[redacted]

From: [redacted]
Sent: Tuesday, May 19, 2015 1:45 PM
To: [redacted]
Subject: FW: OVDI Question- Australian Superannuation Accounts (FOIA Email)

(b)(6)

[redacted]
IPN Coordinator for OVDI
Offshore Arrangements IPN Technical Specialist
LB&I - International Individual Compliance
IRS - 1 Montvale Avenue
Stoneham, MA 02180
[redacted]

From: [redacted]
Sent: Monday, July 15, 2013 10:16 AM
To: [redacted]
Cc: [redacted]
Subject: RE: OVDI Question- Australian Superannuation Accounts

(b)(6)

The Australian Superannuation accounts do not meet the FAQ 54 requirements. The determination of whether there is unreported income, an FBAR and a 3520/3520-A filing requirement will depend on the facts and circumstances. Unfortunately, we do not have a job aid or site but I included some general factors for you to consider. Is the individual a US person? Who is funding the plan? Is the plan a foreign employer pension plan, an elective personal pension (similar to IRA, Roth IRA) or a public pension similar to our social Security ? If the plan is an employer pension plan, then it might fall under code sections listed as exceptions (below) for the filing of the Form 3520/3520-A. If it an elective personal pension and the client is a US person, then the client would likely be required to file Form 3520/3520-A.

Taxability of earnings with the accounts - The general rule is that we don't recognize retirement accounts in other countries unless there is something specific in the treaty with the country that the taxpayer lives and sets up the account that says we will not tax the income in the account. So if it is a country that we don't have a treaty, we definitely don't recognize the account as a retirement account. If it is a country we have a treaty with you have to research the treaty to see if there is anything that addresses it. Canada has such an item in their treaty and the UK does too (with restrictions), but Switzerland does not.

As a general rule, the pension/annuity articles of most tax treaties allow the country of residence (as determined by the residency article) to tax the pension or annuity under its domestic laws. This is true unless a treaty provision specifically amends that treatment. Some treaties, for example, provide that the country of residence may not tax amounts that would not have been taxable by the other country if you were a resident of that country. In some cases, government pensions/annuities or social security payments may be taxable by the government making the payments. There also may be special rules for lump-sum distributions. You need to look at each treaty carefully. Remember, for a U.S. citizen, you also may need to refer to the so-called “saving clause” (typically found in Article 1) for special rules that allow the United States to tax in some cases as if the treaty had not entered into force.

The taxpayers need to make the determination. We do not know exactly what they have so we need to keep things general when speaking to representatives and taxpayers.

FBAR filing requirements - The key fact is whether or not there is an account associated with the pension plan. If the pension plan is just a promise to pay (e.g. Social Security), or the retirement assets are held in an account to fund a future annuity where the taxpayer does not have legal ownership of any portion of the account (e.g. defined benefit plan), then there is no FBAR filing requirement.

<u>As for the 3520/3520-A filing requirement</u>, we would simply state if they own the account a 3520 is required. If they do not own the account, then if it is a foreign employer pension likely do not need to file but if the account is an individual retirement plan - similar to an IRA they would be subject to reporting the transfer on 3520 assuming they are a US person. **Under IRC 408A, Roth IRA is treated as an individual retirement plan. An account similar to a Roth IRA account is an elective personal pension likely requiring the filing of the Form 3520**.

Exceptions to filing Form 3520/3520-A:

- Without regard to whether a transfer to a foreign trust is gratuitous or nongratuitous, transfers to foreign trusts described in IRC 402, 404(a)(4) or 404A are exempt from reporting under IRC 6048(a). IRC 6048(d)(4) authorizes the Secretary to suspend requirements of IRC 6048(a) as appropriate. Based on this authority, no reporting will be required under IRC 6048(a) on transfers to Canadian Registered Retirement Savings Plans (RRSPs) if the trust would qualify for treat benefits at the time of the transfer under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital. Furthermore, the Secretary has determined that, if a foreign trust is described in IRC 402(b), 404(a)(4), 404A, or is an RRSP, and a transfer to such trust would be exempt from reporting under IRC 6048(a) pursuant to this notice, no reporting is required with respect to any transfer to that trust under IRC 1494. (Notice 97-34)
- The Form 3520 instructions list as exceptions to filing transfers to foreign trusts described in sections 402(b), 404(a)(4) or 404A.
- IRC 402(b) plans are non-qualified deferred compensation trusts. Most foreign employer pensions would fall under this label. The trend has been to move away from employer driven plans towards elective personal pensions wherein employee's make discretionary contributions to the plan. The literal language of IRC 402(b) does not cover these types of personal pensions and therefore it does not appear that the exceptions to filing Form 3520 or 3520A are available

[redacted]
LB&I - IIC, Technical Specialist

(b)(6)

From: [redacted]
Sent: Monday, July 08, 2013 11:53 AM
To: [redacted]
Cc: [redacted]
Subject: FW: OVDI Question- Australian Superannuation Accounts

Hi, [redacted]

Here's a question I sent to UNCODED this morning. If you have time to respond, that would be great. Otherwise, I'll just wait until [redacted] returns.

Thanks!

[redacted]

Revenue Agent
LB&I: IIC
5990 W. Creek Rd.
Independence, OH 44131
[redacted]

From: [redacted]
Sent: Monday, July 08, 2013 10:03 AM
To: [redacted] (b)(6)
Subject: OVDI Question- Australian Superannuation Accounts

Hi, [redacted] (b)(3)/26 USC 6103

[redacted]

I know there are other Taxpayers who have these superannuation accounts (based on Frank's comments on some of the monthly calls). Have we determined that these superannuation accounts, in general, meet the FAQ 54 requirements? Are there any special procedures we've been following with these?

