



Our
reference: TAX-12-074

Subject: Insurance Europe comments on bilateral intergovernmental agreements (IGAs) implementing FATCA.

Brussels, 21 June 2012

Insurance Europe welcomes the intergovernmental approach to the Foreign Account Tax Compliance Act (FATCA) implementation. We would like to applaud you all for taking a lead on this issue and understanding the potential devastating effect FATCA would have on both European financial institutions and the economy if the existing legal impediments to compliance are not overcome.

These agreements are a necessary development and it is vital that these agreements are concluded. Insurance Europe is grateful that the Joint Statement issued by the US Treasury/Internal Revenue Service (IRS) and five European nations acknowledge "*the need to keep compliance costs as low as possible for financial institutions and other stakeholders and are committed over the longer term towards achieving common reporting and due diligence standards.*" Insurance Europe shares the view that Inter-Governmental Agreements (IGAs) are the best way to deal with the existing impediments to comply with FATCA requirements and provide clarity on country specific products and entities and minimise compliance costs.

In line with the Joint Statement, Insurance Europe is writing to provide comments on the legal impediments and compliance burden issues associated with FATCA.

While we note that the main reason for entering into these negotiations was to address the data protection issues there are a number of other issues that affect insurers that we ask you to be mindful of throughout your negotiations. We would thus urge you to address these issues through IGAs as well.

Furthermore, Insurance Europe would like to underline that the period between publication of the final FATCA regulations and bilateral tax agreements is too short to allow European insurance companies to comply with all FATCA requirements. Therefore, would we like to see not only IGAs finalised as soon as possible but we would also like to see a phased in approach to their implementation.

Legal barriers

In addition to addressing the data protection concerns, Insurance Europe believes that IGAs concluded between the EU Member States and the US need to give consideration to the following elements:

1) Inability to cancel contracts

FATCA requires closing accounts of recalcitrant policyholders. We believe that insurance companies should not be obliged to terminate a policyholder's contract. Insurance policies are legally enforceable contracts governed by contract law. In any insurance contract, the insurer and policyholder fix the terms of the agreement at the beginning of the policy. For existing contracts, no such clause allowing for termination on FATCA grounds exists. Therefore, if European insurers unilaterally cancel insurance policies then they run the risk of legal action by the policyholder for reinstatement of the policy and damages and sanctions by regulators up to and including suspension of insurance licensing. Furthermore it is questionable

whether regulators would allow contracts to be cancelled in these circumstances, even if such a clause existed.

2) Inability to withhold on policyholders

FATCA requires a 30% withholding tax on payments made to recalcitrant account holders. The regulatory restrictions on insurance companies make it impossible for insurance companies to withhold on policyholders. Furthermore there is no legislative mechanism to allow such withholding.

European life insurance savings policies are contractual in nature, therefore the policyholder does not have a direct legal interest in the underlying investments, but a contractual right to receive returns on the sum originally invested. The contracts do not provide for withholding of tax under the FATCA, thus, if forced to withhold, insurance companies would most likely gross up the withholding payment, resulting in the insurance company bearing the cost of FATCA and no penalty for the policyholder as was intended by FATCA.

Compliance barriers

In order to minimise the compliance burden for European insurance companies Insurance Europe asks that the following is considered during the negotiations:

1) Deemed-compliant status

In cases where IGAs are being negotiated with a country, all Foreign Financial Institutions (FFIs) based in that jurisdiction should be treated as deemed-compliant FFIs during the negotiations and during the process prior to ratification. Treating all FFIs in a jurisdiction as deemed-compliant FFIs while an IGA between the United States and that jurisdiction is being negotiated would allow those FFIs to avoid having to adopt procedures or examine accounts that ultimately might prove to be unnecessary.

Furthermore, Insurance Europe believes that IGAs should allow for each IGA counterparty to determine which entities should be assigned deemed-compliant status because of the low risk nature of the financial products offered.

2) Exclusion of low tax risk products

Insurance Europe is convinced that IGAs are the best way of allowing the US and each IGA counterparty to identify accounts products in that country that have a low associated tax risk and therefore should be excluded from treatment as US accounts e.g. all pension products.

3) Alignment with current Anti-Money Laundering (AML) rules

IGAs should be used to integrate the account identification processes already used in foreign countries with those contemplated in FATCA, allowing FFIs in those countries to minimise the changes needed in their account opening procedures. For instance, the draft FATCA regulations include the obligation to identify the beneficial owner, defined as the persons holding 10% or more of shares or the property of the policyholder. However, according to AML rules the obligation to identify the beneficial owner arises only when the person is holding at least 25% of shares or the property of the policyholder. Another example is that European AML/Know Your Customer (KYC) procedures currently do not always capture US indicia (e.g. US telephone number) as required in the draft FATCA regulations. Accordingly, we believe reporting standards for FATCA should leverage off existing standards used for AML purposes.

4) Use of brokers to collect FATCA information

Insurers frequently rely on third-party insurance brokers, including banks with which insurers have "bancassurance." The third-party brokers often solicit insurance customers, make the sale, and, in so doing, obtain customer information without any direct involvement by the insurer. Depending on the country, hundreds or thousands of non-FFI brokers distribute insurance products for a majority of the insurance industry. In many jurisdictions, including in the European Union, third-party insurance brokers



are regulated and perform the KYC and AML identification procedures. Currently, there is uncertainty whether an insurer would be able to rely on the brokers' identification processes. Our concern is that insurers may not be permitted to do so under the proposed FATCA regulations, but instead would have to do their own costly exercise of re-verifying the account holder information before they could open an account. Insurance Europe therefore asks that this issue is addressed in the negotiations.

We sincerely hope that you will find our comments useful. The topic is of utmost importance to the European insurance sector and please do not hesitate to contact us if you like to receive any further information.

Yours sincerely,

Michaela Koller
Director General
Insurance Europe

Copy to: Mr Mike Williams and Mrs Kate Ramm (HMRC); Mr Dieter Eimermann (Bundesministerium der Finanzen); Mr Enrico Martino (Ministero dell'Economia e delle Finanze), Diego Martín-Abril y Calvo (Ministerio de Hacienda y Administraciones Públicas);