FATCA and Foreign Retirement Plans: Two Case Studies

By Kimberly Tan Majure and Monica Zubler

It seems inexorable: Every time you turn around, you find something else to add to your FATCA workplan. As a non-financial company, it may have been a surprise to find that, in fact, you are within the scope of the Foreign Account Tax Compliance Act ("FATCA"). Then, not only have you wrestled with your withholding and reporting processes, you have had to comb through your global group looking for "foreign financial institutions" ("FFIs"). Not a problem – unless, like a lot of other "non-financial" companies, you have foreign cash pooling, hedging, intercompany financing, or other group financial activities that could trigger FFI status. In that case, you may have needed to work your way through the various exceptions to resolve your entities' classifications.[1] You can finally see the light at the end of the tunnel. Except…

What about your foreign pension funds?

Surprised? You aren't alone. But at the highest level, foreign pension funds are collective investment vehicles formed for the purpose of investing, reinvesting or trading in financial assets (*e.g.*, securities). An employer sponsors a pension or retirement plan and the employer and/or employee participants contribute funds into the plan – often to a complex trust formed for the purpose of providing pension, retirement, and/or death benefits. The entity invests these funds in securities and other financial assets for the ultimate benefit of the participants. Investment returns are used to fund future distributions to plan participants. These foreign pension funds sit squarely within the definition of "investment entity" for FATCA purposes. Unless an exemption applies, a foreign pension fund will need to register as a participating FFI and satisfy due diligence and annual reporting requirements in order to avoid the 30 percent penalty on its U.S. investment returns.[2] And, unless there are local law restrictions on offshore investments, it is hard to find a retirement plan that does not make, or contemplate making, investments in U.S. assets.

How Do the FATCA Rules Apply to Foreign Pensions?

Let's face it: A foreign pension scheme is not likely to be at the top of anyone's list as a tax evasion mechanism. Still, it is conceivable that, if a U.S. person participated in a foreign pension plan and received distributions, there could be a temptation not to report pension distributions – particularly if the foreign pension plan was under no obligation to report the distributions to any tax authority. This temptation may be exacerbated if participants can contribute non-wage related funds (*e.g.*, gifts) to, or freely take distributions from, the pension plan.

Nonetheless, foreign pension plans are mostly outside the eye of the FATCA storm. The FATCA rules contain several provisions designed to exempt certain retirement funds from FFI status. Foreign funds may qualify for "exempt beneficial owner" ("EBO") status if they fit into any one of six categories of qualifying funds. At a high level, the fund must satisfy several requirements focused either on its legal status or on other "legitimizing" features.[3] Here are some highlights regarding each of the exemptions:

Treaty-qualified fund. This is a fund established in one of the United States' tax treaty partners, and qualified to receive tax treaty benefits (including under the limitation on benefits provisions of the treaty). This fund must be operated principally to administer or provide pension or retirement benefits.[4]

401(a)-equivalent fund. This is a fund formed pursuant to a pension plan that, if the fund were created or organized in the United States, would qualify as a section 401(a)-qualified retirement plan.[5]

Broad participation fund. As an initial issue, the broad participation fund exemption applies to a fund established to provide retirement, disability and/or death benefits to current or former employees (or their designees) in consideration for services rendered. The fund must be subject to government regulation and must provide annual information reporting about its beneficiaries to the tax authorities in its country. In addition, the fund must satisfy *one* of the following requirements:

(i) The fund's country (where it was established or operates) has granted a tax exemption with respect to the fund's investment income, based on its status as a retirement or pension plan;

(ii) The fund receives at least 50 percent of its total contributions from the sponsoring employer(s);

(iii) Participants may receive distributions or make withdrawals only upon specified events related to retirement, disability or death, or must be subject to penalties for early withdrawals; *or*

(iv) Employee contributions must be limited either by reference to the employee's earned income or subject to a $50,000 annual cap.[6]

Narrow participation fund. A narrow participation fund must have fewer than 50 participants. Like a broad participation fund, a narrow participation fund must be established to provide retirement, disability and/or death benefits to current or former employees (or their designees) in consideration for services rendered. It must also be subject to government regulation and must provide annual information reporting about its beneficiaries to the tax authorities in its country. Moreover, the fund must meet *all* of the following requirements, which are somewhat different from those applicable to broad participation funds:

