

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY  
AUSTRIAN ASSOCIATION OF INVESTMENT MANAGEMENT COMPANIES]

Inland Revenue Service  
1111 Constitution Avenue, NW,  
Washington DC 20224

Vienna, 07.06.2011

**Austrian Commentary: *IRS Notice 2011 ~ 34*/Supplemental Notice to *Notice 2010-60* providing further guidance and requesting comments on certain priority issues under chapter 4 of subtitle A of the Code**

Dear Sirs,

The *Austrian Association of Investment Management Companies* (VÖIG) is the representative association of the Austrian investment fund management companies. VÖIG represents through its members about EUR 140 billion in assets under management managed by around 2200 investment funds. For more information, please visit [www.voeig.at](http://www.voeig.at). We have participated in the first round of proposed implementation guidelines, issued by the Treasury and IRS in Sept. 2010 (Notice 2010-60).

In our first statement we have

- described the legal background of holding client accounts and the structure of distribution of investment funds in *Austria* (see enclosure 1);
- identified possible solutions for the Austrian funds industry to comply with FATCA regulations (see enclosure 2);
- in both aspects asked the Treasury and IRS for further clarification of the implementation guidelines on FATCA for the Austrian funds industry.

**I) Separation of legal duties**

Regarding FATCA compliance of Austrian investment funds *IRS Notice 2011-34* especially deals with the procedure of passthru payments (section II) and possible deemed compliant status of certain investment funds (section III).

We have understood from the available Notices that Austrian banks and certain Austrian investment companies, who are the only persons having direct client account relationship in Austria, have to comply with FATCA US client reporting and identification guidelines according to *SEC 1471 (b)*. *SEC*

1471 (d) (1) (C) ~ elimination of duplicative reporting requirements as well as Section IV, E of the *Notice 2010-60* support our view that shares/units of a fund held by a Custodian will not be a US account subject to reporting by the Fund respectively only the participating FFI that has the more direct relationship with the investor will be required to FATCA reporting standards.

Austrian Investment management companies, who are responsible for managing investment funds, are not allowed to have a direct client account relationship and cannot be targeted by FATCA reporting requirements (*SEC 1471 (b)*). Please also notice that US withholding taxes can only be levied by FFIs who are integrated in the payments process. Austrian Investment management companies/funds are not involved in any payment process and cannot deduct withholding taxes.

Please be aware that this separation of legal duties between Austrian banks/investment companies, having direct client account relationship, and investment management companies should be reflected in any future legal arrangement between Austrian funds management companies and the Treasury as well as any future legal arrangement between Austrian banks/investment companies and the Treasury otherwise the industry will have tremendous problems agreeing with US FATCA regulations as a whole.

**A further clarification on this matter would be appreciated.**

## **II) Definition of passthru payments**

Regarding the definition of passthru payments in respect of investment funds we would advise clarification that any distribution of the fund comprising US-assets or sale of shares/units of the fund in question by a non-participating FFI (multiplied by the passthru percentage) can give rise to withholding taxation by the first tier participating FFI. An example should be added under section II, C, custodial payments.

Besides we would appreciate if the asset test of funds could be done only twice a year, not on a quarterly basis. We think that the asset allocation of investment funds is very stable over the life time of the fund.

## **III) Confirmation of deemed compliant status**

We have understood from *Notice 2011-34* that according to section III deemed compliant funds (resp. the investment management company responsible for the funds) has to comply with special simplified IRS notification guidelines.

Section III of the *Notice 2011-34* lays down ~ unless provided otherwise ~ the requirements for deemed compliant status of certain funds:

- application of deemed compliant status with the IRS,
- to obtain an FFI identification number from the IRS  
and

- certification every three years to meet the requirements (for example asset test).

According to *Notice 2011-34*, Section III, C, for category 3 deemed compliant funds (page 32-33 of the Notice) there could be additional requirements for Austrian Investment management companies:

- to take care of the prospectus issued to the public including the sales restriction to US-persons,
- the calculation of the percentage of US-assets regarding any passthru payments and
- the confirmation of possible deemed compliant status of certain investment funds according to *SEC 1471(b)(2)*  
~ Financial institution deemed to meet requirements in certain cases.

There could be a further requirement for the investment management company confirming that their own distribution agreements for the funds managed prohibit sales of certain funds to US-persons.