[redacted]

Revenue Agent
LB&I: IIC
5990 W. Creek Rd.
[redacted] (b)(6)

[redacted]

From: [redacted]
Sent: Wednesday, January 28, 2015 9:28 AM
To: [redacted]
Cc:
Subject: RE: Superannuation Question

(b)(6)

Thanks for following-up [redacted] Counsel's position is inconsistent and has some holes; however, they do not seem to be interested in re-visiting the issue, so there is no need to follow-up with them.

Please note new telephone numbers
[redacted]
Exam Quality and Technical Support
Offshore Compliance Group
Room 3448
600 Arch Street
Philadelphia, PA 19106

SE:S:E:HQ:EQ&TS:OCG
[redacted]

(b)(6)

From: [redacted]
Sent: Friday, January 23, 2015 3:29 PM
To: [redacted]
Cc:
Subject: RE: Superannuation Question

(b)(6)

[redacted]

We held the superannuation follow-up call last Thursday. Unfortunately I was sick during the call and the call was a bit discombobulated leading to some very rough notes. I should have invited you to the call so your questions could be clearly answered. Please let me know what you still need clarification on and I will get it for you. The responses are in red in your email below. Some additional notes from the call are here:

- The facts of the particular situation will weigh in on the final ASA determination. We cannot give an overall ASA policy for OVDP.
- Deposits into 402(b) are taxable currently.
  - TP should have been taxed on the money when it went into the fund.
  - You have to actually include in income to get the basis.
- Earning in 402(b) are not taxed until distribution. Taxed under annuity rules of 72.
- If not 402(b), then earnings are currently taxable to the individual.
- Any type of contractual relationship between employer and fund. It becomes harder to say it is 402(b) instead of GTR.
- PFIC and 402(b)
  - Does 402(b) trump PFIC rules or vice-versa? No one is sure.
  - This is being looked into further.

Any items that are confusing or unclear please let me know and I will reach out to specific counsel for further clarification.

P.S. Sorry for delay in providing this, was focusing on other items after return from vacation and sick leave.

Sincerely,
[redacted]
Technical Specialist - Foreign Entities IPN
IPN OVDP Coordinator
2203 N Lois Ave, Suite 500
Tampa, FL 33607
[redacted]

(b)(6)

From: [redacted]
Sent: Friday, November 21, 2014 5:19 PM
To: [redacted]
Cc: [redacted] Reicks Pamela J
Subject: RE: Superannuation Question

(b)(6)

(b)(6)

[redacted] Article 6 of the Social Security Agreement between the United States and Australia states that wages paid to an Australian worker that are subject to both Australian superannuation because the employer is Australian, and U.S. Social Security taxes because the person performs the work in the United States, are exempt from U.S. Social Security taxes at both the employer and employee level. The Agreement also works in the reverse, exempting wages from the Australian superannuation payments if the person performs services in Australia for a U.S. company and the wages are subject to U.S. Social Security taxes. Article 18 of the tax treaty between Australia and the United States provides that social security or other government pensions are taxable only by the paying state. For U.S. citizens, Article 18 has an exception to the savings clause that states U.S. citizens who are residents of Australia do not pay U.S. tax on social security payments. The social security agreement appears to consider a superannuation account to be a defined-contribution social security arrangement. **Did Counsel consider both the implications of the social security agreement and the tax treaty when arriving at their conclusion?**

(b)(3)/26 USC 6103

. [redacted]

An Australian super fund should be subject to FBAR reporting, if the person is otherwise required to file the report. The FBAR instructions exempt from reporting by the beneficiary foreign accounts held within an IRA or other tax-qualified plan, which makes sense because the IRA or plan itself must be maintained with a U.S. custodian (so the custodian may have the FBAR reporting requirement).

I have a few other questions.

Under Australian law there is no functional difference between a superannuation fund created by a self-employed person, a super fund created to receive mandatory contributions by Australian employers, and a super fund created to make after-tax contributions to the plan. With some exceptions, generally a person may choose the super fund where his employer sends the required (and optional) payments. There are some closed corporate super funds available to employees only, and persons who invest in these closed funds normally must transfer their money to another super fund upon leaving employment; however, a subsequent employer cannot require an employee to transfer an existing super fund into a closed corporate fund as a condition of employment (the new employer can require the new employee to use a closed corporate super fund for contributions paid by the new employer). Australian law also allows an employee to change the super fund to which his employer send the funds (although the employer is only bound to follow one such instruction per year); therefore, a person also may have multiple super funds, funded in different years with contributions from the same employer, where each super fund has different investment objectives (technology, energy, etc.). **Since superannuation funds are not controlled by the employer, after determining that a superannuation fund is an employee trust under IRC 402(b), what was the rational for deeming the transfer of assets between super funds a taxable event?**

- Depends on the totality of the facts and circumstances.
- Transfer of property as it went from employer to personally managed ASA
- Employer no longer had any involvement broke the link to 402(b)

