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LONG OVERDUE: DEFINITIVE GUIDANCE ON U.S. TAX CLASSIFICATION AND REPORTING REQUIREMENTS FOR CROSS-BORDER RETIREMENT CONTRIBUTIONS, EARNINGS AND DISTRIBUTIONS IN COUNTRIES WITH HYBRID SOCIAL SECURITY REGIMES

(Code §§72, 401, 402, 671-679)

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EXECUTIVE SUMMARY[5]

While the COVID-19 pandemic and its deleterious effects on the mental and financial well-being of individuals and economic stability of countries continues to take center-stage in government offices around the world, the related issue of taxation of cross-border pension and retirement income continues to escalate as the global workforce continues to evolve. As workers have re-evaluated where, when, and how they work, this evolution continues to expose the notable differences between the tax systems in the United States ("**U.S.**") and in other countries which existed even before the pandemic. Notably, these differences include such as differences with respect to the various features of each country's "social security"[6] plans and the resulting questions of how those plans should be classified, taxed, and reported for U.S. tax purposes. These differences are even more pronounced now that certain governments are allowing workers and retirees early access to retirement savings and implementing comprehensive pension reforms[7] both to buffer pension financial sustainability and compensate for economic hardships.[8] For taxpayers who are also "**U.S. Persons**"[9] this equation becomes even more complicated as such amounts attract various income and withholding taxes, penalties and reporting burdens when remitted across borders. In the most serious cases, these issues can lead to financial ruin, resentment and in some cases, even renunciation of US citizenship.

This paper will: (1) provide an overview of foreign pension plans in countries that have implemented pension reform; (2) review the existing statutory framework for the U.S. tax classification and reporting of foreign private pension contributions, earnings and distributions (collectively, "**Cross Border Pensions**") by U.S. Persons under Sections ("**§**") 72, 402, and Subchapter J of the Internal Revenue Code of 1986, as amended (the "**Code**"); (3) examine the pension provisions under the U.S. Model Income Tax Convention ("**MITC**") which provide guidance on U.S. policy positions when negotiating bilateral tax treaties and ascertain whether such provisions provide relief for U.S. Persons with beneficial interests in Cross Border Pensions; (4) propose an alternative analytical framework for the U.S. tax classification, treatment and reporting of foreign pension plans that are based in OECD countries with privatized social security regimes; and (5) advocate for long overdue Congressional action that

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6 *See*, Jorge Alonzo Ortiz, Social Security and Retirement across the OECD Countries (Job Market Paper) WP Carey School of Business, Arizona State University (December 3, 2009), unpublished.

7 For example, over the past 2 years, the OECD has reported various pension reforms introduced in OECD and G20 countries to protect the income of workers and pensioners, adjusting retirement ages, extending early retirement options, and adjusting benefits and contributions in earnings-related schemes which combine work and pensions. *See,* OECD Pensions at a Glance 2021, Chapter 1 – Pension Reforms.

8 *See generally,* OECD Pensions at a Glance 2021.

9 Code §7701(a)(30)(A), which defines "United States Person" as a citizen or resident of the United States. "Resident" is further defined in Code §7701(b), which provides the tests for determining U.S. resident status for income tax filing purposes.

would make U.S. Persons with beneficial interests in Cross Border pensions on equal footing, tax-wise, with U.S. Persons who participate in domestic tax-qualified plans. In the short term however, administrative guidance can be issued by the Internal Revenue Service ("**IRS**") and Treasury Department based on the recent passage of SECURE ACT 2.0 of 2022 (the "**SECURE ACT 2.0**"),[10] which recalibrates traditional U.S. domestic retirement planning vehicles such as plans created under Code §401(k) and individual retirement accounts ("**IRAs**")[11] and brings them one step closer to the pension and retirement regimes of the Organization for Economic Co-operation and Development[12] ("**OECD**") member countries with mandatory employer funded accounts.

Worldwide, there are many various types of retirement savings plans[13] making up the cross-border pension landscape. For example, pension plans may be accessed (1) through employment and established by employers on behalf of their employees or by social partners ("**Occupational Pensions**") or (2) by individuals directly without any involvement of their employers and established directly by a pension fund or a financial institution acting as a pension provider ("**Personal Pensions**"). Both types of pensions co-exist in 33 of the 38 OECD reporting countries.[14] Additionally, Occupational Pensions are either "Defined Benefit" ("**DB**") or "Defined Contribution" ("**DC**"). In DC plans, participants bear the brunt of the risk. By contrast, in traditional DB plans, sponsoring employers assume all of the risks. However, many countries also offer hybrid and mixed DB plans, which come in different forms, but all result in spreading the risk between employers and employees. As reported by the OECD, DC and Personal Pensions have been gaining market share around the world, even in countries that have traditionally favored investment in DB plans, like the U.S.[15] Domestically, this same observation was noted in the August 2022 report by the US GAO on Retirement Security,[16] which noted that traditional DB pension plans have become less common with more U.S. individuals managing their own retirement savings than ever before. Compounding this is an ongoing trend of more and more U.S. Persons relocating abroad for work and lifestyle choices, meaning a growing number of U.S. Persons now own foreign pension plans that do not fit squarely within the four corners of our traditional tax-qualified retirement plan definition. In fact, some U.S. Persons have beneficial interests in foreign plans that do not conceptually fall with in the parameters of a traditional IRA or 401(k) plan (for example, the Australian superannuation fund and the Mexican AFORE).[17]

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[10] *See generally,* Secure 2.0 Act of 2022, Division T of the Consolidated Appropriations Act, 2023, Pub. L. 117-328 (2022).

[11] *See generally,* Code §408.

[12] The OECD is a forum for the governments of 38 countries to work together on economic, social, environmental and governance issues through their commitment to democratic government and the market economy. The OECD works to promote economic growth, financial stability and trade and investment, technology, innovation and development cooperation.

[13] The OECD defines the term "retirement savings plans" private arrangements (funded and book reserves) and funded public arrangements. *See,* OECD Pensions at a Glance 2021 at Chapter 9 – Landscape of Retirement Savings Plans, page 216.

[14] OECD Pensions at a Glance 2021, at page 216.

[15] Id.

[16] *See,* US Government and Accountability Office (GAO) Report to the Chairman, Committee on Ways and Means, House of Representatives on Retirement Security – *Recent Efforts By Other Countries to Expand Plan Coverage and Facilitate Savings* (August 2022).

[17] Discussed further in Section V(A) below.

International tax practitioners have long bemoaned the fact that the U.S. domestic tax regime has not kept pace with pension reforms initiated around the world to expand retirement security by increasing opportunities for individual taxpayers to accumulate pre-tax savings. Rather than encourage savings, the current U.S. statutory tax framework for classification and reporting of foreign retirement savings plans remains incoherent and disjointed, severely lacking a uniform structure for addressing foreign pension plan arrangements in a manner that extends to such plans the benefits of tax-deferral or, in some cases outright exemption, as endeavored in U.S. bilateral tax treaties. To further complicate this area of the law, in May of 2018 the IRS implemented an enforcement campaign targeting foreign trust reporting by U.S. Persons. This campaign unfortunately cast a broad net, which caught U.S. Persons with beneficial interests in cross-border pension plans in the crossfire.

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DISCUSSION

I. FOREIGN PENSION PLANS AROUND THE WORLD

There are many types of retirement savings plans[18] worldwide which make up the cross-border pension landscape. However, there is no comprehensive scheme providing a uniform global classification of such plans for all tax purposes in all countries. Over the past 100 years,[19] in the U.S. at least, a survey of publications by the Treasury Department and the Internal Revenue Service ("**IRS**") yields a plethora of guidance on the tax treatment of domestic retirement plans, and more recently, foreign pension plans. Published guidance with respect to the former appears to have been issued on an as needed basis, thereby resulting in the application of provisions under the Code and the Treasury Regulations ("**Treas. Regs.**") promulgated thereunder, which when strung together, provide a tax classification that supports adverse tax treatment of the foreign plan for U.S. income tax purposes. Indeed, relief from the unfavorable tax consequences to U.S. participants in foreign plans has been sought time and again through applicable treaty provisions negotiated between the U.S. and the treaty country.[20] Due to the inherent political nature of the treaty making process, the ratification and amendment of tax treaties remains in a "lengthy hiatus,"[21] subject to the changing priorities of the U.S. government. Acknowledging the evolving nature of foreign pension plans and adapting our existing domestic tax frameworks to keep pace with these changes, such that U.S. Persons with beneficial interests in these plans are not disadvantaged, must be urgently prioritized to keep the U.S. competitive with the rest of the world.

In general, foreign pension plans around the world have now shifted to fully funded private individual accounts that can be accessed by individuals who are who are employees through their employer or by social partners (i.e.: Occupational Pensions) or directly without any involvement of their employers and established directly by a pension fund or a financial institution acting as a pension provider (i.e.: Personal Pensions). Occupational Pensions are either Defined Benefit ("**DB**") or Defined Contribution ("**DC**"). In DC plans, benefits offered are directly linked to the extent of contributions made by the participants, but participants bear the brunt of the risk and are ultimately responsible for managing their investment decisions for

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[18] The OECD defines the term "retirement savings plans" private arrangements (funded and book reserves) and funded public arrangements. *See,* OECD Pensions at a Glance 2021 at Chapter 9 – Landscape of Retirement Savings Plans, at page 216.

[19] The first private pension plan was created in the United States in 1899, by the American Express Company. Congress passed the first income tax bill in 1913, which did not address pensions directly, but was followed by an IRS ruling in 1914 that pensions paid to retired workers could be deducted by employers as "ordinary and necessary business expenses." This was followed by the Revenue Act of 1926, which formally exempted income from pension plans from a retired employee's taxable income. *See*, Workplace Flexibility 2010, Georgetown University Law Center, "A Timeline of the Evolution of Retirement in the United States" (2010). *Memos and Fact Sheets*. 50 accessed at: https://scholarship.law.georgetown.edu/legal/50.

[20] *See generally,* the United States Model Income Tax Convention of 1996, 2006 and 2016, discussed in Section III below.