(i) The fund must be sponsored by at least one employer that is *not* an investment entity[7] or a passive non-financial foreign entity ("NFFE");[8]

(ii) Contributions (employer and employee) must be limited by reference to the employee's earned income; *and*
(iii) No non-resident participant can be entitled to receive more than 20 percent of the fund's assets.[9]

Retirement fund investment vehicle. Entities established to earn income for the benefit of one or more qualifying retirement funds described above, for qualifying retirement or pension accounts, or for funds otherwise described in an applicable intergovernmental agreement ("IGA") (discussed below) may themselves qualify for exemption.[10]

EBO-owned fund. This is a fund established or sponsored by an EBO other than a qualifying retirement fund (all as defined in the FATCA regulations). This would include a retirement fund of a foreign government or U.S. territory, international organization, or a foreign central bank.[11]

In addition, foreign pension funds resident in a country that has entered an IGA with the United States may have the benefit of additional, IGA-based, exemptions. Annex II of each IGA provides a list of local foreign entities that are to be treated as "non-reporting financial institutions" in a particular country, or considered EBOs for purposes of the FATCA regulations. The Annex II language differs from IGA to IGA, sometimes dramatically. In some countries, Annex II merely cross-references the pension provisions in an existing tax treaty between the relevant country and the United States.[12] In other instances, Annex II references specific types of local plans that qualify for EBO status. Annex II of the Bermuda IGA, for example, specifically describes as exempt "[a]ny pension fund established in Bermuda under the National Pension Scheme Act of 1998."[13] Note, however, that IGA analysis is not always easier than analysis under the FATCA regulations. Often an Annex II will replicate or refer to exemptions contained in the FATCA regulations, particularly the broad and narrow participation fund rules.[14]

Getting Started

The analysis necessary to confirm a pension plan's FATCA status can be difficult, in part because responsibility for a company's global plans may fall outside the bailiwick of the U.S. tax or perhaps even U.S. benefits departments.[15] Furthermore, day-to-day management of the foreign pension plans is often outsourced to third-party trustees and administrators, and in-house personnel may only have a passing familiarity with foreign plans' features and regulatory obligations.

The first thing you will want to accomplish is a detailed inventory of your global pension plans. Create a spreadsheet that will note several key pieces of information for each plan:

What You Need	Why This Helps You
Plan name	May indicate the type of plan you have (defined contribution, defined benefit, provident fund, superannuation, etc.), which may also indicate possible approaches to your analysis
Sponsor(s)	You may need to know the sponsor's FATCA status for purposes of classifying the fund; this may also help identify funds formed as investment vehicles for other pension funds or EBOs
Country of formation (and, if different, the country of operation)	Whether income tax treaty benefits and/or IGA exemptions may be available
Number of participants	Whether the plan could potentially qualify as a broad participation fund or as a narrow participation fund (fewer than 50 participants)
Whether and how the plan is funded	Whether the plan is implemented through an entity that needs to be classified for FATCA purposes; through a series of accounts maintained and potentially reportable by an external FFI (*e.g.*, a life insurance company); or is unfunded (and falls outside the scope of FATCA)
Whether the fund is permanently precluded (e.g., pursuant to local legal restrictions) from investing in U.S. assets	Whether FATCA classification drives potential tax cost (30 percent imposed on U.S. source investment returns and, beginning in 2017, gross proceeds on the disposition of certain U.S. investment assets)[16]
Administrator's and trustee's names and contact information	Whom to interview about how the plan works

The bottom line: A little organization goes a long way. Not all exemptions are appropriate in all cases. And, as you may have noticed, while some of the exemptions may overlap with others (*e.g.*, exemptions applying to treaty- and IGA-benefited funds), others are mutually exclusive (*i.e.*, broad and narrow participation exemptions). Your spreadsheet will give you a snapshot of which exemptions may apply to any given fund. For example, if a fund is a provident fund and a foreign government agency manages and controls the fund with no participation from the employer, you may be able to take that fund off your to-do list altogether. The same is true with unfunded plans, which have no fund entity, financial accounts or other assets to be classified for FATCA purposes. The spreadsheet will also allow you to identify quickly those funds located in IGA or U.S. tax treaty partner jurisdictions. If a fund is not located in a U.S. tax treaty or IGA partner jurisdiction, you will be able to focus squarely on the broad and narrow participation exemptions, only one of which will apply based on the number of plan participants. The various rules can be difficult to navigate, but a good spreadsheet can significantly streamline your analysis.