Australian superannuation funds are tax-favored savings arrangements; they are not tax deferred arrangements like IRAs in the U.S. Australia imposes a flat income tax of 15% (or possibly 30%) on employer-mandated contributions to the superannuation fund; voluntary, tax-deductible contributions to super funds also are subject to tax at these same rates. After-tax contributions to a super fund are not subject to tax at the super fund level. Making a contribution "tax deductible" at the individual level but subject to tax at the super fund level is the mechanism to ensure the person pays the lesser 15% tax rate and not a higher marginal tax rate. The super fund also pays a 15% (or 10% for certain capital gains) tax rate on earnings. Normally the super fund deducts the taxes due on the earnings prior to posting the earnings to person's account (e.g., with a 15% tax rate, $100 of earnings would result in only $85 being posted to the account). In addition, the super fund also deducts administrative fees from the earnings (e.g., where there is a 15% tax rate and the fee is $25, $100 of earnings would result in a posting of $60 after taxes and fees). **In OVDI, how does the person account for these deductions, particularly the payment of the Australian income tax?**

- Problem with treaty in a way
- Individual taxpayer doesn't get a credit for that tax
- Treaty doesn't address this point

IRC 6048(a)(3)(B)(ii) states the person does not have to file Form 3520 for certain reportable events with respect to transactions with IRC 402(b) trusts. If a super fund is an IRC 402(b) trust, then the person does not have to report either the creation of a superannuation fund or the contributions to a super fund (you stated this result in your email; however, you referenced IRC 402(b)(3), which only exempts the person from filing Form 3520-A). **Is a superannuation account subject to reporting on Form 8938?** If yes, then there could be a Title 26 filing requirement.

- ASA are reportable on F8938
  - Although exempt from reporting per the model 1 US-AUS IGA, it is added back by 6038D regs
  - 1.6038D-1(a)(7) reg adds it back into needing to be reported on F8938
  - Because they are not considered FFA under IGA doesn't mean they are not reportable on 8938

Please note new telephone numbers
[redacted]
SBSE Quality & Technical Support
Offshore Compliance Group
[redacted]
(b)(6)

From: [redacted] (b)(6)
Sent: Friday, November 21, 2014 10:35 AM
To: [redacted]
Cc: [redacted] Reicks Pamela J
Subject: RE: Superannuation Question

[redacted] (b)(6)

We have made some headway with the assistance of counsel on the issue of the Australian SuperAnnuation (ASA) funds which I discussed on yesterday's OVDP coordinator call. Now I am formalizing all the thoughts trapped in my head and notes and I hope this provides clarification. Now, if the given case has some caveats we will want to raise it to counsel for more detailed consideration. So let me begin now…

In general, an employer funded ASA will indeed qualify as a 402(b) employee trust. So what does this mean? It means that:

1. Vested employer contributions to the ASA are taxable to the taxpayer at the time of contribution per IRC 402(b)(1).
2. The income accumulated in the ASA will remain untaxed until distributions are made and taxed per reference to IRC 402(b)(2) and 72.
3. The 402(b) employee trust is not considered a grantor trust per IRC 402(b)(3). This means that the ASA is not a foreign grantor trust, and therefore there would be no F3520/F3520-A filing requirements. There would be no Title 26 filing requirements in general other than the taxpayers need to comply with income tax reporting requirements as outlined in items 1 and 2 above.

So what about the OVDP penalty? Well we are currently looking into whether a foreign 402(b) employee trust account needs to be reported on an FBAR. I am under the impression that it is reportable since the Form 114 instructions only specifically list 401(a), 403(a) and 403(b) as exempt from FBAR. If the ASA is reportable on an FBAR then all we need is a dollar of unreported income and it will be in the OVDP MOP. Again this dollar of underreporting for a 402(b) will come from unreported contributions or distributions as outlined above. Ok, so what if the ASA is not reportable on an FBAR? Well then it may still be includable in the OVDP MOP under the theory that an account is being funded with untaxed contributions but of course we may hit the penalty cap under FAQ 50 since there will not be a direct FBAR tie to base the penalty and we will need to rely on other accounts increasing the FBAR underreporting to keep us under the 50% FBAR penalty max. The FBAR and OVDP MOP issues need some work still and hopefully we can get answers ASAP for you and others facing ASA's in the field.

Ok so this covers the general circumstances, but there are more circumstances to be considered:

1. What if the TP is self-employed and funding an ASA?
   a. The ASA is not considered a 402(b) employee trust
   b. The trust is considered a foreign grantor trust under IRC 679 and 677
   c. All earnings are currently includible on TP's F1040
   d. Form 3520/3520-A filing requirements are in place
   e. FBAR filing in place
   f. MOP penalty in place as long as FAQ 35 met, should be easy if all earnings are currently includible
2. What if the taxpayer makes contributions to the 402(b) ASA in addition to the employer?
   a. This issue may need to be looked at further.
   b. Initial thought is that it still qualifies for 402(b) so everything in general above would still be in place.

3. What if the taxpayer left one Australian employer and went to another and had to "roll" the ASA to the new employer?
    a. This issue also may need to be looked at further.
    b. Initial thought is also that this will be acceptable and will remain 402(b)
4. What if the taxpayer left Australian employment and was forced to "roll" the employer ASA into a personal ASA?
    a. This has an undesirable unintended consequence.
    b. While the ASA was at one point a 402(b) employee trust, it was determined by counsel that this act of transferring to a personal ASA broke the link to 402(b)
    c. This link breakage is a taxable transfer described under IRC 83 and Treas Reg 1.83-3(e)
    d. At this point, the taxpayer becomes the owner of the trust and with that all the considerations of item 1 regarding self-employed persons comes into play from that point forward.
5. Any other considerations in meeting the requirements of 402(b)?
    a. There are some considerations regarding highly compensated employees, but I have no detail to provide at this time. Please refer to IRC 402(b)(4) and cites contained therein.