[21] *See generally,* Oren Penn, *US Income Tax Treaties at the Start of the Biden Administration*, PWC (May 2021), https://www.pwc.com/us/en/services/tax/library/pwc-us-income-tax-treaties-at-the-start-of-the-biden-administration.html.

retirement. In contrast, in traditional DB plans, sponsoring employers assume all of the risks. However, some countries have also developed hybrid and mixed DB plans, which come in different forms but all result in spreading the risks between employers and employees. Both types of pensions co-exist in 33 out of the 38 countries that report to the OECD.[22]

The OECD reports that DC and Personal Pensions have been gaining prominence at the expense of DB plans even in countries where there has historically been a high proportion of assets in DB plans, such as the U.S.[23] Indeed, this same observation was reiterated in the August 2022 report by the U.S. Government and Accountability Office ("**GAO**") on Retirement Security,[24] noting that traditional pensions have become less common, with more individuals managing their own retirement savings. This is attributable to pension reforms instituted in many OECD countries since the 1980s to restructure their public pension programs to address future financial shortfalls that was imminent with the traditional Pay-As-You-Go ("**PAYG**") pension system,[25] which meant reducing entitlement to benefits under the public pension and increasing incentives for fully funded and mandatory individual account-based savings[26] ("**Fully Funded Private Pension Plans**"). This included (1) requiring automatic enrollment by employers of their employees in retirement savings plans to increase program participation;[27] (2) mandatory employer contributions and government contributions to incentivize participants to remain in their plans;[28] (3) use of default contribution rates of 3 to 5 percent of a participant's salary to facilitate savings by simplifying key investment decisions of how much to contribute;[29] and (4) providing participants with flexibility in terms of plan options when changing employers, ability to pause or stop contributions; early withdrawals and draw-down of funds.[30] Fully Funded Private Pension Plans are intended to complement existing public pension plans, so much so that in some countries like Australia, Canada, the Netherlands, the United Kingdom and Chile, funded private pension plans have overtaken public pensions as the main source of retirement

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[22] OECD Pensions at a Glance 2021, at page 216.
[23] Id, footnote 19.
[24] *See,* U.S. Government and Accountability Office (GAO) Report to the Chairman, Committee on Ways and Means, House of Representatives on Retirement Security – *Recent Efforts By Other Countries to Expand Plan Coverage and Facilitate Savings* (August 2022). Referenced hereinafter as "**GAO-22-105102 Retirement Security**."
[25] *See,* GAO Report to the Chairman, Committee on the Budget, U.S. Senate – *Entitlement Reform Process, Other Countries' Experiences Provide Useful Insights for the United States* (January 2008). Cited as GAO-08-372 at page 9.
[26] *See,* GAO Report to the Chairman, Committee on Ways and Means, House of Representatives – *Retirement Security: Recent Efforts by Other Countries to Expand Plan Coverage and Facilitate Savings* (August 2022). Cited as GAO-22-105102.
[27] *See,* GAO-22-105102 Retirement Security at p. 7. For example, Canada's Pooled Registered Pension Plan; Lithuania's Pension Accumulation Plan ("**LPAP**"); New Zealand's KiwiSaver; Quebec's Voluntary Retirement Savings Plan ("**VRSP**"); and the UK's Qualifying Workplace Pension Plans (e.g., **NEST**).
[28] Id at pp. 15-19, Employers in New Zealand and UK must contribute at least 3 percent of an employee's salary to their respective KiwiSaver and NEST accounts. On the other hand, the governments of Lithuania, Quebec and Canada encourage employer to contribute through tax incentives such as tax deductions for contributions. Australian employers are required to contribute 9.5 percent of an employee's salary into their Australian superannuation account as a superannuation guarantee which is tax deductible to the employer.
[29] Id. At p. 21. For example, the contribution rate for the LPAP is 3 percent; Kiwisaver is 3 percent; VRSP is 4 percent and NEST is 5 percent.
[30] Id at. p.28.

funding.[31]

With more and more U.S. Persons relocating abroad for work and lifestyle choices, it is not a surprise that many U.S. Persons now participate in foreign Fully Funded Private Pension Plans that do not fit squarely within the four corners of what would be classified as a tax qualified plan under the Code.[32] Not surprisingly, the foreign countries where U.S. persons are relocating or have already relocated are the countries which are among the top-ranked in the world for Fully Funded Private Pension Plan assets as of 2022. These are: the United Kingdom ($3.6 Trillion); Australia ($2.3 Trillion); the Netherlands ($2.0 Trillion); Canada ($1.7 Trillion); Japan ($1.5 Trillion); and Switzerland ($1.2 Trillion).[33] Of the foregoing countries, only Canada has received adequate guidance from the IRS with respect to the US tax classification, tax treatment and reporting of its various Canadian registered pension plans over the last two decades.[34] Australian superannuation plans continue to receive inconsistent tax classification and treatment, although we are hopeful that the US tax court in *Dixon v. Commissioner* [35] will be able to provide much-needed direction in this respect.

II. <u>EXISTING DOMESTIC STATUTORY FRAMEWORK FOR FOREIGN PENSION PLANS</u>

The U.S. retirement scheme allows for individuals to direct savings and to have both occupational and personal pensions. However, unlike many other countries, occupational plans were *voluntary* in the United States up until the recent passage of the SECURE ACT 2.0 of 2022[36] (the "**Secure Act**") which recalibrates traditional U.S. domestic retirement vehicles (such as 401Ks and Individual Retirement Accounts ("**IRAs**")) one step closer to the pension and retirement regimes of other countries with *mandatory* employer funded accounts.

Because the U.S. retirement regime for occupational pensions up until the SECURE ACT was voluntary, accounts established by an employer under a DC or DB plan for the benefit of its employees to assist with retirement savings, are afforded tax-deferred status under IRC §401(a) to encourage participation. This statute confers tax-qualified treatment to an employees' trust that is created or organized in the U.S. and forming part of a stock bonus, pension or profit-sharing plan of an employer for the benefit of its employees or beneficiaries. The irony is that there is no definition under the Code or regulations of what would constitute an "*employees'*

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[31] *See,* Chapter 9, Table 9.2 Assets in Retirement Savings Plans and Public Pension Reserve Funds in OECD Countries and other Major Economics, in 2020 or latest year available, OECD Pensions at a Glance Report 2021.
[32] The result is that these plans will likely be classified as "non-qualified plans" which are taxable to the U.S. person on a current basis rather than a deferred basis under the existing statutory framework for foreign pension plans.
[33] *See,* OECD Pensions Outlook 2022, Table 1.1.
[34] *See generally*, Rev. Proc. 2014-55, 2014-44 I.R.B. 753 (Oct. 27, 2014) (providing guidance for reporting interests in certain Canadian retirement plans consistently with Par. 7 of Art. XVIII of the U.S.-Canada Income Tax Convention) superseding guidance provided in I.R.S. Notice 2003-75, 2003-2 C.B. 1204 and Rev. Proc. 2002-23, 2002-23 C.B. 1204 (Apr. 15, 2002). *See also,* Rev. Proc. 2020-17, 2020-12 I.R.B. (Mar. 16, 2020) (providing exemptions from U.S. foreign grantor trust reporting requirements under Code §6048 for certain "tax-favored retirement and non-retirement savings accounts"), discussed in more detail in Section IV(D) of this paper.
[35] *See, Dixon v. Comm'r*, No. 13874-19 (T.C., July 25, 2019). *See also*, Marsha Laine Dungog and Tamara Cardan, *Dixon: A Cautionary Tale of US-Australian Tax Issues*, 170 Tax Notes Federal 909 (Feb. 8, 2021).
[36] *See generally,* Secure 2.0 Act of 2022, Division T of the Consolidated Appropriations Act, 2023, Pub. L. 117-328 (2022).

trust" for this purpose. Moreover, even if one were somehow able to divine that a particular retirement or pension plan is an employees' trust, it would still would most definitely have to be a domestic trust to obtain tax qualified status under Code §401(a). The tax-deferral benefits enjoyed by a U.S. employee who is covered under a U.S. tax qualified plan (the "**U.S. Plan**") extends even after that employee relocates to work another country. However, a U.S. participant's contributions to such a plan, as well as income accruals and distributions from the U.S. Plan are generally subject to tax in the other country unless relief is available under the applicable tax treaty between the U.S. and that foreign country.[37] Our survey of existing U.S. tax treaties with applicable relief provisions reveals there is no uniformity of relief to be found.[38]

Nonresident persons who relocate to the U.S. and participate under U.S. Plans are afforded the same tax-deferral benefits on plan contributions and income accruals as U.S. Persons. While there is an option to exempt from U.S. taxation any contributions made to a pre-existing foreign retirement plan ("**Foreign Plan**") prior to relocating to the U.S. under Code §72(w),[39] there does not appear to be any relief from current U.S. taxation of income and gains accrued in the Foreign Plan once the beneficiary of such plan has become a U.S. tax resident.[40] s