How Does This Work?

It is much easier to understand the FATCA pension rules when you see them in action. Below, we have set up two examples that illustrate different portions of the rules. Our goal is not to reach conclusions on these two fund classifications, but to discuss how you would approach the requirements and highlight some of the practical challenges in dealing with them.

Let's start by assuming that your company has two foreign affiliates, one (ForCo1) in Country X and one (ForCo2) in Country Y. Country X has an income tax treaty in effect with the United States, which treaty grants benefits to pension funds and contains a pension-specific provision in its limitation on benefits article, as well as an IGA. Country Y has entered neither an income tax treaty nor an IGA with the United States. Each affiliate has a fully funded pension plan for its employees, using an in-country complex trust as the plan vehicle. The complex trusts are special-purpose entities, formed and operated solely to administer pension, retirement, and death benefits for plan participants. In each case, the pension fund has tax-exempt status under local foreign law, based on its status as a retirement fund.

Example 1: Country X Retirement Fund

<u>Plan Name</u>: ForCo1 Defined Contribution Plan

<u>Employer Sponsor</u>: Country X Manufacturing and Distribution Ltd.

<u>Country</u>: Country X

<u>Number of Participants</u>: 200

<u>How Funded?</u>: Fully funded. Employees may contribute up to 5 percent of earned wages; ForCo1 matches 100 percent of employee contributions. Total annual contributions are capped at US$30,000 per employee.

<u>US Assets? If Not, Reason?</u>: Yes.

<u>Contact Information</u>: Mr. X, trustee; Ms. Y, administrator

As noted above, the ForCo1 DB plan is tax-exempt in Country X, based on its status as a pension fund.

Status-Based Exemptions. The United States has both an income tax treaty and an IGA with Country X, so we may be able to shortcut the analysis. The Country X-U.S. IGA requires that the United States treat any Country X retirement plans described in Annex II as deemed-compliant FFIs or EBOs, as appropriate. The IGA defines a non-reporting Country X financial institution ("NRXFI") to include Country X entities described in Annex II, or otherwise qualified as deemed-compliant FFIs or EBOs under the FATCA regulations. (Note, you will want to check the IGA language carefully. Not all IGAs explicitly grant the ability to "cherry-pick" back to the FATCA regulations; they may, instead, authorize the partner jurisdiction to allow cherry-picking pursuant to future implementing regulations.) This provision allows you to cherry-pick back to the FATCA regulations as necessary. Annex II lists several specific types of funds[17]:

1. A pension fund regulated under the Country X Pension Act;
2. An industry-wide pension fund as meant in the Pension Act and the Act on Mandatory Participation in an Industry-Wide Pension Fund;
3. An occupational pension fund as meant in the Mandatory Pensions for Professional Groups Act; and
4. A premium pension institution as meant in the Act on Financial Supervision.

As you can see, the determination of whether a particular retirement plan qualifies under the IGA is a local law determination. A call to Mr. X and Ms. Y, your Country X pension trustee and administrator, and perhaps a confirming look at the fund documents, registration papers, and/or regulatory filings is generally enough for you to determine whether any Annex II exemption applies.

If the fund cannot demonstrate qualified status per Annex II, it may then turn to the FATCA regulations. Country X is a tax treaty partner, and that may be the fund's best path to exemption.[18] Note, if a foreign fund is pursuing the treaty-based exemption, it must satisfy any substantive requirements for treaty benefits, including resident and qualified resident status.[19] In many cases, a treaty analysis has already been done for chapter 3 withholding purposes, and you can simply obtain a copy of the fund's Form W-8BEN (starting no later than January 1, 2015, the Form BEN-E). So long as the fund has asserted a valid treaty claim – including any necessary tax identification numbers and treaty representations – you can use the prior analysis to demonstrate the basis for a FATCA exemption. If no prior treaty claim has been made, it's not too late; the FATCA regulations grant the benefit of the exemption even if the fund, in fact, earns no U.S. source investment income but would be entitled to treaty benefits if such income were earned.[20] Note, however, that just because a plan is an "approved" pension plan in the country does not mean it satisfies the treaty. If the employer is in a treaty country but the trust holds the money in a non-treaty country, you probably cannot use the treaty to exempt the pension plan.

