April 16, 2012

Filed electronically via Notice.comments@irscounsel.treas.gov

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Internal Revenue Service
Room 5203
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Re: Participation of Trusts for Puerto Rican Plans in Group Trusts; Notice 2012-6

Dear George:

We very much appreciate the recent opportunity to meet with you and your colleagues on investments in group trusts by plans maintained by US companies for their Puerto Rican workers – a subject of major interest to members of the American Benefits Council ("Council"). The Council greatly appreciates the additional transition relief provided by the Service in Notice 2012-6, and strongly recommends that Treasury and the Service promptly publish guidance allowing such investments on a permanent basis.

The Council is a public policy organization principally representing 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.

This letter focuses on what appear to be the two principal issues of concern to Treasury and the Service: (1) the proper interpretation of section 1022(i)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and how it fits with the Service's guidance on the qualification of group trusts, and (2) the Service's

ability to "certify" the eligibility of a group or collective trust to certain treaty partners where a Puerto Rico trust participates in the group or collective trust. We also share some factual information we collected on a possible *de minimis* approach we suggested at the meeting as a practical alternative resolution of the treaty issue.

1. Interpretation of Section 1022(i)(1)

The express purpose of section 1022(i)(1) of ERISA was to enable Puerto Rico retirement plan trusts[1] which only cover residents of Puerto Rico, and which do not meet the qualification requirements of the Internal Revenue Code, to diversify their portfolios by investing in the US without paying US income tax on the income derived from such investments. H.R. Rep. No. 807, 93rd Cong., 2d Sess. 163 (1974).

We think the most natural reading of section 1022(i)(1) of ERISA is consistent with the Section 401(a) underpinnings of the group trust concept. The introductory language of section 401(a) provides that a "trust created or organized in the United States" that meets certain requirements is treated as a qualified trust under that section. However, section 501(a) – which actually confers the tax exemption on the trust – refers to an "organization described in . . . section 401(a)." Consistent with this structure, section 1022(i)(1) provides that "for purposes of section 501(a) . . . [a PR-only qualified trust] . . . shall be treated as an organization described in 401(a)." While that ERISA section does not make the plan qualified, it does treat the trust the same. This should be a sufficient technical ground for group trust participation (and the Service actually ruled this way in a number of private letter rulings).

Perhaps more importantly, the underlying policies of both ERISA section 1022(i)(1) and group trusts are also the same – the diversification of retirement plan investments, including in US investments, on a tax-free basis. We believe this policy should overcome any technical concerns which might exist.

2. Tax Treaty Certification

We believe there are three reasons why the so called "treaty issue" should not be an obstacle to permanent relief for Puerto Rico trusts.

1. As discussed at the meeting, it is unclear how common it is for the treaty certification process to require the Service to "look through" a group trust to identify whether the underlying plans qualify for treaty exemption. The instructions to Form 8802 suggest that a "look-through" may be required under

[1] This assumes that the Puerto Rican retirement plans described in ERISA section 1022(i)(1) meet the applicable requirements of the Puerto Rico Internal Revenue Code of 1994 or 2011, as respectively amended (collectively, the "PR Code"), and have received or will receive favorable determination letters from the Puerto Rico Treasury Department (commonly known as "Hacienda"), as required by applicable Puerto Rico regulations and law, respectively.

the Swiss Treaty,[2] but not necessarily as a general matter. In any event, we believe there is considerable variation among Treaties in this respect.

2. Even where such a "look-through" is required, we understand from those familiar with the banking side that institutional trustees often find it difficult to precisely identify each of the underlying plan investors in a group trust. This is because (i) many corporate plan sponsors use a master trust to pool the assets of their affiliated plans for investment purposes, and (ii) the master trust often is the group trust participant named under the subscription agreement. Moreover, a bank that maintains the group trust often will not know if the Puerto Rican plan participating in the master trust is dual-qualified (and uses a domestic trust) or is PR-only qualified. Thus, there are practical reasons why a "look-through" is often not feasible even where it technically may be required.

3. We seriously question whether our foreign treaty partners would be troubled by the inclusion of a *de minimis* number of Puerto Rican residents – who are, after all, US citizens subject to US tax on their income from sources outside Puerto Rico (including the US source income from benefit plans) – under a group trust claiming treaty benefits. We took a random informal poll of Council members. The poll indicates –

    - Puerto Rico participants typically are less than 1% of a US plan sponsor's total plan population – in many cases, only a small fraction of 1%.

    - Even where the Puerto Rico participants slightly exceed 1% of the total, the associated PR plan assets are considerably less than 1% of the total assets of the plan sponsors' plans. In fact, the asset ratios generally tend to be even smaller than the participant ratios.

While we do not purport to be international tax experts, it seems reasonable to believe that such a *de minimis* level of participation by PR plans should not be cause for an entire group trust – typically involving assets in the hundreds of millions or even billions of dollars – to lose treaty benefits for its many plan clients. Under these circumstances, it is obvious that the group trust is not being used to abuse the treaty process. The overwhelming share of the treaty benefits will benefit domestic trusts in all cases – and all of the participating trusts are formed for retirement purposes.

We respectfully request that Treasury and the Service consider this *de minimis* approach in resolving the treaty certification issue.

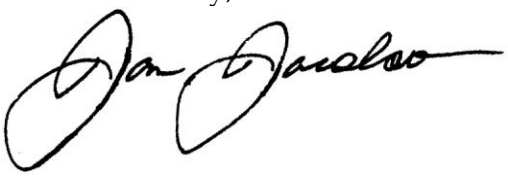
[2] We note that this also appears to be the case under the just-released Competent Authority Agreement between Germany and the U.S.

On a separate but related matter, the Council requests that Treasury and the Service clarify that Rev. Rul. 2008-40 (as modified by Rev. Rul. 2011-1 and Notice 2012-6) allows for transfers from a 403(b) plan to a Puerto Rico only plan. Under the ruling, it appears somewhat unclear whether such a transfer can proceed from a 403(b) plan or is limited to transfers from a Code Section 401(a) qualified plan. It would seem that the same policies that underlie the special grace period (scheduled to end 12/31/2012) for transfers from a 401(a) plan should equally support transfers from a 403(b) plan and the Council would appreciate this clarification.

* * *

We hope this information is helpful and welcome any further questions or comments you may have.

Sincerely,



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