[37] Alternatively, the U.S. employee may move coverage to a U.S. affiliate's qualified plan. This topic is outside the scope of this paper.
[38] *See e.g.*, Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Austria, Art. 18(5), May 31, 1996, T.I.A.S. No. 98-201 (1998); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Belg., Art. 17(6), (7) and (9), Nov. 27, 2006, T.I.A.S. No. 07-1228.2 (2007), as amended by Protocol (2006) and Memorandum of Understanding (2009); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Bulg., Art. 17(5), Feb. 23, 2007, T.I.A.S. No. 08-1215.1 (2008), as amended by Protocol (2008); Convention with Respect to Taxes on Income and Capital, with Exchange of Notes, U.S.-Can., Art. XVIII (7), (8) & (13), T.I.A.S. 11087 (1985), as amended by Protocol (1996, 1997, and 2009); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, with Exchanges of Notes, U.S.-Fr., Art. 18(2), Aug. 31, 1994, T.I.A.S. No. 1963 (1995), as amended by Protocol (2004 and 2009); Taxation Convention, U.S.-Ger., Art. 18A(1), (2), & (5), Aug. 29, 1989, T.I.A.S. No. 91-821 (1991), as amended by Protocol (2006); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Ice., Art. 17(4), Oct. 23, 2007, T.I.A.S. No. 08-1215 (2008); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, with Protocol and Related Agreement, U.S-Ir., Art. 18(5), July 28, 1997, T.I.A.S. No. 2141 (1997), as amended by Convention (1999); Taxation Convention, U.S.-It., Art. 18(6), Aug. 25, 1999, T.I.A.S. No. 09-1216 (2009); Taxation Convention, U.S.-Malta, Art. 18, Aug. 8, 2008, T.I.A.S. No. 10-1123 (2010); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, with Understanding and Exchange of Notes, U.S.-Neth., Art. 19(7) & (8), Dec. 18, 1992, T.I.A.S. No. 2291 (1993), as amended by Protocol (1993 and 2004); Taxation Convention, U.S.-S. Afr., Art. 18(6), Feb. 17, 1997, T.I.A.S. No. 97-1228 (1997); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Protocol Amending the Convention, U.S.-Swed., Art. 19(4), Sept. 30, 2005, T.I.A.S. No. 06-831 (2006); Taxation Convention with Protocol, U.S.-Switz., Art. 28(4), Oct. 2, 1996, T.I.A.S. No. 97-1219 (1997), as amended by Protocol (2009); and Taxation Convention with Exchange of Notes, U.S.-U.K., Art. 18(1), (2), and (5), July 19, 2002, T.I.A.S. No. 13161 (2003), as amended by Protocol (2001).
[39] While Code §72(w) exempts from contributions made to the foreign plan from the U.S. person's investment in the contract, it ultimately exacerbates the U.S. taxation of income and gains accrued in the plan on distribution because the investment in the contract will be relatively low since it would exclude those contributions made by the U.S. person prior to immigrating to the United States (i.e., pre-immigration contributions). Code §72(w) does not exempt any income and gains arising from pre-immigration contribution amounts.
[40] Code §72(w) affords limited relief, in the sense that it would exempt from U.S. tax certain contributions to a foreign plan made with respect to compensation for labor or personal services (a) performed outside the U.S. before

In the same vein, U.S. persons who participate in foreign retirement plans while living overseas have very limited ability to claim tax deferral on contributions, income accruals and distributions from a Foreign Plan that is not a U.S. tax qualified plan. As previously noted, most Foreign Plans will not meet the requirements for U.S. tax qualified plans under Code §401(a) because there is no definition in the Code of "employees' trust", and even if there were, Code § 501(a) requires the employees' trust to be a U.S. domestic trust.[41] Hence, the U.S. tax treatment of Foreign Plans falls under Code §402(b), which was enacted in its current form in 1969,[42] to govern contributions and earnings made within a non-exempt employees' trust.

Code §402(b) provides that (a) contributions made to the Foreign Plan by a foreign employer would be includible as gross income of the U.S. Person with a beneficial interest in such plan (a "**USP Beneficiary**") and taxed currently, to the extent such amounts meet the requirements of Code §83;[43] and (b) income accretions in the Foreign Plan that are actually distributed or made available for distribution to the USP Beneficiary are taxable to such U.S. Person in that same year, to the extent provided for under Code §72.[44] What is not apparent is that the term "*distribution*" under Code §402(b) does not include transfers and rollovers between foreign plans that are non-exempt plans. In fact, transfers from a foreign plan to another foreign plan are treated as taxable distributions absent specific exemptions for such transfers under this Code section. One would hardly consider resorting to the provisions of Code § 402(b) as being in the best interests of the USP Beneficiary because such individual would likely be subject to U.S. tax on contributions made by his or her foreign employer, rollovers or transfers of accounts between Foreign Plans; and income accretions made available to the U.S. taxpayer without actual distribution. A USP Beneficiary of a Foreign Plan under Code §402(b) should expect to be taxed on almost all components of his or her Foreign Plan without any recourse for treating the plan as a "Foreign Grantor Trust,"[45] such that future distributions made from the plan would no

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the beneficiary became a U.S. resident; and (b) was not taxable by any other foreign country because the contribution was made directly into the foreign plan and not paid to the employee who would have otherwise been taxable under foreign law.

[41] "Domestic trust" is defined in Code §§7701(a)(30)(E)(i) and (ii), which provide that a trust is a U.S. Person if: (i) a court in the U.S. is able to exercise primary supervision over the trust (the "**Court Test**") and (ii) one or more U.S. persons control all "substantial decisions" of the trust (the "**Control Test**"). A trust that fails to satisfy one or both tests is classified as a "Foreign Trust" under Code §7701(a)(31)(B).

[42] Code §402(b) was introduced in its current form by the Tax Reform Act of 1969. The Tax Reform Act of 1969 amended §402(b) to coordinate the taxation of pensions with the taxation of property received for the performance of services in current Code §83, which was introduced in the 1969 Act.

[43] To be includible in the U.S. person's income, the employer contributions must meet the conditions of Treas. Reg. §1.83-3(b), requiring "substantial vesting." Once the employer contributions are vested and taxed, income earned by the trust is deferred until it is distributed or actually made available to the employee under Code §402(b)(2), unless the U.S. person is a highly compensated employee under such plan. If the U.S. Person is a "highly compensated employee" under the plan, vested earnings are instead included in the employee's income each year under Code §402(b)(4). Since (1) most foreign employer contributions to foreign retirement plans are mandatory and irrevocable, and (2) almost all foreign retirement plans with a U.S. employee would fail the discrimination test under Code §410(a); it follows that U.S. person would be taking these employer contribution amounts into income and taxed currently. There would be no tax deferral extended to such amounts.

[44] Under Code §72(d), the amount of a payment made by an annuity under a qualified employer plan is only includable in the employee's gross income to the extent it exceeds the investment in the plan, determined by dividing the total investment in the contract as of the annuity start date by the number of anticipated payments based on the age of the employee.

[45] *See generally,* Subchapter J of the Code (i.e.: §§ 671 – 679, collectively, the "**Grantor Trust Rules**").

longer be subject to an additional tax.[46]

To mitigate the risk of double taxation with respect to these Foreign Plans, a USP Beneficiary may opt to treat the Foreign Plan as a Foreign Grantor Trust under Treas. Reg. §1.402(b)-1(b)(6). Doing so would exempt future distributions from the plan (including rollovers and transfers between Foreign Plans) from additional U.S. taxation. However, this provision can only be applied if the USP Beneficiary's employee contributions are "*not incidental when compared to employer contributions"* and the "*applicable requirements of subpart E are satisfied".*[47] No further guidance is provided under this subsection of the Treasury Regulations to enlighten US taxpayers and their advisors. From our perspective, taking a position under this obscure subsection of regulatory guidance could be quite the gamble given the overall lack of clarity in how these provisions actually operate.

A better option in the long run for USP Beneficiaries of Foreign Plans is to report the plan itself as a Foreign Grantor Trust under the Grantor Trust Rules. As previously mentioned, this option only becomes available as an exception to the exception under Treasury Regulations ("**Treas. Reg.**") §1.402(b)-1(b)(6).[48] A deliberate classification of a Foreign Plan as a Foreign Grantor Trust under Subchapter J of the Code rather than as an exception to the exception under Treas. Reg. §1.402(b)-1(6) would subject all contributions and income accruals to current U.S. taxation but will eliminate U.S. taxation on future distributions. In essence, the Foreign Plan would be treated as a post-tax plan, operating similarly to a U.S. Roth.[49] However, unlike U.S.-based Roth plans, the only monetary limits to savings under such a Foreign Plan would be the limits placed on it by the foreign country's laws.

Still, resorting to a Machiavellian fix to mitigate the risk of double taxation of U.S. persons with beneficial interests in foreign pension plans leaves much to be desired. The end does not justify the means. More work is needed to recalibrate the statutory tax framework used to classify foreign occupational and personal pension plans to narrow the tax gap between the U.S. Persons with domestic plans and those with Foreign Plans. After all, since U.S. persons are taxable on their income worldwide, regardless of how and where such income is generated, there seems to be no reason why a U.S. person working in the United States for a U.S. employer

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[46] *See,* Code §402(b)(3) which states that the beneficiary of a nonexempt employees' trust under Code §402(b)(1) shall not be considered an owner of the trust under Subpart E, part 1 of Subchapter J.

[47] *See*, Treas. Reg. §1.402(b)-1(b)(6).

[48] Treasury Decision ("**TD**") 7554, 1978-2 CB 71, provides that "The regulations under section 402(b), 403(c) and 404(a)(5) provide rules for the treatment of nonexempt employees' trusts and nonqualified employees' annuity plans that are consistent with the treatment of property under section 83. Thus, where an employer contributes cash to a nonexempt employees' trust or a nonqualified employees' annuity plan, an employee is taxable on the contribution when the employee's rights under the trust or plan are substantially vested." We note that TD 7554 does not provide additional commentary on Treas. Reg. §1.402(b)-1(6) specifically. However, based on the legislative history of Code §§402(b) and 83 (referenced in footnote 28 above) because employee contributions are made in the employee's discretion and can be made using post-tax funds, the option to treat a foreign plan as a foreign grantor trust likely arises because the funds could be considered "substantially vested" at the time of contribution to the non-qualified plan. Similar to making an election under section 83(b), electing foreign grantor trust treatment under Treas. Reg. §1.402(b)-1(6), allows the employee to opt out of the deferral and accelerate the tax.

[49] A "Roth IRA" is an IRA that is funded using after-tax dollars (i.e.: no tax deduction is available for contributions) and withdrawals are generally tax-free, assuming the necessary conditions are met. *See generally*, US Bank, *What is an IRA?*, https://www.usbank.com/retirement-planning/open-an-ira/what-is-an-ira.html (last visited Apr. 20, 2023); *see also*, Code §408A.

should incur no tax on contributions and income accruals in his or her tax qualified plan while a U.S. person working for a foreign employer overseas[50] participating in a mandatory foreign pension plan is subject to double taxation on the same components.