If the fund cannot demonstrate tax treaty eligibility or status as another Annex II-list fund, the next status-based exemption would be based on section 401(a) equivalence. By far, the easiest way to proceed is to ask if the fund has been issued an Internal Revenue Service ("IRS") determination letter. Absent a determination letter, you could possibly seek an opinion from a qualified tax advisor. But before embarking on what could be a tough analysis, you will want to consider whether any of the features-based regulatory exemptions apply.

Features-Based Exemptions. If the fund qualifies for a treaty or IGA-based exemption, or has the benefit of an IRS determination letter, you can generally stop. Let's assume for purposes of this discussion that the fund doesn't qualify for any status-based exemption and move on to the features-based exemptions.

Because this fund has more than 50 participants, it could potentially qualify under the broad, but not the narrow, participation fund exemption.[21] Let's list out the requirements we believe it satisfies, and open items needed, for the broad participation exemption. For clarity's sake, we have broken the regulatory language into a series of sub-requirements.

_Y_ established to provide retirement, disability and/or death benefits

_Y_ for beneficiaries that are current or former employees, in consideration for services rendered

____ has no beneficiary with the right to receive > 5 percent of the fund assets

_Y_ subject to Country X regulation

____ subject to annual information reporting requirements about its beneficiaries

____ the reports described above are provided to the Country X tax authorities

_Y_ satisfies at least one of the following:

  _Y_ is tax exempt due to its pension fund status

  ____ receives at least 50 percent of its total contributions from sponsoring employers

  ____ allows distributions or withdrawals only upon specified retirement, disability or death events OR imposes penalties for early withdrawals

  _Y_ limits employee contributions either by reference to the employee's earned income or a cap not exceeding $50,000 annually

For purposes of discussion, let's discuss all of the open items – even though, as you can see, not all are absolutely necessary to qualify for the exemption. We have grouped the requirements thematically below. As we go, we will note a few practical issues you may encounter in your analysis.

Distribution limits. One absolute requirement for exempt status is that no participant may have a right to receive a distribution of more than 5 percent of the fund's assets.[22] The FATCA regulations aren't clear on how participants' ultimate distribution rights should be quantified, particularly if some are not yet vested. This task is a little easier if your fund already issues annual statements disclosing the value of the participants' pension rights; it would not be unreasonable to piggyback off the existing analysis. Otherwise, a possible approach is to assume that all rights are fully vested and that all participants will receive distributions of a presumed value of their rights. The FATCA regulations do not appear to contemplate the nuances between defined benefit and defined contribution plans, and you will want to get Mr. X and Ms. Y involved in the calculations. It would be a good idea for the workpapers to clearly state the assumptions on which the calculations are based. You will want to check this requirement every year, i.e., as participants' interests change in value. If Mr. X and Ms. Y can confirm that none of the participants exceed this distribution threshold, the fund will satisfy this requirement. (As a practical matter, it would not be unusual to see a fund fail this requirement, particularly in cases where the fund is located in a slow-moving job market and has a cadre of highly compensated participants.)

In addition, it may be necessary to inquire about the conditions under which participants may receive distributions. Distributions and withdrawals must be linked to specific events related to retirement, disability, or death;[23] or participants must be penalized for early withdrawals. The FATCA regulations provide no guidance as to what these penalties should entail. Forfeiture of employer-matching contributions is a pretty clear penalty, as is taxation of the distribution at higher-than-normal rates. It's not so clear, however, that current taxation at the employee's normal rates would be a sufficient penalty for these purposes. Ask Mr. X and Ms. Y about any tax or non-tax change to the employee's rights, to get the full picture on whether the employee might be penalized for early withdrawals.

Annual filing requirements. All qualifying funds must be subject to annual filing requirements "about the beneficiaries."[24] Be careful here. The FATCA regulations do not specify the type of information that must be reported. It is best to ask what kinds of information are included, and confirm that all beneficiaries are covered in the report. There is no absolute requirement that the beneficiaries be individually named. But, given FATCA's purpose, more information – especially information identifying participants and disclosing contributions, account value, and distributions – is always better. Technically, for example, information regarding the number of plan participants would qualify as information "about participants," but that alone is likely not enough to satisfy the FATCA requirements. Ask Mr. X and Ms. Y to confirm the scope of the information reported as well as the percentage of beneficiaries reported, and to provide copies of recent filings for your records.