I am hoping this email provides a good amount of detail for you to consider and apply to any ASA issues at hand and those you may encounter going forward. Also, I attached my ASA counsel call notes for reference.

Sincerely,

[redacted]

Technical Specialist - Foreign Entities IPN
IPN OVDP Coordinator
2203 N Lois Ave, Suite 500
Tampa, FL 33607

[redacted]

(b)(6)

From: [redacted]
Sent: Wednesday, October 08, 2014 4:08 PM
To: [redacted]
Subject: RE: Superannuation Question

(b)(6)

[redacted]

I apologize for not getting back to you right away, I have been slammed trying to clear my T2 NW approvals and other items in my personal mailbox. I have done some research on this previously but need to do more follow-up when I return. Unfortunately this is something that comes up from time to time and everyone seems to have their own opinion. I need to get a solid answer for how to approach. I started working on and then [redacted] went on leave, she has been back but it is something I got off of and started putting focus elsewhere. I will get back on this horse when I return.

Sincerely,

[redacted]

(b)(6)

Technical Specialist - Foreign Entities IPN
IPN OVDP Coordinator
2203 N Lois Ave, Suite 500
Tampa, FL 33607

[redacted]

[redacted]

(b)(6)

From [redacted]
Sent: Monday, October 06, 2014 1:17 PM
To: [redacted]
Subject: FW: Superannuation Question

Do you have any insight on this issue? I don't have a lot of firsthand experience with it.

My understanding is that we include the income and the value in the HAB.

However, on a call earlier today, Bryan implied that Superannuations were excluded similar to RRSP.

[redacted]
IPN Coordinator for OVDI
Offshore Arrangements IPN Technical Specialist
LB&I - International Individual Compliance
IRS - 1 Montvale Avenue
Stoneham, MA 02180
[redacted]

From: [redacted]
Sent: Monday, October 06, 2014 12:56 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Superannuation Question

(b)(6)

[redacted]

(b)(3)/26 USC 6103

[redacted]

Thanks for your help.

[redacted]
Revenue Agent
Technical Coordinator, OVDI
International Individual Compliance
[redacted]

(b)(6)

From: [redacted]
Sent: Thursday, October 02, 2014 6:58 AM
To: [redacted]
Cc: [redacted]
Subject: RE: Superannuation Question

Hi [redacted]

I don't have time today to respond to your question. However, I will forward some emails that I think are on point.

Please let me know if you have any follow-up questions.

[redacted]
IPN Coordinator for OVDI
Offshore Arrangements IPN Technical Specialist
LB&I - International Individual Compliance
IRS - 1 Montvale Avenue
Stoneham, MA 02180
[redacted]

(b)(6)

From: [redacted]
Sent: Wednesday, October 01, 2014 4:04 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Superannuation Question

(b)(6)

[redacted]

These Australian superannuation funds are causing quite a lot of problems. Could you please provide a response to the questions below. Thanks.

[redacted]
Revenue Agent
Technical Coordinator, OVDI
International Individual Compliance
[redacted]

From: [redacted]
Sent: Tuesday, September 30, 2014 5:09 PM

To: [redacted] (b)(6)

Subject: Superannuation Question

I have an issue I would like to be raised through [redacted] up through the OVDI ranks especially given the statement in the last coordinator meeting regarding consistency with regard to the Australian superannuation fund. [redacted]

(b)(3)/26 USC 6103

[redacted]
(b)(6)
Team Manager, International Individual Compliance
Large Business & International Division
1999 Broadway MS:4355:DEN
Denver, CO 80202
[redacted]

[redacted]

From: [redacted]
Sent: Wednesday, February 04, 2015 9:45 AM
To: [redacted]
Cc:
Subject: RE: OVDP Hotline - Foreign Pension

(b)(6)

[redacted]

I didn't mean to imply that [redacted] and I are not here to assist you with questions.

We do try to answer general questions if we can and also more specific procedural OVDP questions.

However, we try not to give specific yes/no answers as to whether something is taxable. It is our experience, that there are too many variables that can influence the outcome that may not be presented(even if un-intentionally). When it comes down to it, it is up to the examiner to make the final decision after looking at all the facts. I know that we have seen several different types of pensions in the UK.

Canadian pensions (RRSP and RRIFs) are a different story. We have Rev Procs. etc to support our answers.
We have also done a lot of research on Australian Superannuation accounts and recently determined that they need to be looked at based upon specific facts and we cannot provide blanket guidance.

So it gets tricky giving an answer. The TP really needs to analyze the treaty etc and document their position. Once it gets to exam the examiner can look at it based on its merits and work with the Treaty people directly to determine if it is exempt.

I am not a treaty expert or a pension expert, but it's my understanding that the treaty has to specifically state that the type of pension is excluded. In some brief research this is what I found in layman terms....note it is not authoritative
http://www.us.kpmg.com/microsite/tax/ ies/tea/summer2004/st ories/article01.htm

Article 17: Pension Income

Article 17 of the Treaty governs the payment and receipt of pension income to indivi duals who are residents of the one or the other treaty country. This Article provides a rule of "reciprocal exemption" whereby the country of residence of such individuals has the exclusive right to tax pension income and other similar remuneration. The Saving Clause applies to this provision, with the result that U.S. citizens and residents are subject to U.S. tax on pension income regardless of which country they ar e living in at the time, and which country the pension is paid from.