III. NO TREATS PRESENT IN MOST TAX TREATIES FOR FOREIGN PENSIONS

International tax practitioners have long bemoaned the fact that the U.S. domestic tax regime has not kept pace with pension reforms initiated around the world to expand retirement savings. The current U.S. statutory tax framework for classification and reporting of Foreign Plans remains incoherent and disjointed, severely lacking a uniform structure for addressing foreign pension plan arrangements in a manner that extends to such plans the benefits of tax-deferral or exemption altogether as envisioned under the pension, retirement and social security provisions in U.S. bilateral tax treaties.[51] Indeed, according to a report[52] on workplace retirement accounts by the U.S. GAO submitted to the U.S. Senate Committee on Finance, the key challenges facing U.S. taxpayers overseas who are participants in Foreign Plans are: (1) complying with the U.S. tax reporting requirements for foreign retirement plans; and (2) transferring foreign retirement savings when switching jobs because most foreign plans are not tax qualified under the Internal Revenue Code and could have adverse U.S. tax consequences for individuals participating in such Foreign Plans.[53]

The United States currently has a network of 62 comprehensive tax treaties which provide protection from double taxation of Cross Border Pension Plans. However, there is a lack of uniformity in these tax treaty provisions.[54] Older treaties are not very precise about which pension arrangements are covered under the tax treaty provision; while relatively more recent tax treaties with updated pension article provisions do not include a comprehensive list of arrangements that qualify as a pension. One reason for this complexity could be the fact that there are differences in the corresponding pension articles of the 1996, 2006 and 2016 U.S. Model Income Tax Convention ("**MITC**"). While the MITC is not intended to represent an ideal U.S income tax treaty, its principal function is to facilitate negotiations between the U.S. and another country by identifying the differences between the income tax policies in the two countries. In this regard, the MITC provides the framework for discussions to ensue between the negotiators by providing a basic explanation of U.S. treaty policy for prospective treaty partners.

For example, with respect to exemption from taxation of cross-border pension plan contributions, income accruals, and distributions, Article 18, paragraph 6 of the 1996 U.S. MITC states in relevant part:

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[50] According to the National Taxpayer Advocate Report 2019, there are approximately 9 million US citizens living abroad, along with more than 170,000 US military personnel. In addition, more than 330,000 U.S. students study overseas. See NTA 2019 Purple Book, page 29 citing the Department of State estimated issued by the Bureau of Consular Affairs (CA by the Numbers, Fiscal Year 2017 data updated for July 2018). Please note, these numbers do not include U.S. lawful permanent residents and other individuals who are U.S. citizens at birth.

[51] IRS officials have acknowledged that the tax treatment of foreign retirement plans is not uniform, and that treaty provisions are not uniform. See GAO, Workplace Retirement Accounts (January 2018) at p. 37 at https://www.gao.gov/assets/690/689853.pdf.

[52] *See,* Id.

[53] *See,* Id.

[54] In addition, not every country with a bilateral treaty with the United States has compiled an agreed upon list of approved plans to be covered under the tax treaty.

6. For purposes of this Convention, where an individual who is a participant in a pension plan that is established and recognized under the legislation of one of the Contracting States performs personal services in the other Contracting State:

a) Contributions paid by or on behalf of the individual to the plan during the period that he performs such services in the other State shall be deductible (or excludible) in computing his taxable income in that State. Any benefits accrued under the plan or payments made to the plan by or on behalf of his employer during that period shall not be treated as part of the employee's taxable income and shall be allowed as a deduction in computing the profits of his employer in that other State.

b) Income earned but not distributed by the plan shall not be taxable in the other State until such time and to the extent that a distribution is made from the plan.

c) Distributions from the plan to the individual shall not be subject to taxation in the other Contracting State if the individual contributes such amounts to a similar plan established in the other State within a time period and in accordance with any other requirements imposed under the laws of the other State.

d) The provisions of this paragraph shall not apply unless:

(i) contributions by or on behalf of the individual to the plan (or to another
similar plan for which this plan was substituted) were made before he arrived in
the other State; and

(ii) the competent authority of the other State has agreed that the pension plan generally corresponds to a pension plan recognized for tax purposes by that
State.

The benefits granted under this paragraph shall not exceed the benefits that would be allowed by the other State to its residents for contributions to, or benefits otherwise accrued under a pension plan recognized for tax purposes by that State

Paragraph 6(a) provides three types of benefits: deductions (or exclusions) at the employee and employer level for contributions to a pension plan; paragraph 6(b) provides exemption from tax on undistributed earnings realized by the plan; and paragraph 6(c) provides an exemption from tax on rollovers from one plan to another. The 1996 MITC pension provision extends a deduction (or exclusion) for pension plan contributions in another state if certain conditions are met. Notably, where the U.S. is the host country, the exclusion of employee contributions from the employee's income under Article 18, paragraph 6(a) is elective at best, and limited to an amount not in excess of the same amounts set in Code §402(g).[55]

In addition, the host-country competent authority must determine that the recognized plan to which the contribution is made in the home country of the individual generally corresponds to the plan in the host country. Specific to this provision, the Department of Treasury commentary states that:

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[55] *See*, pp. 55 to 56, *Technical Explanation to the United States Model Income Tax Convention of September 20, 1996*.

"*It is understood that United States plans eligible for the benefits of paragraph 6 include qualified plans under section 403(a), individual retirement plans (including individual retirement plans that are part of a simplified employee pension plan that satisfies section 408(k), IRAs and section 408(p) accounts), section 403(a) qualified annuity plans, individual retirement accounts, and section 403(b) plans.*"[56]

To date we understand that not every country with a bilateral treaty with the United States has compiled an agreed upon list of the approved plans to be covered by the treaty. To further limit the ability to claim deductions or exclusions from income for contributions made to foreign plans, all of the foregoing qualified plans in the United States are trusts. This is problematic, as retirement vehicles in many countries do not take this same legal structure.

Article 17, paragraph 1(a) of the 2006 U.S. MITC provides:

1. a) Pensions and other similar remuneration beneficially owned by a resident of a Contracting State shall be taxable only in that State.

b) Notwithstanding subparagraph a), the amount of any such pension or remuneration arising in a Contracting State that, when received, would be exempt from taxation in that State if the beneficial owner were a resident thereof shall be exempt from taxation in the Contracting State of which the beneficial owner is a resident.

Paragraph 1 above provides that distributions from pensions and other similar remuneration beneficially owned by a resident of a Contracting State in consideration of past employment are taxable only in the State of residence of the beneficiary. The term "pensions and other similar remuneration" includes both periodic and single sum payments. The Treasury Department commentary further provides that: *The phrase "pensions and other similar remuneration" is intended to encompass payments made by qualified private retirement plans. In the United States, the plans encompassed by Paragraph 1 include: qualified plans under section 401(a), individual retirement plans (including individual retirement plans that are part of a simplified employee pension plan that satisfies section 408(k), individual retirement accounts and section 408(p) accounts), section 403(a) qualified annuity plans, and section 403(b) plans.*[57]

Article 18 of the 2006 U.S. MITC states in relevant part:

Article 18
PENSION FUNDS
1. Where an individual who is a resident of one of the States is a member or beneficiary of, or participant in, a pension fund that is a resident of the other State, income earned by the pension fund may be taxed as income of that individual only when, and, subject to the provisions of paragraph 1 of Article 17 (Pensions, Social Security, Annuities, Alimony and Child Support), to the extent that, it is paid to, or for the benefit of, that individual from the pension fund (and not transferred to another pension fund in that

[56] *See, Id.*
[57] *See,* page 54 of the *United States Model Technical Explanation Accompanying the United States Model Income Tax Convention of November 15, 2006*.

other State).

2. Where an individual who is a member or beneficiary of, or participant in, a pension fund that is a resident of one of the States exercises an employment or self-employment in the other State:

a) contributions paid by or on behalf of that individual to the pension fund during the period that he exercises an employment or self-employment in the other State shall be deductible (or excludible) in computing his taxable income in that other State; and

b) any benefits accrued under the pension fund, or contributions made to the pension fund by or on behalf of the individual's employer, during that period shall not be treated as part of the employee's taxable income and any such contributions shall be allowed as a deduction in computing the taxable income of his employer in that other State.

The relief available under this paragraph shall not exceed the relief that would be allowed by the other State to residents of that State for contributions to, or benefits accrued under, a pension plan established in that State.

3. The provisions of paragraph 2 of this Article shall not apply unless:

a) contributions by or on behalf of the individual, or by or on behalf of the individual's employer, to the pension fund (or to another similar pension fund for which the first-mentioned pension fund was substituted) were made before the individual began to exercise an employment or self-employment in the other State; and

b) the competent authority of the other State has agreed that the pension fund generally corresponds to a pension fund established in that other State.

4. a) Where a citizen of the United States who is a resident of exercises an employment in ------- the income from which is taxable in -------, the contribution is borne by an employer who is a resident of ------- or by a permanent establishment situated in -----, and the individual is a member or beneficiary of, or participant in, a pension plan established in ------,

i) contributions paid by or on behalf of that individual to the pension fund during the period that he exercises the employment in --------, and that are attributable to the employment, shall be deductible (or excludible) in computing his taxable income in the United States; and

ii) any benefits accrued under the pension fund, or contributions made to the pension fund by or on behalf of the individual's employer, during that period, and that are attributable to the employment, shall not be treated as part of the employee's taxable income in computing his taxable income in the United States.

b) The relief available under this paragraph shall not exceed the lesser of:

i) the relief that would be allowed by the United States to its residents for contributions to, or benefits accrued under, a generally corresponding pension plan established in the United States; and *ii) the amount of contributions or benefits that qualify for tax relief in --------.*

c) For purposes of determining an individual's eligibility to participate in and receive tax benefits with respect to a pension plan established in the United States, contributions made to, or benefits accrued under, a pension plan established in ------ shall be treated as contributions or benefits under a generally corresponding pension plan established in the United States to the extent relief is available to the individual under this paragraph.

d) This paragraph shall not apply unless the competent authority of the United States has agreed that the pension plan generally corresponds to a pension plan established in the United States.

