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IRS Guidance on U.S.-Swiss Tax Treaty Pension and Retirement Provisions Includes IRAs

PUBLISHED: June 10, 2021

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The U.S. has issued an announcement with guidance on how the 2009 amendment to the tax treaty between the U.S. and Switzerland applies to pension and retirement arrangements of both countries.

As background, though the U.S.-Swiss tax treaty dates from 1996, and the two countries agreed to amend the tax treaty back in 2009, the Senate did not ratify the 2009 amendment until July, 2019. Thus, until fairly recently, both countries were effectively operating under the original tax treaty provisions from 1996. This is important because the 2009 amendments agreed to extend the exemption on withholding for dividends that are paid to pension and retirement arrangements (normally 15%) to individual retirement arrangements as well, both U.S. and Swiss.

IRS Announcement 2021-11 (June 4, 2021) provides the new Competent Authority Agreement ("CAA") between both countries which identifies the plans and arrangements that the 2009 amendments will apply to effective for dividends paid on or after January 1, 2020. The new CAA updates and replaces the prior agreement from 2004.

I. Qualifying Treaty Arrangements

The following arrangements will qualify for the dividend exemption (provided that they do not control the company paying the dividend in the other country, and that they satisfy all additional applicable requirements set forth in the treaty, including the Limitation on Benefits (LOB) article):

A. U.S. Pension Arrangements:

1. A trust providing pension or retirement benefits under a Code section 401(a) qualified pension plan (which includes a Code section 401(k) plan) and a profit sharing or stock bonus plan;

2. A trust described in Code section 457(g) providing pension or retirement benefits under a Code section 457(b) governmental plan;
3. Code section 403(a) qualified annuity plan (a new mention from the prior 2004 agreement) and a Code section 403(b) plan;
4. A group trust described in IRS Revenue Ruling 81-100 (as amended by IRS Revenue Ruling 2014-24 and IRS Revenue Ruling 2011-1), provided that it is operated exclusively or almost exclusively to earn income for the benefit of pension funds that are themselves entitled to benefits under the Treaty as a resident of the United States;
5. The Thrift Savings Fund (Code section 7701(j)).

B. U.S. Individual Retirement Accounts (these are all new):

1. A trust that is an individual retirement account under Code section 408;
2. A Roth individual retirement account under Code section 408A;
3. A simple retirement account under Code section 408(p); and
4. A trust providing pension or retirement benefits under a simplified employee pension plan under Code section 408(k).

C. Swiss Pension Arrangements:

Qualified Swiss pension or other retirement arrangements include a Swiss resident pension or other retirement arrangement that has been established in accordance with the Federal Act on old age, survivors' and disabled persons' insurance payable in respect of employment or self-employment of 25 June 1982, including a retirement arrangement covered by:

1. The Federal Act on Vested Benefits of 17 December 1993;
2. Paragraph 6 and paragraph 7 of Article 89a of the Swiss Civil Code of 10 December 1907; and
3. Any arrangement covered by paragraph 1 of Article 331 of the Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911.

D. Swiss Individual Retirement Savings Plans:

The following arrangements are Swiss individual retirement savings plans that will qualify for benefits

1. Any arrangement covered by the Federal Act on old age, survivors' and disabled persons' insurance payable in respect of employment or self-employment of 25 June 1982, including individual recognized pension plans comparable with occupational pension plans.

E. List Not Exclusive

The CAA goes on to note that it is not an exclusive list, and any U.S. or Swiss pension or other retirement arrangement, or individual retirement savings plan, may present its case to the U.S. and Swiss Competent Authorities for a determination that it qualifies for benefits under the treaty as well.

II. Groom Observations on Group Trusts

For many years, the Form 8802 that the IRS uses to issue a Form 6166, the letter that a taxpayer sends to the foreign country to claim a treaty exemption as a tax exempt pension plan, has stated with respect to 81-100 group trusts that "[a] group trust that is seeking benefits from Switzerland with respect to dividends paid by a Swiss corporation must also attach to Form 8802 the name of each participant and a statement that each participant listed is a trust forming part of a plan described in section 401(a), 403(b), or 457(b)." That Form has not been updated yet for the new CAA, but presumably will be.

It might also be noted that the CAA names an 81-100 group trust as qualified for the dividend exemption if "operated exclusively *or almost exclusively* to earn income for the benefit of pension funds that are themselves entitled to benefits under the Treaty as a resident of the United States". This is interesting because the prior 2004 agreement named 81-100 trusts "with respect *only* to participants" that are plans named to be entitled to treaty benefits. The change in wording suggests that a few pension or other funds not entitled to treaty benefits, such as Puerto Rico qualified only plans or governmental welfare plans, may be included in the 81-100 trust without losing the U.S. Swiss treaty benefit.

If you have any questions about the new CAA or other pension issues under tax treaties, please call David Powell or your regular Groom lawyer.