

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
AEGON N.V.]

10/29/2010

CC:PA:LPD:PR (NOT-121556-10),
Room 5203, Internal Revenue Service,
PO Box 7604, Ben Franklin Station,
Washington, DC 20044.

Dear Sirs,

AEGON N.V. (“AEGON”) hereby submits comments, as requested by the U.S. Treasury (“Treasury”) and Internal Revenue Service (“IRS”) in *Notice 2010-60* (“the Notice”), regarding the implementation of information reporting and withholding under Chapter 4 of Subtitle A of the Internal Revenue Code (“FATCA”). FATCA was enacted as part of the HIRE Act on March 18, 2010 and is effective for payments made on or after January 1, 2013. The FATCA provisions create a new reporting and withholding regime to detect and discourage offshore tax abuses through increased transparency, enhanced reporting and strong sanctions.

AEGON, headquartered in the Netherlands, is one of the world’s largest providers of life insurance, pensions and long-term savings, and investment products. Approximately 28,000 AEGON employees serve some 40 million customers across the globe. Over 65% of AEGON’s worldwide earnings are generated through its U.S. operations, where they employ approximately 12,000 people.

AEGON Asset Management is part of the AEGON group. AEGON Asset Management has businesses in over twenty countries in Europe, the Americas and Asia. It manages more than EUR 200 billion on behalf of individual investors, financial institutions, pension funds and insurance companies around the world. The AEGON Asset Management businesses employ over 1,300 staff worldwide. AEGON Asset Management manages a wide range of investment funds, the majority of which are established in the UK, Ireland and the Netherlands.

Trade associations in which AEGON companies are active ⁿ¹ have already sent comments to Treasury. We agree with those comments and support the ongoing efforts of those organizations. However, because FATCA could significantly impact AEGON’s business, including its relationship with its customers, we feel compelled to comment directly.

AEGON understands the intent of FATCA and acknowledges that additional reporting by certain foreign entities may reduce U.S. tax evasion. We also recognize that Treasury and the IRS have publicly stated that FATCA is intended to be a reporting regime and not a withholding regime. ⁿ² It is with those objectives in mind that we submit our comments.

We are writing to comment specifically on the application of FATCA to insurance companies and investments funds holding assets of insurance companies and third parties.

First, Congress anticipated that the Secretary may need to write special rules to implement FATCA for insurance companies. n3 We anticipate that those rules will define when or if insurance companies are considered “financial institutions” under the statute and when or if insurance contracts are considered “financial accounts” under the statute. The Notice acknowledges insurance and reinsurance contracts without cash value as “not implicating the concerns of chapter 4.” The Notice requests comments as to the appropriate treatment of life insurance and annuity contracts with an investment component that “may present the risk of U.S. tax evasion that chapter 4 is designed to prevent.” n4 We believe that insurance contracts, even those with an investment component, generally pose a low risk of U.S. tax evasion. We believe that rules could be written to exclude from chapter 4 many insurance products and insurance companies, with minimal impact on U.S. tax revenues.

Treasury and the IRS have not cited any evidence of tax evasion or data to support their concern that life insurance presents a risk of tax evasion. On the contrary, life Insurance contracts are in force for a significant number of years and, by their nature, do not meet the conditions for a high risk of U.S. tax evasion.

In addition, during the long duration of a life insurance contract, the contract holder typically does not make changes to the policy. Unlike typical investment contracts, there is generally little activity on a life insurance contract, which supports its purpose and use to provide financial protection. Also, certain products are subject to non-U.S. taxation at source and are therefore unlikely to be used by U.S. persons to evade U.S. tax.

At a minimum, prior to imposing significant reporting and data collection requirements on life insurers, it is requested that additional consideration be given to identifying those types of life insurance contracts that may present the opportunity for tax evasion. For example, contracts with low cash values, as well as group life insurance and disability contracts, do not present a significant risk for tax evasion.

Second, investment funds of the type that are managed by AEGON Asset Management, although qualifying as a foreign financial institution (“FFI”) under chapter 4, generally pose a low risk of U.S. tax evasion as well. If investment in the fund is limited to low risk investors, or if the fund itself is low-risk, these funds should be deemed FATCA compliant.

We refer to the comments on FATCA submitted by the European Funds Asset Management Association in its letters dated July 7, 2010, and August 10, 2010.

To the extent the Secretary decides to include insurance products/companies and investment funds within the scope of FATCA, regulations should be enacted that allow the broadest possible compliance by insurance companies/asset managers and easiest administration for the IRS. Toward that objective we provide comments on the following topics:

- Exclusion of pre-existing contracts

- Delay of effective date for new contracts to comply with applicable foreign countries data protection rules
- Delay of effective date for new contracts due to Solvency II resource constraints
- Exclusion of low value and low risk insurance contracts
- Affiliated group agreements
- Retirement plans
- Exclusion of low risk funds
- Exclusion of widely held funds
- Investment restrictions applicable to U.S. account holders.

Exclusion of pre-existing contracts:

Section III(B)(2)(a) of the Notice outlines procedures for obtaining account information for pre-existing accounts. The FFI must evaluate all accounts exceeding a \$ 50,000 threshold for indicia of U.S. residency in order to determine if the accounts are to be treated as U.S. accounts, accounts of recalcitrant accountholders or other accounts.