We want to stress that Austrian management companies can only confirm that their own distribution agreements with other intermediaries are met, they cannot confirm if the distribution agreements of other intermediaries (predominantly banks) include similar sales restrictions as there is no direct client (account) relationship with these intermediaries. Therefore we are questioning how the investment management company can give special confirmation to the IRS on this matter in order to receive deemed compliant status of a certain fund.

**A further clarification on this matter would be appreciated.**

#### **IV) Penalizing of investment funds ~ 30% lump sum withholding tax**

Despite the administrative burden levied on the funds industry, we are very much concerned that investment management companies cannot avoid their products being taxed if a non-participating FFI holds investment fund units in the intermediary chain. The penalizing effects can be described as follows:

As mentioned before Austrian funds do not have direct account relationships with their end investors. There is significant concern that applying withholding requirements to deemed compliant funds may impose withholding on many payments that are ultimately made to non-U.S. investors. For example, a non-U.S. person may invest in a fund through an intermediary distributor. If that distributor is a non-participating FFI, bearing in mind that, that non-participating FFI has committed to not sell interests in the fund to specified US persons, the Custodian or the deemed compliant FFI of the fund would be required to withhold on a payment that is beneficially owned by a non-U.S. person. In some

circumstances, this may serve as an incentive for distributor FFIs to enter into FFI agreements. In theory at least, the non-U.S. person in the above example would be more likely to invest through a participating FFI, so that withholding is not imposed on that investor. However, the disintermediation of funds means that the retail investor often holds his interest in the fund through an intermediary and is unlikely to be aware of what intermediaries are in the chain. Thus, the investor may not be capable of making an informed decision to invest only through a chain of participating FFIs.

Although the fund may distribute its units through distributors, the fund's fiduciary duties remain with the end investors. To the extent that payments that are beneficially owned by non-U.S. persons are subject to withholding because distribution goes through a non-participating FFI, the fund may be in breach of its duty to the investor. Such withholding raises additional practical concerns. First, non-U.S. persons subject to withholding are likely to move their investments into funds not investing in U.S. assets rather than assess whether any entities in a distribution chain are non-participating FFIs. Second, a non-U.S. investor who is subject to withholding is likely to presume that the fund itself is to blame (*i.e.*, because the investor may not know who else is in the distribution chain), which will likely lead to negative publicity for the fund. Third, we are asking how non-US persons will be able to reclaim the 30% lump sum tax which has to be levied by the first tier withholding agent.

We think EFAMA n1 has done a lot of work on proposing categories of funds which could be deemed low risk funds (for example widely held collective investment funds). Unfortunately the IRS until now has not accepted any of the more efficient ways of handling investment funds under the FATCA regulatory. The funds industry, including the Austrian funds industry itself has already implemented and proposed a lot of measures how to restrict investment of US-persons in certain foreign investment funds (for example disclaimer of sales restriction of certain funds to US-persons in the funds prospectus as well as general sales restriction of funds to US-persons in distribution agreements of the investment management company).

We are very much concerned that the current proposals of the Treasury could lead to a major shift out of US-investments as the administrative burden levied on banks and investment funds is not matched properly by any possible positive effects for the whole industry.

**We would therefore kindly ask the Treasury for more simplified assumptions for the funds industry, especially as regards unavoidable withholding taxes levied on non-US persons (see above). As an example we would appreciate and propose a “de minimis” rule for funds which at any time do not invest more than 25% of the total funds volume in US-assets. This would mean that these funds like other non-US assets are out of scope of FATCA. These principles by the way would correspond to Art 6 EU savings Directive (2003/48/EC) n2 where funds are out of scope of the EU savings Directive if the interest bearing assets of accumulating funds at any time do not exceed 25% of the total funds volume.**

Kind regards

Vereinigung Österreichischer  
Investmentgesellschaften

Mag. Dietmar Rupa

Mag. Thomas Zibuschka

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## Enclosure 1

### **Description of holding client accounts in Austria and description of the structure of distribution of Austrian investment funds:**

1. Each Austrian investment Fund is organized as an investment fund under the Austrian Investment Fund Act. Each Fund is a portfolio of assets jointly owned by unit-holders, who hold unit certificates of the Fund (primarily via banks).