The Treasury Explanation to Article 18 of the 2006 MITC states that this article deals exclusively with the deductibility of cross-border pension contributions which result from "discontinuities". It elaborates that, "*such discontinuities may arise where countries allow deductions or exclusions to their residents for contributions, made by them or on their behalf, to resident pension plans, but do not allow deductions or exclusions for payments made to plans resident in another country, even if the structure and legal requirements of such plans in the two countries are similar.*"[58] It is interesting to note that Article 18 is the first instance where the tax treaty uses the term "pension fund". The 2006 MITC defines "pension fund" under Article 3(k) as including,

> *"…any person established in a Contracting State that is generally exempt from income taxation in that State and that is operated principally to provide pension or retirement benefits or to earn income for the benefit of one or more such arrangements. In the case of the United States, the term "pension fund" includes the following: a trust providing pension or retirement benefits under a Code section 401(a) qualified pension plan, profit sharing or stock bonus plan, a trust providing pension or retirement benefits under a Code section 403(b) plan, a trust that is an individual retirement account under Code section 408, a Roth individual retirement account under Code section 408A, or a simple retirement account under Code section 408(p), a trust providing pension or retirement benefits under a simplified employee pension plan under Code section 408(k), a trust described in section 457(g) providing pension or retirement benefits under a Code section 457(b) plan, and the Thrift Savings Fund (section 7701(j)). Section 401(k) plans and group trusts described in Revenue Ruling 81-100 and meeting the conditions of Revenue Ruling 2004-67 qualify as pension funds because they are covered by Code section 401(a)."*

Article 18 checks all the boxes with respect to sources of discontinuities with Cross-Border Pensions, providing under paragraph 18(1) tax deferral to the USP Beneficiary for income accrued in the pension fund until distribution; and under paragraph 18(2) deductions or

[58] *See,* page 56 of the *United States Model Technical Explanation Accompanying the United States Model Income Tax Convention of November 15, 2006*.

exclusions from income for cross-border contributions made to a pension fund regardless of where the services are rendered. However, as with previous versions, the ability of a plan participant to deduct contributions or exclude from income employer contributions is limited to relief allowed in the host state for pension funds established in that state.[59] Most importantly, the benefits afforded under paragraph 18(2) are contingent on a determination by the applicable Competent Authority that the contribution is made to a plan in the other contracting state which generally corresponds to the plan in the host state. Where the U.S. is the host state, for example, contributions must be made to foreign plans which "generally correspond" to U.S. tax qualified plans which are domestic trusts.[60] Many Foreign Plans are not structured as trusts and therefore will fail to qualify for tax deferral or exemption benefits under Article 18.[61] Even those Foreign Plans that are structured as trusts would fail to qualify as well since these plans must run the gamut of Code §402(b) and Code § 401(a).

However, we would also like to point out that the Treasury Explanation to Article 18 explicitly provides that, by virtue of the "Saving Clause" under paragraph 5(a) of Article 1, the United States will allow U.S. citizens and residents the benefits of paragraph 1 (i.e., tax deferral for income accruals in the pension fund prior to distribution) and paragraph 4 (i.e., exclusion of employer contributions to the pension fund for the employee's benefit from such employee's income for U.S. tax purposes). However, the benefits of paragraph 2 (i.e., tax deduction or exclusion from income for employee and employer contributions to a host state pension fund) are exclusive to persons who are not permanent residents or citizens of the United States. *Accordingly, a person who becomes a U.S. permanent resident or citizen will no longer receive a deduction for contributions to a pension fund established in the other Contracting State.* It would appear therefore that a foreign person who becomes a U.S. Person is doing himself or herself a disservice by adjusting to permanent resident status or acquiring U.S. citizenship because he or she would lose the tax benefits afforded for participating in Foreign Plans.

The 2016 version of the MITC contains a robust Article 17 section providing a tax deferral for income accruals and earnings in foreign pension funds where a U.S. person has a beneficial interest, as well as an exclusion from U.S. tax for rollovers between foreign pension funds that are tax-deferred in the host country. Article 17 states in relevant part:

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[59] *See,* Id. At page 57, the Treasury states, "…*Therefore, where the United States is the host State, the exclusion of employee contributions from the employee's income under this paragraph is limited to contributions not in excess of the amount specified in section 402(g) for elective contributions. Deduction of employer contributions is subject to the limitations of sections 415 and 404. The section 404 limitation on deductions is calculated as if the individual were the only employee covered by the plan.*"

[60] *See,* Id at page 58. Tax qualified domestic plans are Code §401(a), individual retirement plans (including individual retirement plans that are part of a simplified employee pension plan that satisfies Code §408(k)), individual retirement accounts, individual retirement annuities, Code §408(p) accounts and Roth IRAs under Code §408A, Code §403(a) qualified annuity plans, Code §403(b) plans, Code §457(b) plans and the Thrift Savings Plan (found in Code §7701(j)).

[61] We once again point out that we are not aware of any country which has a bilateral treaty with the United States which has compiled an agreed upon list of approved plans to be covered by Article 18, and that for contributions to foreign plans to qualify for deductions or exclusions from income, such trusts must be "generally similar" to U.S. qualified plans, which are all structured as trusts.

1. *a) Pensions and other similar remuneration beneficially owned by a resident of a Contracting State shall be taxable only in that Contracting State.*

   b) Notwithstanding subparagraph (a) of this paragraph, the amount of any such pension or remuneration arising in a Contracting State that, when received, would be exempt from taxation in that Contracting State if the beneficial owner were a resident thereof shall be exempt from taxation in the Contracting State of which the beneficial owner is a resident.

2. *a) Where an individual who is a resident of a Contracting State is a member or beneficiary of, or participant in, a pension fund established in the other Contracting State, income earned by the pension fund may not be taxed as income of that individual, unless, and then only to the extent that, it is paid to, or for the benefit of, that individual from the pension fund (and not transferred to another pension fund established in that other Contracting State in a transfer that qualifies as a tax-deferred transfer under the laws of that other Contracting State). In such case, the provisions of paragraph 1 of this Article shall apply.*

   b) Where a citizen of the United States who is a resident of __________ is a member or beneficiary of, or participant in, a pension fund established in __________, the United States may not tax the income earned by the pension fund as income of the individual unless, and then only to the extent that, it is paid to, or for the benefit of, that individual from the pension fund (and not transferred to another pension fund established in __________ in a transfer that qualifies as a tax-deferred transfer under the laws of__________). In such case, the provisions of paragraph 1 of this Article, which generally is subject to paragraph 4 of Article 1 (General Scope), shall apply.

While Article 17, paragraph 2(b) of the 2016 MITC provides a tax deferral for (1) income accruals and earnings in foreign pension funds; and (2) transfers between pension funds beneficially owned by U.S. persons, the definition of "*pension*" under the treaty is actually limited only to those foreign plans that would be afforded reciprocity in the United States if it were treated similarly to a domestic tax-qualified plan in the foreign country. For example, Canadian Registered Retirement Savings Plans ("**RRSPs**") could be classified as very similar to a 401(k) plan in the United States because they (a) provide pre-tax deductions for contributions made to the plan by employees; (b) do not tax earnings accumulated in the RRSP to the individual employee until a distribution is made; and (c) impose tax on distributions from the RRSP at the individual's Canadian marginal rate. In contrast, an Australian Superannuation Fund should not be classified and taxed as similar to a 401(k) plan because (a) earnings accumulated in a superannuation plan are subject to a reduced rate of tax in Australia while in the plan; and (b) distributions are generally made to the taxpayer tax-free.

More importantly, it would appear that the negotiated version of the rollover exemption for transfers between Foreign Plans under paragraph 2(b) of Article 18 does not achieve what the model version endeavored to achieve. For example, in IRS Memorandum No. AM2008-009 issued on August 21, 2009, the transfer of contributions from the UK pension scheme to a U.S. retirement plan was not automatically classified as an exempt cross-border rollover under Article 18(1) of the UK-U.S. Tax Treaty. According to the IRS, the transfer would still have to meet the time requirements of an eligible rollover under Code §402(c)(4) to qualify for the rollover benefits afforded under the treaty. Since the rollover took more than 60 days to complete, it did not meet the requirements of Code §402(c)(4).

To date, we have not reviewed any other published guidance from the IRS or Treasury with respect to the U.S. tax treatment of Cross Border Pension rollovers or transfers from one foreign plan to another.

A. Countries with Bilateral Treaties with the United States

Equally perplexing is the U.S. tax treatment of those contributions and distributions made from foreign pension funds owned by U.S. persons in countries with no existing bilateral tax treaty with the United States in place. For example, the Singaporean Central Provident Fund ("**CPF**") provides for an automatic transfer of a terminated employee's account from the employer contribution account to a personal account in the same plan. Under the existing tax framework for foreign pensions, such a transfer would likely be treated for U.S. tax purposes as a taxable transfer within the foreign workplace plan because the U.S. participant has some access to and control over his or her retirement fund under the doctrine of constructive receipt.[62]

If the ultimate objective is to ensure that a U.S. person has every opportunity to save during their income-earning years to fund retirement with less government monies involved, then part of the solution is to put U.S. Persons living abroad on par with U.S. Persons at home at least where tax treatment and reporting of retirement and savings plans are involved. Treasury officials appear to concur with this assessment, even informing the GAO that a change in the Code could improve the tax treatment of transfers between foreign retirement plans. However, without further action, U.S. Persons may not consolidate their foreign retirement accounts or may have to pay higher U.S. taxes on transfers than U.S. Persons participating in qualified plans in the United States, threatening the ability of U.S. individuals living abroad to save for retirement.

IV. THE IRS ACTION TO DATE

The IRS has over the years provided guidance on the tax classification and treatment of Foreign Plans, either by applying existing Code provisions for domestic plans or resorting to applicable tax treaty provisions to determine the tax treatment of Foreign Plans. The results leave

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[62] We note that the IRS has released a series of Memoranda re: the taxation of investments in Singaporean CPFs. *See generally*, I.R.S. Chief Couns. Mem. PTMA 00173-6973 (Oct. 10, 1997); I.R.S. Chief Couns. Mem. PTMA 2007-00113 (1996); and I.R.S. Chief Couns. Mem. PTMA 2007-00114. However, the IRS has not opined on the taxation of Mandatory Provident Funds ("**MPFs**"), which are funds in Hong Kong that are similar in structure and operation to the CPFs offered in Singapore. Notably, neither country currently has a tax treaty with the U.S., so many international tax practitioners have taken the position that similar tax treatment will apply to investments in MPFs as apply to investments in CPFs and they will be taxed similarly (i.e.: under Code §§61, 72, and 402(b)).

much to be desired. Applying the existing U.S. law under Code Sections 402(b) and 72(w) to Foreign Plans prematurely taxes savings of USP Beneficiaries of such plans, even before their savings are taxed in the foreign country where the plan is based. Applying bilateral tax treaty provisions provides limited tax relief to USP Beneficiaries overseas who are participants in Foreign Plans, because they still remain subject to annual U.S. tax reporting for such plans which they incur at substantial financial costs without corresponding deductions for doing so.