However, if the pension income would be exempt from taxation for residents in the country where the pension plan is established, then it will also be exempt in the country where the individual is resident, subject to applicable limitations. Thus, for exampl e, a distribution from a U.S. Roth IRA account to a U.K. resident would be exempt from U.K. tax to the same extent it would be exempt from U.S. tax if distributed to a United States resident. This provision is exempt from the Saving Clause and the relief it affords is therefore equally available to U.S. citizens and residents.

Article 17 contains an important change from the previous U.S.-U.K. treaty. Lump-sum payments from pension plans are subject to taxation in the country from which they are paid. Under the previous treaty, lump-sum payments from U.S. pension plans to U.K. residents, in certain circumstances, could escape taxation in either country because such payments were exempt from tax in the United Kingdom. This paragraph of the Treaty is not exempt from the Saving Clause, with the result that lump-sum payments paid from U.S. pension plans to United States citizens and residents who are residing in the United Kingdom will now be subject to U.S. tax.

Social security and other similar payments are taxable only in the country where the individual receiving such payments resides. This provision is exempt from the Saving Clause; thus, for example, U.S. citizens and residents who have become U.K. residents will not be subject to U.S. tax on social security or other similar payments from the United States, but will be taxable in the United Kingdom.

Article 18: Pension

Article 18 of the Treaty contains important new rules governing contributions to and earnings of pension plans, where the individual who is the beneficiary of the plan has divided his or her working life between the United States and the United Kingdom. As stated above, the underlying purpose of these provisions is to facilitate the movement of such individuals between the two countries.

Under Article 18, where an individual is a resident of one country but is a beneficiary of a pension plan established in the other country, neither country may tax the income earned through the plan until such time as that income is distributed. Rollovers from one qualified pension plan to another qualified plan in the same country are not treated as distributions. This paragraph is excluded from the Saving Clause, with the result that U.S. citizens and residents working in the United Kingdom and participating in a U.S. pension plan will not be taxable in the U.K. on the earnings of that plan until such time as that income is distributed to them.

If an individual is a member of a pension plan established under the law of one country, and performs services in the other country, contributions made to the plan during the period he or she performs such services are deductible or excludable in computing his or her taxable income in that other country. Similarly, any benefits accrued by the plan and employer contributions to the plan will not be treated as part of the individual's taxable income. Thus, for example, a U.K. citizen working temporarily in the United States may continue to make contributions to a U.K. pension plan and deduct such contributions for U.S. tax purposes.

Conditions and Limitations for Relief

There are important conditions and limitations to the availability of this relief under the Treaty:

- The deduction or exclusion cannot exceed the relief that would be allowed by the host country for contributions to a pension plan established in the host country. Hence, with respect to the example given above, a U.K. citizen working in the United States and contributing only to a U.K. pension plan, for U.S. tax purposes, could deduct or exclude contributions up to the limit applicable to qualified plans under section 401(a) of the Internal Revenue Code (generally, $13,000 in 2004, although some uncertainty remains as to the applicable financial limits).

- This benefit is subject to a limited exclusion from the Saving Clause. It is not available to U.S. citizens and greencard holders, but is available to individuals who are treated as U.S. residents for another reason, such as meeting the substantial presence test during the tax year in question.

- The individual (or the individual's employer) must have made contributions to the home-country pension plan before the individual began to work in the host country.

- The competent authorities of the respective countries must have determined that the pension plan "generally corresponds" to a pension plan established in each country. In the Exchange of Notes that accompanies the Treaty, the competent authorities have set out a list of plans that meet this requirement and this list includes retirement benefit plans established in the United Kingdom under Part I of Chapter XIV of the Income and Corporation Taxes Act of 1988. U.S. pension plans that meet this requirement include qualified plans under section 401(a) of the Internal Revenue Code, individual retirement accounts (IRAs), Roth IRAs, and certain other statutory plans.

As stated above, because of the Saving Clause, this relief is not available to U.S. citizens or residents. However, related relief is granted to U.S. citizens under Article 18. Under this provision, a U.S. citizen who is resident in the United Kingdom and employed there by a U.K. entity or the U.K. permanent establishment of a foreign entity, and who is participating in a U.K. pension plan, may deduct or exclude contributions made to the U.K. pension plan for purposes of his or her U.S. tax liability. In addition, any benefits accrued by the pension plan and employer contributions to the plan will not be treated as part of the individual's taxable income for U.S. tax purposes.

Again, there are important conditions and limitations to this provision:

- The relief permitted is only available to the extent that the contributions or benefits qualify for relief in the United Kingdom
- The deduction or exclusion permitted by this provision cannot exceed the amount that would be available to U.S. residents participating in U.S. based pension plans
- The U.S. competent authority must have agreed that the U.K. pension plan generally corresponds to a U.S. pension plan (as discussed above, the Exchange of Notes that accompanies the Treaty contains a list of plans that meet this requirement)
- The contributions to the plan must be made during the period that the individual is working in the United Kingdom, and must be attributable to that employment.

The Protocol to the Treaty, signed on July 19, 2002, removed some ambiguity in relation to this paragraph by confirming that it is exempt from the Saving Clause. U.S. citizens may therefore claim the full benefit afforded by this provision.