The unit certificates are securities that evidence co-ownership of the assets of the Fund and the rights of the unit-holders. The Funds are either public funds or special funds. Special funds are funds that are owned by no more than ten unit holders who are known (in contrast to public funds) to the investment fund management company and who could be individuals or institutional investors. The beneficial interests of each investment Fund may sometimes be held by a single unit-holder, but more often by many unit-holders. Austrian funds have no separate legal identity,

2. The assets of the Fund are managed by an investment fund management company that invests the assets of the Fund in accordance with the specific investment objectives of the Fund. From time to time the Fund will invest a portion of its assets through brokers in the United States, in securities of U.S. companies, in U.S. government bonds or bills or in overnight funds with U.S. lending institutions. Each investment fund management company has the discretionary power and authority to vary the investment of the unit-holders of the Fund, including selling the Fund's assets and purchasing different assets in accordance with the specific investment objectives of the Fund. As an investment fund each Fund has written fund rules

regulating the legal relationship between the unit-holders and the investment fund management company as well as the custodian bank. The written fund rules also provide the purpose and the rules of governance of the Fund. Under *section 9* of the Investment Fund Act no holder of a beneficial interest in a Fund has any liability for the losses or debts of the Fund, except to the extent of such person's investment in the Fund.

3. All payments regarding Austrian investment funds are processed by the Custodian bank of the investment fund. They submit payments of the funds mostly to first tier FFIs, for example to other commercial banks, where the funds units are held by their clients, who can be the beneficial owner or second tier FFIs.

4. The Austrian investment funds Act stipulates that Austrian investment funds (respectively the investment management companies) are not allowed to hold direct client accounts (Art 2 (2)). Therefore the identity of the clients holding fund units is not known to the investment funds/management company. Client accounts can only be held by registered banks. In the exceptional case of special funds where the investors are also known to the investment funds management company the client account can also only be held by Austrian banks. We think that more than 90% of Austrian funds is distributed via registered banks.

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## **Enclosure 2**

### **Possible solutions for the Austrian funds industry to comply with FATCA regulations:**

#### **Section IV, chapter E**

Section IV, chapter E, refers to participating investment funds (FFIs) issuing units/shares that are treated as a financial account under US law and such units/shares are held by another participating FFI (custodian) on behalf of a specified US person.

Treasury stipulates "that, where possible, it is preferable for reporting to be performed by the FFI that is in a direct payment relationship with the account holder."

Please be aware that Austrian funds cannot be in direct payment relationship with the account holder as from a legal point of view they cannot have any direct account relationship with clients. Therefore to our mind they should be fully out of scope of the FATCA regulations according to chapter E of section IV. According to Austrian law only Austrian banks are allowed to hold client accounts.

**There should be a clear statement of the Treasury in the notice that investment funds/management companies structured according to the Austrian Investment Act are deemed compliant or out of scope of FATCA as they cannot have direct payment relationship with the funds clients. All payments regarding fund units have to be submitted via the Custodian bank of the fund to the commercial banks where clients are holding their funds deposit/accounts.**

Besides we fully agree with the intention and Treasury drafting regarding elimination of duplicative reporting. As we have described above the Austrian investment funds law distinguishes between public funds and special funds (special funds cannot be held by more than ten persons). The clients of special funds are known by the investment management company as well as by the banks which in Austria are exclusively responsible for holding client accounts. In order to simplify the procedure and in order to avoid double reporting only the participating FFI that has the more direct relationship with the investor or customer will be required to information reporting. The investment funds/investment management company cannot and therefore should not be required to information reporting because the client accounts are exclusively held by commercial banks.

We therefore fully agree with the Treasury's opinion that, where possible, it is preferable for reporting to be performed by the FFI that is in a direct payment relationship with the account holder.

## **Section V, chapter E**

According to Section V, chapter E, Treasury is considering exemptions of FATCA for investment funds which prohibit the sale of their interests to certain US persons.

As mentioned before Austrian investment funds/management companies do not know the clients of the funds. Therefore the investment fund/management company cannot meet FATCA information requirements and has no chance to verify or sanction any misconduct of distributors of the funds units. In this special case FATCA compliance should be the sole duty of the distributors (especially commercial banks holding client accounts). Because of the special structure of Austrian investment funds/management companies Austrian funds/management companies are not allowed to sign agreements with the IRS covering FATCA information requirements.

Any obligation levied on investment funds/management companies could only be restricted to a mere supporting function for distributors. Austrian funds already have posed disclaimers in the prospectus of the funds which forbid distribution of units of the funds to US persons as well as a clause in the sales agreement with the distributor giving reference to this sales restriction. Any further obligation cannot be claimed for by Austrian investment funds/investment funds management companies.

**FOOTNOTES:**

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European Funds and Asset Management Association

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OJ L 157,26.6.2003