The IRS has also released several PLRs on the application of U.S. tax treaty provisions to payments received by USP Beneficiaries. While limited in application to the taxpayer requesting the PLR and not binding on the IRS, these rulings are nonetheless instructive on the IRS' general position on what qualifies as a "pension" for U.S. tax treaty purposes and the elements that must be present in such plan for a participant to receive treaty relief. A brief summary is provided below:

A. IRS Private Letter Ruling 8904036 (October 31, 1988)

In 1988, the IRS issued a ruling regarding the application of U.S. withholding tax to pension payments from an IRA to be made to an Italian citizen. At the time of the ruling, the taxpayer was also a U.S. resident, employed by a U.S. company, and enrolled in their qualified pension plan. The taxpayer was planning to return to Italy following his retirement at age 62. Prior to departing the U.S., he was planning to receive his pension benefits as lump sum payments, which would be rolled over into a segregated IRA within 60 days of receipt. The IRA would make regular distributions to him once he became Italian resident. The IRS ruled that no income tax withholding was required under Article 18(1) of the U.S.-Italy tax treaty, assuming that: (1) plan distributions were made from a qualified plan (i.e.: a plan that qualified as a "pension" under the treaty which referenced the definition of "pension" under domestic tax laws of the treaty country), (2) the taxpayer had received age 55, (3) the taxpayer had worked for the U.S. company for at least 5 years before distribution, and (4) the taxpayer was no longer working for the U.S. company when distributions were made.

We note that, since this private letter ruling was issued in 1988, Italy is among the OECD countries that have implemented pension reforms as recently as January 2021 to shift the burden of retirement savings from public funding sources to private Fully Funded Pension arrangements. Absent any updates to the U.S.-Italy tax treaty,[63] we have concerns as to whether the new private pension vehicles instituted under Italy's pension reform, which were enacted after the tax treaty was ratified, would qualify as a "*pension*" under the U.S.-Italy tax treaty to avail of much needed relief under the Code.

B. IRS Private Letter Ruling 9541043 (July 6, 1995)

In 1995, the IRS issued a ruling on the U.S. taxability of distributions from three fully vested U.S. qualified plans, including two defined contribution plans and a defined benefit plan, paid to a citizen and resident of India (a.k.a. "taxpayer"). The taxpayer was also a U.S. green card holder, who was looking to surrender his green card and return to India following his retirement at age 55. The taxpayer had lived and worked in the U.S. for over 20 years,

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[63] *See generally,* Taxation Convention, U.S.-It., Art. 18(6), Aug. 25, 1999, T.I.A.S. No. 09-1216 (2009)

contributing to qualified plans sponsored by his U.S. employer. All three plans were fully vested at the time the taxpayer retired. Additionally, the defined contribution plans were fully paid in lump sums to the plan custodian for investment in a new IRA, at the taxpayer's request. The taxpayer planned to receive periodic distributions from the IRA and monthly payments from the defined benefit plan and requested a ruling on whether the payments would be taxable under Article 20 of the US-India tax treaty.[64] The IRS ruled that neither distributions from the defined benefit plan nor the IRA itself would be taxable in the U.S., assuming that: (1) the taxpayer had at least 5 years of service to the employer at the time of the payment or, if employed less than 5 years, had first been employed after age 60, (2) the benefit was (A) paid on or after attainment of "Social Security retirement age 38", (B) paid on account of death or disability, (C) paid as part of a series of substantially equal payments over the employee's life expectancy or for the life of the employee, or (D) paid after separation from service after age 55, and (3) all distributions are made after separation from service with the employer maintaining the plan, except for distributions made after the employee reaches age 70 and ½.

We note that India has also implemented pension reforms since the PLR was issued in 1995. However, the PLR above reveals the IRS position that, to be exempt from U.S. taxation, the IRA distributions must be on account of old age, disability or a term of service; and that the IRA itself would have to be maintained by the employer after the employee has left. Additionally, this ruling is indicative that the IRS view is that for payments from certain Foreign Plans to be exempt for U.S. tax purposes, they must be made commensurate with the conditions that would be imposed here in the United States for making social security payments to such individual.

C. IRS Private Letter Rulings 9644050 and 9644051 (Aug 1, 1996)

In 1996, the IRS issued a pair of rulings on the U.S. taxability of distributions from a Code § 403(b) defined contribution money plan received by U.S. non-citizen, non-residents living in Germany and the UK. The individuals were non-resident aliens at the time of contribution. They requested a ruling on whether or not U.S. withholding tax would be applied to distributions paid under the plan. Similarly to its ruling in PLR 9644050, the IRS ruled that withholding tax would not apply under Article 18 of the U.S.-Germany[65] and U.S.-UK[66] tax treaties, assuming that the employees were: (1) residents of Germany and the UK, respectively, (2) had obtained 5 years' service for the employer or age 62 before distributions were made, and (3) the distribution was (i) made on account of death or disability, (ii) paid as part of a series of substantially equal payments over the employees' life expectancy or older than 55, and (iii) the distribution was made after the employee ceased work for the employer or older than age 70 ½.

We note that Germany and the UK are among the OECD countries that passed national pension reform after the subject bilateral tax treaties came into force and the rulings were issued. There does not appear to be any acknowledgment by the IRS that pension reform did take place

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[64] *See,* Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, together with a related protocol, U.S.-India, Art. 20, Sept. 12, 1989, T.I.A.S. No. 90-1218 (1990).
[65] *See,* Taxation Convention, U.S.-Ger., Art. 18A(1), (2), & (5), Aug. 29, 1989, T.I.A.S. No. 91-821 (1991), as amended by Protocol (2006).
[66] *See,* Taxation Convention with Exchange of Notes, U.S.-U.K., Art. 18(1), (2), and (5), July 19, 2002, T.I.A.S. No. 13161 (2003), as amended by Protocol (2001).

in these countries such that conditions to retirement and/or social security payments under these Foreign Plans would be different from the United States.

D. Revenue Procedure 2020-17

In 2018, the IRS instituted a robust foreign trust reporting enforcement campaign which aimed to improve Form 3520 and Form 3520-A compliance (a.k.a. the "**3520 Campaign**").[67] The IRS intent was to: (1) improve the U.S. taxpayer's and practitioner's knowledge of a U.S. person's requirement to report ownership of, and transactions with, foreign trusts; (2) decrease the percentage of late filed and incomplete Forms 3520/3520; and as a corollary, (3) increase the number of properly filed Forms 3520/3520-A.[68]

Code §6048 provides the statutory mandate for foreign trust reporting implemented by Form 3520, *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts* and Form 3520-A, *Annual Information Return of Foreign Trust with a U.S. Owner*. While Code §6048 provides an exception from reporting for certain transfers to foreign compensatory trusts under Code §402(b) which are reported as compensation income by the U.S. person under an applicable U.S. federal income tax return, the lack of any specific list identifying which foreign trusts are in fact foreign compensatory trusts under Code §402(b) makes this exception an elusive one. Indeed, most Foreign Plans that are foreign trusts would generally fall within the parameters of Code §6048 which would impose annual obligations on USP Beneficiaries to file the Form 3520, and if the foreign plan is treated as a foreign grantor trust for U.S. tax purposes, the Form 3520-A.

In the absence of specific guidance from federal tax authorities on many Foreign Plans, tax practitioners have defaulted to reporting Foreign Plans in which a U.S. Person has a beneficial interest (either directly or beneficially) as foreign trusts subject to U.S. foreign trust reporting requirements and disclosure under the Foreign Bank Account Reporting ("**FBAR**") and Foreign Account Tax Compliance Act ("**FATCA**"). There is, however, no consistency among tax practitioners in reporting Foreign Plans as foreign trusts subject to Form 3520 or Form 3520-A filings. Out of an abundance of caution, and in the absence of IRS guidance directly on this issue, many international tax practitioners have defaulted to characterizing Foreign Plans as trusts reportable on under either Form 3520 or Form 3520-A. Doing so provided too broad a net, as it caught foreign pension-like plans that present a low risk of facilitating tax evasion due to the strict regulatory overview by their respective government agencies and the relatively low statutory lifetime contribution limitation thresholds that were often included in the legislation creating these plans.

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[67] *See,* "IRS Announces the Identification and Selection of Six Large Business and International Compliance Campaigns," I.R.S., LB&I Compliance Campaigns, (May 21, 2018), accessed at: https://www.irs.gov/businesses/irs-lbi-compliance-campaigns-may-21-2018. We note that the IRS subsequently announced the completion of this campaign on June 15, 2022, and it is now listed on the IRS' list of "Large Business & International – Not Currently Active Campaigns" accessed at: https://www.irs.gov/businesses/corporations/lbi-not-currently-active-campaigns#:~:text=Forms%203520%2F3520%2DA%20Non%2DCompliance%20and%20Campus%20Assessed%20Penalties&text=This%20campaign%20will%20take%20a,and%20transactions%20with%20foreign%20trusts.

[68] *See,* Marsha Laine Dungog and Liguo Cooper Xu, *Should Canadian RESPs and RDSPs Be Exempt From Foreign Trust Reporting?*, 164 No.4 Tax Notes Federal 475 (July 22, 2019).

In March 2020, the IRS issued Revenue Procedure 2020-17 to provide a foreign trust reporting exemption for certain "tax-favored" foreign retirement and non-retirement savings plans that meet specific criteria. It also provided an exemption for rollovers from one foreign plan to another foreign plan if both plans meet the requirements of Rev. Proc. 2020-17.[69] It appears that the IRS recognized that the administrative burden of reviewing every single Form 3520/Form 3520-A filed to disclose interests of U.S. persons in foreign trusts could not be justified, particularly in light of the fact that the existence of such foreign trusts were likely already subject to annual tax reporting under Code §6038D as "Specified Foreign Financial Assets."[70]

While Rev. Proc. 2020-17 has provided some degree of relief to Foreign Plans not previously exempted from U.S. taxation under prior IRS guidance,[71] such as Canadian Registered Education Savings Plans ("**RESPs**") and Canadian Registered Disability Savings Plans ("**RDSPs**"), it does not go far enough to cover other Foreign Plans that should receive the same exemption. The very narrow parameters for determining "Tax-Favored Retirement Plans" or "Tax-Favored Nonretirement Savings Plans" in Rev. Proc. 2020-17 left out other foreign plans which also needed IRS guidance, such as Australian superannuation plans and Canadian Tax-Free Savings Accounts ("**TFSAs**"). Indeed, the parameters are so narrow that perhaps only Canadian RESPs and RDSPs would even qualify for the foreign trust reporting exemption under Rev. Proc. 2020-17.