Corresponding Approval

As discussed above, the Treaty permits deductions or exclusions for contributions to pension plans in one treaty country while the individual is working in the other country, subject to certain conditions. An overriding requirement is that the pension plan in question "generally corresponds" to a plan in the other country. In the majority of cases, there will be no need to seek confirmation from the competent authority of the relevant country that a particular pension plan meets this requirement, because the Exchange of Notes contains a list of standard statutory plans that are deemed to meet this requirement.

This granting of prior approval for established statutory pension plans stands in contrast to the procedure that must followed under the U.S. treaty with Ireland and the protocol with the Netherlands. For treaty relief to be available in relation to contributions to a pension plan established in one of these countries, an application would need to be made to the U.S. competent authority (the Internal Revenue Service) for a determination that the pension plan generally corresponds to a plan in the United States. This procedure involves the submission of detailed information about the plan and it can take several months to obtain a determination.

Conclusion

The grant of corresponding approval can unlock substantial benefits for internationally mobile employees and their employers by enabling the employees to continue to participate in their home-country pension plans while on assignment in the United States, without adverse U.S. tax consequences. The treaty developments in relation to Ireland, the Netherlands, and the United Kingdom provide an opportunity to review existing pension plans for their eligibility for such benefits. A professional tax advisor can provide detailed information and assistance in relation to obtaining corresponding approval from the Internal Revenue Service for pension plans in which internationally mobile employees participate.

Footnotes:

[redacted]
IPN Coordinator for OVDI
Offshore Arrangements IPN Technical Specialist
LB&I - International Individual Compliance
IRS - 1 Montvale Avenue
Stoneham, MA 02180
[redacted]

(b)(6)

From: [redacted]
Sent: Wednesday, February 04, 2015 9:20 AM
To: [redacted]
Cc: [redacted]
Subject: RE: OVDP Hotline - Foreign Pension

[redacted]

I am not sure what Dan's intention was when he instructed us to elevate these issues. In general, we have been elevating issues to you and [redacted] in order to give Hot Line callers a clear answer to their question. So, I think my thought process was along these lines, that you or [redacted] would be able to get us an answer for the caller. That being said, we can revert to our previous answer and turn the issue back on the POA and let the field determine how to handle the pension and income when the OVDP submission is closed. At the same time we can let you know of the questions so that you are aware that we are getting these calls and leave it at that.

What I need is to know how you want us to handle these Hot Line questions.

From: [redacted]
(b)(6)
Sent: Wednesday, February 04, 2015 7:04 AM
To: [redacted]
Cc: [redacted]
Subject: RE: OVDP Hotline - Foreign Pension

[redacted]

Is the purpose of the email just to elevate the information or are you asking us if it is taxable?

If it is the former, I am thinking we need to change the format of the email to be more bullet point just stating the facts for elevation.

If it is the later, I think we should be sticking with the general advice the previous hotline supporters were using. We cannot give a definitive answer (yes its taxable, no it isn't) without knowing the terms of the pension plan.

[redacted]
IPN Coordinator for OVDI
Offshore Arrangements IPN Technical Specialist
LB&I - International Individual Compliance
IRS - 1 Montvale Avenue
Stoneham, MA 02180
[redacted] (b)(6)

From: Price Daniel N [mailto:Daniel.N.Price@IRSCOUNSEL.TREAS.GOV]
Sent: Tuesday, February 03, 2015 3:43 PM
To: [redacted]
Cc:
Subject: RE: OVDP Hotline - Foreign Pension

In an email to the managers in Austin dated 1/13, I advised them to ask personnel manning the hotline, inter alia, the following:

- Novel questions about handling foreign pension plans should be logged and elevated. When representatives or taxpayers present questions about foreign pension plans (other than Canadian plans), please collect the following information: (i) the country where the plan is maintained, (ii) whether the plan is employer-sponsored, and (iii) whether any income tax treaty provisions may apply. Please also ask if the representative can provide a written position on the foreign pension plan.

This point reflects likely forthcoming guidance that will reinforce the Hotline's role in collecting information on these issues.

In the meantime, if we can provide general procedural guidance, we should.

From: [redacted]
Sent: Tuesday, February 03, 2015 12:07 PM
To: [redacted] (b)(6)
Cc:
Subject: RE: OVDP Hotline - Foreign Pension

I spoke with [redacted] to see how they were handling these types of questions previously. She stated that they would refer the TP to the Treaty if there was one and FAQ54/55.

We were providing the following response in the past to FAQ55 questions: "if the Tax Treaty with their country allows postponement of taxation on the retirement account that they should request a late election through OVDI or the streamlined program (if they are eligible) and to file a F8833 stating the treaty provision". But now that they don't have to request a late election for RRSPs, does that also apply to the other treaty eligible plans or not? Should we still be advising them to file F8833 or not?

The answer is yes, they still need a F8833.

The catch 22 is that the FAQ tells them to call the Hotline. Removing this reference was previously elevated and denied.

55.	I have a retirement or pension plan in a foreign country (other than a plan described in FAQ 54) that I do not believe should be included in the offshore penalty base. What should I do?	If you have a retirement or pension plan in a foreign country (other than a plan described in FAQ 54) for which you believe there is no U.S. reporting requirement and that you believe should not be included in the offshore penalty base, you should contact the OVDP hotline at 1-267-941-0020 .

