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Laura Brimmer  
Internal Revenue Service  
Room 6506  
1111 Constitution Avenue NW  
Washington D.C. 20224

Frank Hirth PLC  
1st Floor, 236 Gray's Inn Road  
London WC1X 8HB, UK

T: +44 (0)20 7833 3500  
F: +44 (0)20 7900 2789  
E: [mail@frankhirth.com](mailto:mail@frankhirth.com)

[www.frankhirth.com](http://www.frankhirth.com)

Dear Ms Brimmer

Your Request for Comments on Forms 3520 and 3520-A

We refer to the request for comments on Forms 3520 and 3520-A published on August 20, 2019, 84 FR 43261. We understand the request is made pursuant to the Paperwork Reduction Act and that, among other things, comments are invited on (a) whether the collection of information is necessary for the proper performance of the functions of the IRS and (b) ways to minimize the burden of the collection of information on respondents.

Forms 3520 and 3520-A are mandated by Internal Revenue Code (IRC) §6048 and clearly serve the objective of helping the IRS to enforce the rules for taxation of foreign trusts and their beneficiaries. However, in cases where foreign trusts are utilized in pension structures, the inappropriateness of these Forms has already been recognized both in statute and Revenue Procedure. We would submit that the carve-out of foreign pension trusts from the application of these reporting requirements should be extended in the manner suggested below for U.S. participants in all small foreign personal pension trusts on the basis that the imposition of Form 3520-A and 3520 filing requirements on participants in such pension trusts is unduly burdensome.

**Background**

IRC §§641 to 679 (referred to below as the "trust provisions") set out general principles of income taxation of trusts and their beneficiaries, including foreign trusts. Forms 3520 and 3520-A, as prescribed under IRC §6048, are designed to help the IRS police enforcement of the trust provisions (as well as assisting taxpayers to comply with these provisions) and are effective for doing so where conventional trusts are being reported. However, the IRC reflects that a different approach is required for some foreign pension trusts.

- A. IRC §672(f)(2)(B) provides an exception to the general rule under the trust provisions, that trusts are **not** considered to be owned by a foreign settlor, for cases where distributions from the trust "are taxable as compensation for services rendered". As a result of this exception, the income and gains of pension trusts funded by foreign employers (which will presumably almost always be foreign trusts) are considered to belong to the foreign employer, and employee benefits paid out of the trust are taxed under the provisions of the IRC applicable to remuneration (§§61 and 83), rather than the trust provisions. Consistent with this, instructions to Form 3520 provide that no filing is required by a U.S. person to report distributions from such a trust provided the recipient reports the distributions as income.
- B. Similarly, IRC §6048 provides an exception to the requirement to report as distributions from a foreign trust amounts received by a U.S. person from a foreign trust described in IRC §§402(b), 404(a)(4) or 404A of the rules for taxing pensions, i.e. foreign "employees' trusts". Again, employee benefits paid out of such trusts are taxed under the rules for taxing pensions (IRC §§401 et. seq.), and not under the trust provisions.

**Directors:**

Robyn Limmer ATT, EA | Eric Collins ACA, EA | Sarah Farrow CTA, TEP | Jeffrey Gould | Alex Jones EA | Michael Lewis CTA, EA | Rhea Lucia-Hennis CTA, EA | James Murray CTA, EA |  
Iain Younger CTA, EA, TEP

**Registered Office:**

1st Floor, 236 Gray's Inn Road, London WC1X 8HB. Registered In England: No. 03945095



The IRC does **not** provide relief from §6048 reporting for foreign personal pensions (comparable to individual retirement accounts) that are funded through trusts. This is generally appropriate because such trusts are taxable in accordance with the trust provisions, specifically the "grantor trust" rules of IRC §§671 – 679 which attribute all income and gains of the trust to the person who has funded the trust.

### Recommendation

Having regard to the above, we would recommend consideration be given to providing an additional exception to the Form 3520/3520-A filing requirement for the following foreign pension trusts.

- Relieve reporting on Forms 3520 and 3520-A of interests of U.S. persons in foreign personal pension trusts (i.e. pensions other than employees' trusts), irrespective of where established, holding relatively small amounts, say where the total trust assets do not exceed U.S. \$50,000.

It is submitted that for such small foreign pension trusts the costs of preparing Form 3520 and 3520-A are not justified. As in the case of compensatory trusts described in IRC §672(b)(2)(B), the waiver of Form 3520 reporting for small foreign pension trusts can be conditioned upon the reporting by the U.S. person of all income and gains of the trust as they arise, which is consistent with the treatment of the pension trust as a foreign grantor trust. Thus the IRS' ability to determine liability on income and gains of such trusts will be unimpaired.

Note that under this proposal where a U.S. participant in a small foreign personal pension trust is relieved of the obligation to file Form 3520 and 3520-A his interest in the pension trust nonetheless will continue both to be taken into account in determining his obligation to file Form 8938 (Statement of Foreign Financial Assets), and to be reportable on Form 8938, as required under IRC §6038D. Also unaffected by these proposals would be (a) the U.S. participant's reporting obligations under 31 U.S.C. §5314 (the FBAR requirement) and (b) reporting by U.S. participants of PFIC holdings on Form 8621.

### Conclusion

We are hopeful that this modest proposal can be quickly accepted and incorporated into the instructions to Form 3520 and 3520-A. We would also recommend the IRS study whether Form 3520/3520-A is appropriate for foreign pension trusts generally. U.S. persons participating in such pensions typically have no actual relationship with the trustee and in our experience it is impossible to procure trustee preparation of Form 3520-A.

Thank you for this opportunity to share our views on Form 3520 and Form 3520-A reporting. Please contact Jeffrey Gould ([jeffrey.gould@frankhirth.com](mailto:jeffrey.gould@frankhirth.com)), Iain Younger ([iain.younger@frankhirth.com](mailto:iain.younger@frankhirth.com)) or Carol Hipwell ([carol.hipwell@frankhirth.com](mailto:carol.hipwell@frankhirth.com)) of this firm if you have any questions.

Yours faithfully

 Director

Frank Hirth Plc