In addition to providing narrow parameters for exempting Foreign Plans from foreign trust reporting, Rev. Proc 2020-17 did not provide a solution to alleviate U.S. income taxation of income accruals and employer contributions in such plans. Hence, while Rev. Proc. 2020-17 did eliminate the annual tax reporting requirement for qualifying foreign trusts that are Foreign Plans, and as a corollary, avoid substantial penalties for noncompliance, the revenue procedure did not go far enough to provide effective relief for Foreign Plans in countries that are either not legally structured as trusts in such foreign country,[72] or do not tolerate such low contribution thresholds for retirement savings as in the United States.

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[69] *See,* Rev. Proc. 2020-17, 2020-12 I.R.B. (Mar. 16, 2020).

[70] "Specified Foreign Financial Asset" is defined in Code §6038D as (1) "any financial account…maintained by a foreign financial institution…and (2) any of the following assets which are not held in an account maintained by a financial institution…(A) any stock or security issued by a person other than a United States Person, (B) any financial instrument or contract that is held for investment that has an issuer or counterparty which is other than a United States person, and (C) any interest in a foreign entity.

[71] These plans previously exempted from current U.S. taxation when held by U.S. Persons include (most notably) the Canadian RRSP, which has been the subject of extensive IRS guidance, as outlined in Footnote 31 above.

[72] Rev. Proc. 2020-17 also failed to address other foreign pension plans which are not established as trusts under the domestic laws of the respective countries where established, such as Mexican AFORES, German pension funds and other pension vehicles established in foreign countries that do not recognize or utilize trusts as part of their domestic tax laws.

V. ALTERNATIVE FOR US TAX CLASSIFICATION AND TREATMENT OF FOREIGN PRIVATE PENSION PLANS

A. Treat Foreign Pension Plans as Social Security that is Exempt from Taxation under Article 18 of the U.S. Tax Treaty

Over the past decade, countries around the world have reformed their pension regimes to address the challenges of an aging population with increasing longevity and low fertility by encouraging Fully Funded Private Pensions in the workplace and personally directed by individuals. And it has, thus far, paid off. The OECD documented in its 2022 report that private pension plan assets have surpassed public pension assets by the trillions.[73] And of these private pensions, the DC plan arrangement is preferred to the more traditional DB plan. However, the tradeoff appears to be that individuals with DC or hybrid plan arrangements have more access to their individual accounts because they are at least partially responsible for managing their retirement investments.[74] These accounts are also subject to preferential tax treatment in their foreign country so that savings are accumulated as long as possible, and, in some cases, distributions on retirement age are not taxed at all.[75] Such is the nature of the bargain struck between public and private stakeholders to provide adequate retirement income for everyone without increasing taxes.

In other countries, the retirement savings are accumulated in vehicles other than traditional pension funds.[76] These include employers' books, pension insurance funds, and other privately managed vehicles. [77] For example, the Korean pension system relies on services provided by entities in the financial services industry such as banks, mutual funds and insurance companies to provide voluntary occupational and personal pension contracts with individuals. In most OECD countries that follow the Chilean system, mandatory individual accounts are managed by specialized fund and management companies ("**Pension Entities**") that own individual retirement accounts. The Pension Entities are legally separate from the financial group to which they belong[78]. In Australia[79] and the Netherlands, the superannuation funds and pension funds are provided by independent stand-alone entities which are not owned by providers of other financial services. Even in countries where pensions are provided by public entities or institutions, such as Lithuania and the United Kingdom, the pension providers are not trusts but not-for-profit public corporations.[80]

More importantly, the legal structure for private pension providers around the world vary. Providers structured as pension "funds" are independent entities with legal personality and capacity and have their own governing boards such as in Denmark, Finland, Italy, Japan, The Netherlands, Switzerland, Australia and Germany's *pensionkassen*. Others are contractual

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[73] *See,* OECD Pensions Outlook 2022, Table 1.1.
[74] *See,* OECD Pensions Outlook 2022.
[75] *See* Id.
[76] *See* Id.
[77] *See* Id.
[78] *See* Id.
[79] *See,* Berg & Dungog, U.S. Income Tax Treatment of Australian Superannuation Plans, Tax Notes International (October 10, 2016).
[80] *See* Id.

arrangements between the individual and the pension entity (such as a bank, insurance or management company) with a segregated pool of assets without legal personality or capacity such as in Chile, Czech Republic, Mexico,[81] Portugal and Turkey. Only a few countries like the United States have pension funds in trust structures where the trustee legally owns the pension fund assets and administer the assets in the interests of the plan participants who are beneficiaries of the investments.

What this all boils down to is the reality that retirement savings in Foreign Plans (aka "pension funds") outside of the United States are not limited to trust structures with traditional trustees and beneficiaries. Due to pension reforms in the past decade, the legal structures in which pension funds are held, invested and distributed from are likely not going to meet the requirements of a tax qualified retirement plan for U.S. tax classification purposes under Code § 402(b)(2) and (b)(4) to qualify the U.S. taxpayer participating in such plans for tax-deferral on employer contributions, investment earnings and distributions.[82] Moreover, since most OECD countries now have in place mandatory occupational pension plans,[83] U.S. taxpayers who are employed abroad cannot opt out of their employer-funded private pension plans which give them more access and control over their accounts. [84]Which in turn means that U.S. taxpayers will be currently taxable on employer contributions and income accumulated and undistributed in their respective accounts which, if held through a trust established in the foreign country of employment, such as self-managed Australian superannuation funds, would be likely classified , and immediately taxable in the United States, as foreign grantor trusts.

U.S. Persons in countries that utilize non-trust vehicles as pension fund providers such as private corporations are not spared adverse U.S. tax treatment because of their beneficial interests in such non-trust pension vehicles. For example, in Mexico, individual accounts held by a Mexican private corporation, referred to as *Administrados de Fondos para Retiro* (or "**AFORE**") are invested in the stock of a legal financial entity managing investment portfolios, known as a *Sociedad del Inversion Especializada en Fondos para el Retiro* (a "**SIEFORE**").[85] The interest held by the individual is an ownership in interest in the Siefore which manages four compulsory portfolios comprised of government bonds, domestic securities and foreign equities. Both the Siefore and its portfolios would likely be taxable in the United States as a passive foreign investment company ("**PFIC**"), and subject to the PFIC tax and international reporting requirements with hefty penalties for noncompliance.[86] There is no income tax treaty relief

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[81] For a general overview of the Mexican retirement system, see Berg, Dungog & Corona dela Fuente, *The US Income Tax Treatment of Mexican Retirement Funds Owned by US Persons*, International Journal (BNA), November 2017.

[82] *See,* Veena K. Murthy, Selected Cross Border Equity and Deferred Compensation Issues with Foreign Funded Plans, 42 Compensation Plan J. 67 (2014). See also, Christopher Callahan, *U.S Tax Laws Governing Foreign Pensions,* Tax Notes Today (December 2020).

[83] *See,* OECD Pensions Outlook 2022 and OECD Pensions at a Glance (2016)

[84] *See,* Barbara E. Kritzer, *Individual Accounts in Other Countries*, 66 Soc. Sec. Bull. No. 1 (2005). The countries referenced in the bulletin include Argentina, Australia, Bolivia, Bulgaria, Chile, China, Colombia, Costa Rica, Croatia, Denmark, Dominican Republic, El Salvador, Estonia, Hong Kong, Hungary, Italy, Kazakhstan, Kosovo, Kyrgyzstan, Latvia, Mexico, Mongolia, Nigeria, Peru, Poland, Russia, Singapore, Slovakia, Sweden, United Kingdom and Uruguay.

[85] See Footnote 72.

[86] See Footnote 72. *See also,* Marie Sapirie, *News Analysis: The PFIC Reporting Problem for Foreign Retirement Accounts* (Sept. 16, 2013) posted on http://www.taxnotes.com/imp/41366

available to U.S. taxpayers with beneficial interests in an Australian superannuation fund or Mexican retirement fund to avoid double taxation of contributions and earnings in these retirement vehicles.[87] To add to further injury, both types of private pension plans would also be subject to burdensome U.S. international tax reporting on an annual basis as neither would be classified as a "tax-favored foreign retirement plan" or "nonretirement savings plan" under Revenue Procedure 2020-17. Truly, there is much work left for the IRS and Treasury to remedy this disparate outcome for USP Beneficiaries of such Foreign Plans.

Because most of the pension reforms in the OECD countries were implemented after their bilateral tax treaties with the U.S. entered into force, it is not surprising that the pension articles in these treaties do not reflect structural and legal changes implemented by such reforms. However, a solution can still be found within the existing pension articles of these bilateral tax treaties if the IRS or Treasury were to explore the position that these private pension plans are hybrid social security vehicles implemented by foreign governments under their social security programs to support individuals and their dependents maintain a certain level of income in the event of old age, disability or death, sickness, work injury, unemployment and the like. Social security programs provide cash benefits or benefits in kind to individuals in part through employment, because contributions made by employers and employees, or both largely fund the program. In short, retirement savings contributed and accumulating within foreign private pension plans constitute foreign social security in OECD countries that have undergone pension reform, and therefore should not be subject to tax by the United States under the applicable bilateral tax treaty provision.

At this point, it would be useful to point out that both the tax treaty and the totalization agreement[88] are two types of international agreements used by the United States to coordinate various aspects of the Social Security program.[89] Although similar in function to tax treaties, totalization agreements are legally classified as congressional-executive agreements concluded pursuant to statute.[90] Coordination of the social security program between two countries is addressed either exclusively through an executive agreement or in a treaty, or simultaneously in both. This bifurcated approach has resulted in overlapping and potentially dueling agreements that give rise to interpretational issues and create uncertainty for workers and administrators.[91]

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[87] See Footnotes 70 and 72.

[88] Totalization agreements are bilateral agreements between the United States and another country to coordinate social security coverage and benefit provisions for individuals who live and work in more than one country throughout their working lives.