In addition, these filings must be made to Country X tax authorities. Quite often, while the fund prepares annual reports that would contain substantial information regarding the participants and their pension benefits, the reports are filed with the local *labor* authority. Unless the fund is also required to provide copies to the tax or revenue agency, those reports won't be sufficient to qualify for the exemption.

Contribution limits. The employer must provide at least 50 percent of the total contributions to a qualifying fund.[25] In addition, employee contributions to the fund must either be limited by reference to the earned income of the employees, or capped at $50,000.[26] This Example 1 analyzes a defined contribution plan. Based on our facts, it appears that the employer is making exactly 50 percent of the contributions, due to its 100 percent matching program, and the contribution cap is under the regulatory limit. Before you check this requirement off your list, however, you will want to confirm that employees do not make additional voluntary contributions that go unmatched. Moreover, the 50 percent and $50,000 limit requirements are independent, and any unmatched employee contributions would cause the fund to fail the 50 percent requirement even if total employee contributions fall below the threshold. (Again, the 50 percent requirement is not absolutely necessary to qualify the fund in this case, because the fund already satisfies the tax-exempt and $50,000 requirements above.)

Whatever you ultimately conclude, you will want to keep clear workpapers and copies of supporting documentation such as annual filings. If possible, have Mr. X and Ms. Y sign off on your notes, so you can show that the persons who will ultimately be executing the IRS Form W-8BEN-E on behalf of the fund were involved with the analysis and agreed to the conclusions.

Example 2: Country Y Retirement Fund

Let's assume different facts for the Country Y Retirement Fund.

Plan Name: ForCo2 Defined Benefit Plan
Employer Sponsor: Country Y Finance and Services Corp.
Country: Country Y
Number of Participants: 20
How Funded?: Employees may contribute up to 5 percent of earned wages; ForCo2 matches 100 percent of employee contributions. If trust earnings are insufficient for ultimate benefits, ForCo2 must make "top up" contributions.
US Assets? If Not, Reason?: Yes.
Contact Information: Mr. X, trustee; Ms. Y, administrator

We have assumed that Country Y has not entered into either an IGA or an income tax treaty with the United States. Furthermore, Mr. X and Ms. Y have confirmed that the fund has never been analyzed as 401(a)-equivalent, either by the IRS or any tax advisor. Therefore, as a fund with fewer than 50 participants, let's test for exemption as a narrow participation fund. As in Example 1, let's start off by writing out what we already know about how the requirements (**all** of which must be satisfied) apply to this fund, then discuss the remaining requirements below:

_Y_ established to provide retirement, disability and/or death benefits
_Y_ for beneficiaries that are current or former employees, in consideration for services rendered
_Y_ has fewer than 50 participants
____ sponsored by at least one employer that is not an investment entity or passive NFFE
____ limits employer and employee contributions by reference to the employee's earned income/compensation
____ has no non-resident participant entitled to more than 20 percent of fund assets
____ subject to annual information reporting requirements about its beneficiaries
____ the reports described above are provided to the Country Y tax authorities

Sponsorship requirement. The sponsorship requirement will necessitate FATCA classification of the employer sponsor. At least one employer sponsor must qualify as something other than an investment entity or a passive NFFE, within the meaning of the FATCA regulations. This would have been a little easier for ForCo1, a manufacturing and distribution entity. ForCo2, as a finance entity, may have a tougher time. In any case, it's time to sit down with ForCo2's balance sheet and income statement, and figure out whether its income, assets, and activities take the fund out of the running for an exemption. For more information regarding payee classification issues, see "FATCA: A pragmatic approach to the payee classification rules for multinational groups."[27]

Contribution limitation. This requirement is similar to the one discussed above, with respect to the broad participation fund exemption. That is, the employer and employee contributions can only be made in respect to the employee's compensation. From the technical perspective, the difference is that, while this is one of several alternative requirements for broad participation funds, it is a mandatory requirement for narrow participation funds. Fail it, and the fund is disqualified from the exemption. Moreover, as a practical matter this example addresses application of the requirement to a defined benefit, as opposed to a defined contribution, plan. In the defined benefit context, the amount of up-front contributions is determined actuarially, to achieve a specified retirement benefit for the employee. If the contributions accrue insufficient yield, the employer must make additional contributions to fund the deficit. The regulations provide no guidance regarding how the contribution limits apply to this type of plan. Conceivably, if the fund investments do poorly, the employer could make top up contributions equal to the employee's entire benefit; the contribution amount would not clearly correspond to the employee's compensation. Nonetheless, provided that Mr. X and Ms. Y can confirm that the defined benefit is calculated in respect of the employee's earned income, we believe it reasonable to treat the contributions as meeting this requirement.[28]