[redacted]
IPN Coordinator for OVDI
Offshore Arrangements IPN Technical Specialist
LB&I - International Individual Compliance
IRS - 1 Montvale Avenue
Stoneham, MA 02180
[redacted]

(b)(6)

From: [redacted]
Sent: Tuesday, February 03, 2015 12:47 PM
To: [redacted]
Cc: [redacted] Price Daniel N (Daniel.N.Price@IRSCOUNSEL.TREAS.GOV)
Subject: RE: OVDP Hotline - Foreign Pension

[redacted]

I have added Dan to the email chain.

I am questioning whether the OVDP Hotline's purpose is to answer specific pension/treaty questions. I thought the OVDP hotlines purpose was more procedure related.

I think it becomes dangerous to give opinions when we are not examining/reviewing actual documents and don't have access to all the facts and circumstances of the case (ie what does the pension contract says etc.)

I feel like we are being asked to give an answer in a vacuum. I wonder if we should gather the info counsel has requested (country/treaty article) and then direct them to the international hotline for assistance.

[redacted]
(b)(6)
IPN Coordinator for OVDI
Offshore Arrangements IPN Technical Specialist
LB&I - International Individual Compliance
IRS - 1 Montvale Avenue
Stoneham, MA 02180
[redacted]

From: [redacted]
Sent: Tuesday, February 03, 2015 12:34 PM
To: [redacted]
Cc:
Subject: FW: OVDP Hotline - Foreign Pension

Can you assist us with this Hot Line Question?

(b)(6)

From: [redacted]
Sent: Tuesday, February 03, 2015 11:04 AM
To: [redacted]
Subject: OVDP Hotline - Foreign Pension

[redacted]

Please elevate to [redacted]

Are government sponsored United Kingdom pension payments taxable in US? Is pension reportable on FBAR or Form 8938? [redacted]

(b)(3)/26 USC 6103

If you require additional information, please let me know.

Thank you,

[redacted]
(b)(6)
Internal Revenue Agent
LB&I: International Individual Compliance
OVDP Team 1
[redacted]

Internal Revenue Service
3651 S. IH 35 Room 545
Mail Stop 4301 AUSC
Austin, TX 78741

[redacted]

From: [redacted]
Sent: Thursday, February 05, 2015 12:37 PM
To: [redacted]
Cc:
Subject: RE: Superannuation funds

(b)(6)

[redacted]

Yes this must have been the confusion. It looks like your notes captured all of the key points. As for your question about case by case determinations, I do not feel each and every case needs to be forwarded. However, it is expected that the agent has a firm grasp on the individual case facts and how the laws apply to them. If not, then it should be forwarded for proper determination. Likewise, if the TP is taxing everything and including it in the MOP then just close as is, but if Rep is trying to keep it from being taxed and out of MOP then it is best to reach out so we certain of the proper treatment.

Sincerely,

[redacted]

Technical Specialist - Foreign Entities IPN
IPN OVDP Coordinator
2203 N Lois Ave, Suite 500
Tampa, FL 33607

[redacted]

(b)(6)

From: [redacted]
Sent: Thursday, February 05, 2015 11:19 AM
To: [redacted]
Subject: Superannuation funds

(b)(6)

[redacted]

I think I may have been confused and combining my notes from the call in my head. On 11/6/2014 I have in my notes that additional guidance on the Superannuation funds would be forthcoming and then on 11/20/2014 I have the following notes:

- Australian Superannuation Fund
  - Below is not an official position and it still may be determined that the determinations regarding the Australian Superannuation funds will be made on a case by case basis.
  - Generally employer funded Superannuation funds qualify for IRC 402(b) treatment
    - The employer contributions are taxable to the employee.
    - Earnings in the fund are tax deferred until distribution. Distributions are taxable under IRC 72.
    - They are not considered a Foreign Grantor trust – therefore there is not a Form 3520 or 3520-A filing requirement

- Personally funded Superannuation funds are considered Foreign Grantor Trusts
  - This includes funds set up by self-employed individuals
  - Forms 3520 and 3520-A required as it is a Foreign Grantor Trust
- Rollover from an employer funded Superannuation fund to a personally funded Superannuation fund would create a taxable event for the distribution and a Form 3520 filing requirement for a transfer to a foreign grantor trust.
- Rollover from an employer fund to another employer fund would still qualify for deferred taxation.
- The Superannuation Fund is includable in the MOP if there is any income tax non-compliance associated with the fund (i.e. employer contributions not included in taxable income).

So I think the forthcoming guidance was provided. Is there anything I missed in my notes above?

Maybe I was also confused by the sentence in my notes above that state: it still may be determined that the determinations regarding the Australian Superannuation funds will be made on a case by case basis.

Is that the case, that all the superannuation cases need to be forwarded up through the chain to be determined on a case by case basis or can the agent working the case make the determination and then if there are any questions we would forward those case up?

Thanks for your help and sorry for the confusion.

[redacted]
(b)(6)
Revenue Agent
Technical Coordinator, OVDI
International Individual Compliance
[redacted]

[redacted]

From: [redacted]
Sent: Friday, February 06, 2015 4:02 PM
To: [redacted]
Subject: FW: OVDP Hotline - Foreign Pension

(b)(6)

[redacted]

Now I heard back. Here is what the treaty IPN had to add...

The question is a little ambiguous (at least to me). Are we talking about the taxability of the employer's contributions into the pension plan or the taxability of distributions from a pension plan established by the employer?

