCA reporting. On July 26, the U.S. Treasury released two Model Intergovernmental Agreements (IGAs) for use in negotiating with other countries. The first such IGA was executed with the United Kingdom on September 12.

How IGAs Work

Essentially, the purpose of an IGA is not so much to modify what entities are subject to FATCA and what U.S. accounts must be reported as it is to change the process and direction of reporting – FFIs in the United Kingdom are to report to the HMRC, and the HMRC will then turn the information over to the U.S. Treasury.

The model IGA comes in two forms, a "reciprocal" form under which information is supposed to flow both ways - the U.S. Treasury will provide similar reports to the other country's tax authorities on the U.S. financial accounts of non-U.S. citizens- and a "nonreciprocal" form under which the reporting is only from the other country to the United States. The United Kingdom has entered into the reciprocal version.

Important for retirement plans is that both forms of agreement include an Annex II specifying what types of retirement plans are exempt.

What U.K. Plans Are Specifically Exempted?

Annex II to the new U.S.-U.K. IGA, in addition to exempting numerous U.K. charitable, savings, and governmental entities, exempts several specific types of pension and share-based arrangements. Those include:

- Any pension scheme or other retirement arrangement established in the United Kingdom and described in Article 3 of the U.S.-U.K. tax treaty, which defines a U.K. “pension scheme” to include any plan, scheme, fund, trust or other arrangement established in the United Kingdom which is: (i) generally exempt from income taxation in the United Kingdom, and (ii) operated principally to administer or provide pension or retirement benefits or to earn income for the benefit of one or more such arrangements. This also includes pension funds covered by IRS Announcement 2005-30, which addresses certain types of pooled investment arrangements.

- Pension schemes registered with HMRC under Part 4 of the Finance Act 2004 and pension arrangements where the annual contributions are limited to £50,000 and funds contributed cannot be accessed before the age of 55 except in circumstances of serious ill health.

- Noninvestment-linked, nontransferable immediate life annuities that are issued to individuals to monetize pension or disability benefits under U.K.-registered pension arrangements under the Finance Act 2004 and exempt under Annex II.

- Individual Savings Accounts (ISAs) - as defined in the Individual Savings Account Regulations 1998 (SI 1998 No.1870) and subsequent Amendment Regulations and Junior ISAs as defined in the Individual Savings Account Regulations 1998 No.1870, and subsequent Amendment Regulations.

- Save As You Earn Share Option Schemes approved by HMRC under Schedule 3 Income Tax (Earnings and Pensions) Act 2003.

- Share Incentive Plans approved by HMRC under Schedule 2 Income Tax Earnings and Pensions) Act 2003.

- Company Share Option Plans approved by HMRC under Schedule 4 Income Tax (Earnings and Pensions) Act 2003.

Pension Funds Not Listed on Annex II

If a particular plan, deferred compensation arrangement or funding scheme is not listed on Annex II, it generally must comply with due diligence procedures to identify and report to the HMRC certain information on U.S. accountholders. The Annex may be amended from time to time by mutual agreement between the United States and the United Kingdom.

Finally, it should be kept in mind that these exemptions are for purposes of exempting plans from U.S. tax withholding on their passive investments. U.S. taxpayers participating in exempt U.K. plans may still have to report their interests in the plans on their U.S. individual tax returns.

Although FATCA was enacted in 2010, we are still in the relatively early stages of FATCA guidance. More information should be forthcoming.

David W. Powell is a Principal in the Groom Law Group, Chartered, in Washington, D.C., a leading U.S. employee benefits specialty firm that recently won the Chambers USA Award for Excellence for Employee Benefits & Executive Compensation.

PUERTO RICO TREASURY DEPARTMENT PROVIDES HELPFUL CLARIFICATION OF DEDUCTION LIMIT FOR CONTRIBUTIONS TO DEFINED BENEFIT PENSION PLANS

On September 14, 2012, the Puerto Rico Treasury Department (PR Treasury) issued **Administrative Determination No. 12-13 (AD 12-13)** to clarify the application of the limits on allowable deductions for contributions to defined benefit pension plans under the Puerto Rico Code of 2011, as amended. While Puerto Rico plans are subject to ERISA for the minimum required contribution, benefit restrictions, etc., the 2011 legislation did not significantly address the maximum, which remains very low compared to the U.S. maximum.

Without clarification, in many cases plan sponsors who may want to make contributions to attain an 80 percent funded percentage to avoid applicable at-risk status limitations and requirements under applicable provisions of the U.S. Internal Revenue Code, would have to make a contribution that is over the deductible amount, triggering a 10 percent excise tax. The Council, with the assistance of Groom Law Group, had called this issue to the attention of PR Treasury officials in response to concerns raised by Council members. In A.D. 12-13, the PR Treasury has taken the position that the Puerto Rican Government wants to incentivize funding of qualified retirement plans and clarified that a deduction would be permitted for contributions made to meet the funding requirements, including meeting the 80 percent threshold. A deduction for these contributions is permitted even if they exceed the applicable percentage limitation on contributions under Puerto Rico law and such contributions would not be subject to the 10 percent excise tax on non-deductible contributions (which became effective with plan years beginning on or after January 1, 2011). **A summary memorandum** prepared by Juan Luis Alonso at Groom Law Group is available on the Council website, on the International Issues page.