Nonresident distribution restriction. To qualify for exemption, the fund cannot have any nonresident participant entitled to distributions of more than 20 percent of fund assets. While resident participants may be the norm in countries like the United States, this may be a little tougher in countries (e.g., in Europe) where the labor force is more mobile, particularly for affiliates that serve regional manufacturing, distribution or other functions. Employees' survivors could also be nonresidents. So while a 20 percent distribution limit sounds high, you will still need to consider it carefully. Here again, quantifying participants' entitlements may be difficult generally – although perhaps a little easier in the defined benefit context – and you should get Mr. X and Ms. Y involved with these determinations.

Annual filing requirements. The nuances related to the reporting requirements – information "about beneficiaries" and provision of the report to the Country Y tax authorities – are the same here as for the broad participation fund exemption. Consequently, you will need to ask Mr. X and Ms. Y about the nature of the information reported and confirm that the reports are indeed filed with the local tax agency.

* * *

Whatever the outcome, you will want to memorialize the conversations you have had with Mr. X and Ms. Y, and the reasoning regarding qualification (or not) for EBO status. You will also want to make note of which funds will require future monitoring, *e.g.*, because the number of participants would kick the fund from the narrow into the broad participation fund rules; a broad participation fund has one or more participants close to the 5 percent distribution threshold; a fund has no current U.S. investments but may in the future; etc.

Funds that fail to qualify for an exemption should register as participating FFIs, and the sooner the better. The objective would be to appear on the IRS's published list of registered FFIs before the start of FATCA withholding on January 1, 2015. As an initial matter, this means getting approval for registration at the fund level, and identifying a responsible officer to register the plan. Going forward, compliance with the fund's FATCA obligations may require coordination between the fund (which may have very little useful information regarding the participants' tax or residence status) and the employer. You may want to identify additional points of contact within the employer's human resources group and even the U.S. tax department, to ensure everyone is aware of correspondence between the fund and the IRS. And whatever the fund's compliance plan entails, you will want to ensure there are no foot faults with internal privacy policies or local privacy laws that would preclude the sharing of employee information.

This complex task – analyzing foreign pension funds to confirm their FATCA status – is critical to ensure that foreign beneficiaries are not unexpectedly hit with a not-insignificant 30 percent tax on U.S. investment returns (and, starting in 2017, on proceeds from the disposition of the underlying assets). And, it is a fairly time sensitive analysis; as the different deadlines for FATCA withholding approach, it is only a matter of time before someone requests a withholding certificate for one of your foreign pension funds. As you can see from the above, however, this can be a fairly complex analysis requiring input from third parties situated around the globe. Consequently, you may want to consider moving your pension fund analysis to the front burner as soon as possible.

This article represents the views of the authors only, and does not necessarily represent the views or professional advice of KPMG LLP. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