[89] S*ee generally* Allison Christians, *Taxing the Global Worker: Three Spheres of International Social Security Coordination*, Univ. of Wis. Law Sch., Legal Studies Research Paper Services no. 1031 (Apr. 2006) (Allison Christians). The United States has 62 comprehensive income tax treaties covering 63 countries currently in force, and 27 bilateral social security agreements (Social Security Totalization Agreements or SSTA) currently in force.

[90] The U.S. currently has totalization agreements in 28 countries, entered into between 1978 and 2019. The U.S. has also negotiated totalization agreements with 3 other countries that are not yet in force. The U.S. currently has totalization agreements with the following countries: Italy, Germany, Switzerland, Belgium, Norway, Canada, the United Kingdom, Sweden, Spain, France, Portugal, the Netherlands, Austria, Finland, Ireland, Luxembourg, Greece, South Korea, Chile, Australia, Japan, Denmark, the Czech Republic, Poland, the Slovak Republic, Hungary, Brazil, Uruguay, Slovenia, and Iceland. Notably, the U.S. has totalization agreements with Brazil, Uruguay, and Chile but does not have a tax treaty in place. We note however, that as of April 2023, a U.S.-Chile tax treaty has been approved and signed but is pending ratification by the U.S. Senate and has not yet come into force.

[91] Id.

Such appears to be the case with respect to U.S. international agreements with OECD countries. Our review of totalization agreements between the U.S. and OECD countries as illustrated in Appendix 1, *US Tax Treaties and Totalization Agreements*, show that while only a few of the totalization agreements were ratified by Congress after the bilateral tax treaties entered into force, these few totalization agreements acknowledge that the pension reform in their respective countries have created hybrid social security vehicles. Specifically, the U.S.-Australia totalization agreement explicitly references the employer contribution portion of an individual's superannuation fund as substantially equivalent to social security for U.S. purposes.[92] Similar provisions exist in the U.S.-Slovene totalization agreement, which includes an explicit reference to the "compulsory participation in social insurance" system.[93] This of course gives rise to the possibility that, if the U.S. totalization agreements were updated, many more of the these foreign private pension plans would likely have components that would also be recognized as constituting or equivalent to U.S. social security. And this acknowledgement in bilateral totalization agreements that foreign private pension plans would be in lieu of, similar to, or equivalent to U.S. social security should be recognized as a definitive classification for tax treaty purposes.

In addition, Appendix 1 also shows that all of the U.S. bilateral tax treaties with the 37 OECD countries were entered into force before pension reforms were implemented in 28 of the OECD member countries.[94] Of these 28 countries that have undergone pension reform, 8 countries, *i.e.,* the Czech Republic, Greece, Korea (South), Poland, the Slovak Republic, Slovenia, Sweden and Turkey have never entered into protocols with the United States to update their existing tax treaty provisions.[95] Therefore, relying on the pension articles in the respective bilateral tax treaties in force to remedy the unfortunate and inevitable double taxation of foreign pension plans in these 28 countries under U.S. domestic tax laws should not be the last resort for resolving a case of double taxation of a U.S. Person's Cross Border Pension.[96] Rather, what we would recommend is that a corresponding review of the applicable bilateral totalization agreement be undertaken to confirm if the Cross Border Pension at issue is part of the foreign country's social security program after pension reform. If such is the case, then relief may be available under the applicable tax treaty provision to all or a portion of the Cross Border Pension that is treated as a part of the social security program of the other country.

B. Issue Revenue Procedure Which Exempts Unclassified Pension Plans from Foreign Trust Reporting (Extension of Rev. Proc 2020-17)

Until the IRS and Treasury is prepared to undertake a more detailed review of all foreign private pension plans in which U.S. persons have an interest, the shortest path to helping the U.S.

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[92] *See,* Art. 2(b)(ii), "Agreement Between the Government of the United States of America and the Government of Australia on Social Security," (effective as of Oct. 1, 2002).

[93] *See,* Art 2(1)(b)(ii), "Agreement on Social Security Between the United States of America and the Republic of Slovenia," (effective as of Feb. 1, 2019).

[94] *See* Appendix 1.

[95] *See* Appendix 1.

[96] The applicable bilateral tax treaty between the United States and OECD member country must first be amended by protocol to address the structural changes in social security and pension regime of these countries before one can resort to relying on its operative provisions.

regain its competitive advantage in terms of retirement savings for its U.S. taxpayers in the near term would appear to be one that is rooted in administrative guidance. In particular, follow-up guidance to Revenue Procedure 2020-17 would be highly recommended to (1) provide an exemption for other Foreign Plans that are foreign trusts that do not meet the revenue procedure's narrow parameters for tax-favored retirement and nonretirement savings plans from foreign trust reporting; and (2) create an alternative and less burdensome U.S. international tax reporting requirement for Foreign Plans that are not foreign trusts in their respective jurisdictions.

APPENDIX 1
U.S. TAX TREATIES AND TOTALIZATION AGREEMENTS

OECD Countries	Membership Date	Pension Reform	Date of Reform	Tax Treaty	Entry Into Force	Protocol	Protocol Date	SSA Agreement?	Effective Date
AUSTRALIA	7-Jun-71	YES	1983, 2002, 2014	Yes	1982	Yes	2001	Agreement & Admin	10/1/2002
								Administration	10/1/2002
AUSTRIA	29-Sep-61	YES	2012	Yes	1996	No	NA	Agreement	11/1/1991
								Supplemental Agreement	1/1/1997
BELGIUM	13-Sep-61	YES	2016	Yes	1970	Yes	2006	Agreement	7/1/1984
								Supplemental Agreement	7/1/1984
								Protocol	7/1/1984
CANADA	10-Apr-61	YES	2012	Yes	1980	Yes	2007	Agreement	8/1/1984
			2013			Fourth	1997	Administration	8/1/1984
			2014			Third	1995	Supplemental Agreement	8/1/1984
						Second	1984	Quebec Agreement	8/1/1984
						First	1983	Second Supplemental	10/1/1997
CHILE	7-May-10	YES	2012-2014	Pending				Agreement & Admin	9/1/1994
COLOMBIA	28-Apr-20								
COSTA RICA	25-May-21								
CZECH REPUBLIC	21-Dec-95	YES	2013	Yes	1993	No	NA	Agreement & Admin	1/1/2009
								Supplemental Agreement	5/1/2016
DENMARK	30-May-61			Yes	1948 & 2000	Yes	2006	Agreement & Admin	10/1/2008
ESTONIA	9-Dec-10	YES	2013	Yes	1998				
FINLAND	28-Jan-69	YES	2013	Yes	1989	Yes	2006	Agreement & Admin	11/1/1992
FRANCE	7-Aug-61	YES	2014, 2017	Yes	1994	Yes	2009	Agreement	7/1/1988
						First	2004	Administrative	7/1/1988
GERMANY	27-Sep-61	YES	2014	Yes	1989	Yes	2006	Agreement	12/1/1979
								Administrative	12/1/1979
								Supplemental & Admin	3/1/1988
								Second Supp & Adm	3/1/1988
GREECE	27-Sep-61	YES	2011-2015	Yes	1950	No	NA	Agreement & Admin	9/1/1994
HUNGARY	7-May-96	YES	2013	Yes	1979	No	NA	Agreement & Admin	9/1/2016
ICELAND	5-Jun-61	NO	NA	Yes	1975 & 2007	Yes	2007	Agreement & Admin	Pending
IRELAND	17-Aug-61	YES	2014	Yes	1997	Yes	1999	Agreement & Admin	9/1/1993
ISRAEL	7-Sep-10	YES	2013	Yes	1975	No	NA		
ITALY	29-Mar-62	YES	2012	Yes	1984 & 1999			Agreement	11/1/1978
								Admin protocol	11/1/1978
								Supplementary Agreement	1/1/1986
JAPAN	28-Apr-64	YES	2014	Yes	1971 & 2003	Yes	2003 & 2013	Agreement & Admin	10/1/2005
KOREA (South)	12-Dec-96	YES	2014	Yes	1976	No	NA	Agreement & Admin	4/1/2001
LATVIA	1-Jul-16			Yes	1998	No	NA		
LITHUANIA	5-Jul-18			Yes	1998	No	NA		
LUXEMBOURG	7-Dec-61	YES	2013	Yes	1962 & 1996	Yes	2009	Agreement & Admin	11/1/1993
MEXICO	18-May-94	YES	2013	Yes	1992	Yes	2003	Agreement	Pending
NETHERLANDS	13-Nov-61	YES	2013	Yes	1992	Yes	2004	Agreement & Admin	11/1/1990
								Protocol	11/1/1990
								Second Protocol	5/1/2003
NEW ZEALAND	29-May-73	YES	2013	Yes	1982	Yes	2008		
NORWAY	4-Jul-61	YES	2014	Yes	1971	Yes	1980	Agreement & Admin	7/1/1984
								Superseding Agmt & Admin	11/1/2001
POLAND	22-Nov-96	YES	2012-2014	Yes	1974	No	NA	Agreement & Admin	3/1/2009
PORTUGAL	4-Aug-61	YES	2012	Yes	1994	Yes	1999	Agreement & Admin	8/1/1989
SLOVAK REPUBLIC	14-Dec-00	YS	2012	Yes	1993	No	NA	Agreement & Admin	5/1/2014
SLOVENIA	21-Jul-10	YES	2019	Yes	1999	No	NA	Agreement & Admin	Pending
SPAIN	3-Aug-61	YES	2019	Yes	1990	Yes	2013	Agreement & Admin	4/1/1988
SWEDEN	28-Sep-61	YES	2014, 2016	Yes	2005	No	NA	Agreement & Admin	1/1/1987
								Supplementary Agreement	11/1/2007
SWITZERLAND	28-Sep-61	YES	2012	Yes	1996	Yes	2009	Agreement with Protocol	11/1/1980
								Administrative Agreement	11/1/1980
								Supp. Agreement & Admin	10/1/1989
								Superseding Agmt & Admin	8/1/2014
TÜRKIYE	2-Aug-61	YES	2013	Yes	1996	No	NA		
UNITED KINGDOM	2-May-61	YES	2012, 2014, 2015	Yes	2001	Yes	2001	Agreement & Admin	1/1/1985
								Supp Agreement & Admin	9/1/1997
URUGUAY								Agreement & Admin	11/1/2018