If the former, the treaty article to look at would be Article 28(4). If the latter, the provision would be Article 18(1)—unless the employer is a Contracting State or a political subdivision or a local authority thereof, in which case we'd look at Article 19(2)-(3).

Sincerely,

[redacted]

Technical Specialist - Foreign Entities IPN
IPN OVDP Coordinator
2203 N Lois Ave, Suite 500
Tampa, FL 33607

[redacted]

(b)(6)

From: [redacted]
Sent: Friday, February 06, 2015 9:20 AM
To: [redacted]
Subject: RE: OVDP Hotline - Foreign Pension

Since I haven't heard back from treaty and since they already identified the pension as not covered by the treaty I would just go with the answer I gave last week below...

Sincerely,

[redacted]

Technical Specialist - Foreign Entities IPN
IPN OVDP Coordinator
2203 N Lois Ave, Suite 500
Tampa, FL 33607

[redacted]

(b)(6)

From: [redacted]
Sent: Friday, January 30, 2015 3:56 PM

(b)(6)

To: [redacted]
Cc: [redacted] Pillitteri Charles; Choi Nina E
Subject: RE: OVDP Hotline - Foreign Pension

[redacted]

I am waiting to hear back from the treaty IPN to determine if indeed this specific pension isn't covered by the US-Swiss treaty. In the meantime, let me provide you with my understanding of the tax implications of the scenario. If the treaty doesn't cover this employer sponsored plan then I believe the answer to be that this will fall under a 402(b) nonexempt employee trust. If this is the case then they would need to determine if the taxpayer is a highly compensated employee or not. If not highly compensated, then the contributions and distributions will be subject to tax while the earnings will defer. If highly compensated then must include the vested accrued benefit in income. A 402(b) employee trust does not have Form 3520 or 3520A filing requirements per IRC 402(b)(3) and 6048(a)(3)(b)(ii). My reading of IRC 6038D and regs which outlines Form 8938 filings requirements concludes that the pension needs to be reported as long as reporting thresholds are met. Specifically regulation §1.6038D-5T(f)(3) discusses the valuation of pension and deferred compensation plans for Form 8938 purposes. This is also confirmed by an FAQ on IRS.gov…

Q12. I have an interest in a foreign pension or deferred compensation plan. Do I need to report it on Form 8938?

If you have an interest in a foreign pension or deferred compensation plan, you have to report this interest on Form 8938 if the value of your specified foreign financial assets is greater than the reporting threshold that applies to you.

Based on recent discussions regarding Australian pensions, I would also conclude that even if a US-Swiss FATCA IGA does not call for the sharing of 402(b) accounts by financial institutions that 6038D still calls for the taxpayer to disclose.

Now when it comes to FBAR, this is actually still an outstanding question. I think the thought is that if it is a personal pension then it is reportable. If it is a defined benefit plan it will not be reportable. If it is a defined contribution plan then the answer at this moment is it may or may not be reportable so my recommendation in such a circumstance is that they include the plan on their FBAR to cover themselves, especially since similar information is already having to be disclosed on the Form 8938.

I have included from counsel Charles Pillitteri and Nina Choi in case they have something to add, clarify or correct as this isn't an area of expertise for me.

Sincerely,

[redacted]

Technical Specialist - Foreign Entities IPN
IPN OVDP Coordinator
2203 N Lois Ave, Suite 500
Tampa, FL 33607

[redacted]

(b)(6)

From: [redacted]
Sent: Monday, January 26, 2015 2:42 PM
To: [redacted]
Cc:
Subject: FW: OVDP Hotline - Foreign Pension

Please see the question below.

From: [redacted]
Sent: Monday, January 26, 2015 11:33 AM
To: [redacted]
Subject: OVDP Hotline - Foreign Pension

(b)(6)

[redacted]

Per the email we received from Dan Price, I believe this should be elevated through [redacted]

Are employer sponsored Swiss pension payments taxable in US? Is pension reportable on FBAR or Form 8938? The representative stated he looked to Treaty between US and Switzerland and he didn't note anything which would conclude the pension would be exempt from US tax.

If you require additional information, please let me know.

Thank you,

[redacted]
(b)(6)
Internal Revenue Agent
LB&I: International Individual Compliance
OVDP Team 1
[redacted]

Internal Revenue Service
3651 S. IH 35 Room 545
Mail Stop 4301 AUSC
Austin, TX 78741

SuperAnnuation Call Notes

- Main Participants:
  - Faith Colson –Trusts
  - John Richards – 402(b)
- 402(b)
  - Counterpart to qualified plans like 401(k)
  - Nondiscrimination is requirement
  - Employee non-exempt trust
    - Contributions are taxable if vested
    - Employee can defer earnings unless highly compensated
  - Not a lot of guidance when something is or isn't a 402(b) trust
  - One of the features:
    - Employer makes contribution to acct for exclusive benefit of EE
    - The amount is funded, employee creditors cant get to it

(b)(3)/26 USC 6103

- [redacted]
- Generally would be 402(b) trust unless personal fund established
- If it is 402(b)
  - Taxes people on vested benefits at time of contribution
  - Pay tax on earnings at time of distribution
- Is F3520 for 402(b) employee trust?
  - The answer is no
- What if SA was transferred to new SA of new ER
  - May still qualify for 402(b)
  - If transferred to personal SA then that portion will be FGT
- What if put own money in?
  - Believe at this point will still qualify for 402(b)

- Number of PLRs being submitted related to foreign pension funds