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1. For more on the basics of FATCA and FATCA implementation, see Kimberly Tan Majure and Mathew R. Sontag, FATCA: Myths, Mysteries, and Practical Perspectives, 64 *The Tax Executive* 4, 315 (Jul./Aug. 2012); Kimberly Tan Majure and Christopher Riccardi, FATCA Myths and Mysteries (Part 2), 65 *The Tax Executive* 2, 101 (May/June 2013).
2. A foreign pension plan will likely need to know its FATCA classification even if it has no U.S. investment assets. For example, a pension fund that has a foreign bank account will need to provide its FATCA classification to its bank, in response to the bank's own due diligence efforts to comply with FATCA.
3. Treas. Reg. 1.1471-6(f).
4. Treas. Reg. 1.1471-6(f)(1).
5. Treas. Reg. 1.1471-6(f)(4).
6. Treas. Reg. 1.1471-6(f)(2).
7. Treas. Reg. 1.1471-6(f)(3)(ii); Treas. Reg. 1.1471-1(5)(e)(4)(i) (defining an "investment entity" to include, among other things, an **investment vehicle** that functions or holds itself out as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in financial assets.)
8. Treas. Reg. 1.1471-6(f)(3)(ii). A "passive NFFE" is a non-financial foreign entity that does not qualify as an excepted NFFE, e.g., an NFFE that is a publicly-traded corporation or an affiliate of a publicly-traded corporation or an active NFFE.
9. Treas. Reg. 1.1471-6(f)(3).
10. Treas. Reg. 1.1471-6(f)(5).
11. Treas. Reg. 1.1471-6(g).
12. *See e.g.*, Bilateral Agreeement between the U.S. and Canada to Implement FATCA (February 5, 2014).
13. Bilateral Agreement between the U.S. and Bermuda to Implement FATCA (Dec. 19, 2013), Annex II.
14. *See e.g.*, Bilateral Agreeement between the U.S. and Finland to Implement FATCA (March 5, 2013).
15. In fact, a plan entity is very likely to fall outside the company's consolidated group. The issue here is the potential fiduciary responsibility the company may have if the trustees or managers fail to comply with FATCA and, consequently, the plan's U.S. investment returns are subject to 30 percent FATCA withholding.
16. Remember, even funds without U.S. investments will need to know their FATCA classification, to provide to their banks and other financial intermediaries. In addition, if an IGA includes the pension fund as a reporting FI, due diligence and reporting requirements may trigger local regulatory implications.
17. For purposes of illustration, we have borrowed language from existing IGAs. However, our discussion should not be taken as advice or conclusions regarding the Annex II language, any rules to which such language refers, or application of such language to facts.
18. Treas. Reg. section 1.1471-6(f)(1).
19. *See, e.g.*, Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income,

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1. Section 41(f)(1) states that controlled group members are to be treated as a single taxpayer. Section 41(c)(7) states that a foreign corporation's gross receipts that are not effectively connected with a U.S. trade or business are not gross receipts for purposes of the research credit. We do not believe there is any ambiguity in the statute — any gap in the statutory scheme — that the Treasury Department or IRS need to fill with the proposed regulatory "exception."
2. Example 8 of the proposed rule illustrates the shrinking-back rule, and suggests that only the costs relating to the production of the component (the compressor blade) can be treated as research expenditures whereas the cost of the jet engine (the product) cannot be so treated even though all the expenditures in the example are likely part of a process to discover and eliminate the cause of the compressor blade fatigue. The example assumes the tested component (the compressor blade) can be incorporated into the product (the jet engine) without affecting the overall design of the product itself (which may be the engine or the aircraft as a whole). In many cases, that will not be true because the design, materials used in, utility of, or manufacturing of the component will affect the overall product performance.
3. The preamble to the final section 4980H regulations (TD 9655, Feb. 12, 2014) notes that "any assessable payment under section 4980H is payable upon notice and demand and is assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68 of the Code. The IRS will adopt procedures that ensure employers receive certification . . . that one or more employees have received a premium tax credit or cost-sharing reduction. . . . The IRS will contact employers to inform them of their potential liability and provide an opportunity to respond before any liability is assessed or notice and demand for payment is made." Hence, the IRS and Treasury Department may intend to address the statute of limitations issue in connection with the additional expected procedural guidance.
4. The current IRS position on the statute of limitations for penalties under sections 6721 is reflected in CCA 111814-13 (April 4, 2013). As expressed there, the assessment period for section 6721 is seemingly three years, but that CCA contradicts an earlier CCA (138637-08, dated Oct. 17, 2008) which said that section 6721 penalty assessment period never expires. Both CCAs conclude that the statute never expires on assessment of penalties on the payee statements furnished under section 6722.

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Article 26, para. 2(d), which requires that more than 50 percent of the fund's beneficiaries, members or participants be individuals who are residents of either the Netherlands or the United States.

20. Treas. Reg. section 1.1471-6(f)(1).
21. Treas. Reg. section 1.1471-6(f)(2).
22. Treas. Reg. section 1.1471-6(f)(2)(i).
23. Treas. Reg. section 1.1471-6(f)(2)(iii)(C).
24. Treas. Reg. section 1.1471-6(f)(2)(ii).
25. Treas. Reg. section 1.1471-6(f)(2)(iii)(B).
26. Treas. Reg. section 1.1471-6(f)(2)(iii)(D).
27. Kimberly Tan Majure and David Neuenhaus, TAX PLANNING INTERNATIONAL EUROPEAN TAX SERVICE BLOOMBERG BNA, December 2013.
28. As an example, a plan may define the retirement benefit as 2 percent of average compensation x years of service.