Within two years after the date on which the FFI's Agreement enters into effect, all pre-existing individual accounts that were treated under the procedures described above as other than U.S. accounts and that had an average monthly balance exceeding \$ 1,000,000 during the year preceding the first year in which the FFI's Agreement enters into effect will be subject to procedures for new individual accounts to determine whether such accounts should continue to be treated as other than U.S. accounts, unless the participating FFI has collected, reviewed, and maintained documentation sufficient to establish the U.S. or non-U.S. status of such accounts, and such U.S. or non-U.S. status is reflected in electronically searchable information maintained by the FFI and associated with the account.

Within five years after the date on which the FFI's Agreement enters into effect, all pre-existing individual accounts treated as non-U.S. accounts will be subject to the procedures for new individual accounts to determine whether such accounts should continue to be treated as non-U.S. accounts, unless the participating FFI has collected, reviewed, and maintained documentary evidence sufficient to establish the U.S. or non-U.S. status of such accounts, and such U.S. or non-U.S. status is reflected in electronically searchable information maintained by the FFI and associated with the account.

The Notice solicits comments on possible approaches to reduce the reporting burden imposed on participating FFI's. n5

We appreciate the practical approach outlined in the Notice for pre-existing accounts. Unfortunately, we believe for insurance companies this approach merely delays an inevitable compliance failure.

Unlike a bond or equity investment that is freely traded, it is not unusual for a life insurance policy to be held by the policyholder for decades. Thus our written insurance business includes all ages of policies and many jurisdictions. Existing policies were issued in compliance with information gathering procedures required by that country's regulators at the time of issuance. The information requirements have grown over time in most countries, as know your customer and anti-money laundering rules have been instituted, but such changes were generally not applied retroactively.

The 2 year and 5 year procedures for determining which accounts are U.S. accounts will not be an electronic process for many older policies ~ it will be a paper process and a costly burden to AEGON. The 2 year requirement to evaluate only those accounts exceeding the \$ 1 million average monthly balance only delays this burden. The net effect of the Notice for AEGON is to wade through all pre-existing policies within 5 years to apply the procedures for new individual accounts to determine if those accounts should still be treated as non U.S. accounts. Aside from potentially being a manual process, we do not have the information in our records for older policies from which we can ascertain U.S. status, aside from addresses for some such policies. Therefore, at year 5, FATCA will require policy holders to provide information to AEGON that was not required at time of issue and that is not relevant to continued insurability. Such requests for information will in many cases be contractually unenforceable and could even violate local regulations.

It is AEGON's sincere intention to cooperate with the spirit and intent of the FATCA legislation. However, we hope that Treasury will balance the FATCA requirements by acknowledging the practical difficulties an insurer would face in trying to identify U.S. accounts among pre-existing contracts. Therefore, we urge Treasury to permanently exclude from the scope of chapter 4 all pre-existing insurance contracts.

Delay of effective date for new contracts to comply with applicable foreign countries' data protection rules

Section 1471(b)(1)(F) anticipates that foreign law might prevent the disclosure of personal information with respect to a U.S. account. The section requires an FFI to obtain a waiver from the U.S. person, and failing receipt of a waiver, close the account.

The Notice solicits comments on specific situations in which foreign law may prevent the reporting of account information, along with descriptions of the steps that would be required of a participating FFI in order to overcome or waive any such restriction. n6

There are privacy laws in the EU ⁿ⁷, Canada ⁿ⁸ and other jurisdictions in which AEGON operates which prohibit disclosure of a customer's private information in absence of a waiver. ⁿ⁹ This equally applies to private individuals participating in AEGON investment funds either directly or through a bank account.

As applied to new insurance contracts/investment contracts with private individuals: Even if waivers from data privacy laws can be obtained from the insureds and/or investors, contractual terms will need to be amended. The consent to disclose must be written into new contracts and be a prerequisite for a contract to be consummated. As insurance and investment products are highly regulated there likely will be instances where regulatory approvals may be required for such modifications.

As applied to existing insurance contracts/investment contracts with private individuals: Any unilateral termination by the insurer/asset manager where there is no contractual right to do so would be a breach of contract and possibly of statute. ⁿ¹⁰ If insurers cancelled policies without a contractual right to do so they would run the risk of:

- legal action by the policyholder/investor for reinstatement of the policy and damages;
- sanctions by regulators up to and including suspension of insurance licensing.

In order to correct this, existing contracts would either have to be consensually voided and rewritten or local legislation would have to be enacted to protect insurers/asset managers from liabilities incurred on existing contracts due to FATCA provisions. As neither outcome is within the control of the insurer/asset manager, we don't see how they can be expected to overcome data protection rules on pre-existing contracts in the absence of an exclusion from FATCA.

Drafting new contracts which contractually allow for FATCA reporting is also not entirely within the control of the insurer/asset manager as local regulators generally pre-approve customer contracts. However, given adequate time, we believe it may be possible to do so. However, we must again point out that no evidence has been presented to show that foreign insurance is being used for U.S. tax evasion.

It is AEGON's sincere wish to comply with FATCA provisions while honouring existing contractual obligations, obeying local statutes and meeting local regulatory requirements. However, as FATCA's implementation looms, we believe that more time is necessary to be able to satisfy these competing demands. In order to reduce the burden of FATCA on foreign insurers we propose the effective date for new insurance contracts and fund investments by private individuals be no earlier than two years from the date of final regulations.

Delay of effective date for new contracts due to Solvency II resource constraints

In *Notice 2010-60* Treasury and the IRS solicit comments on possible approaches to reduce the burden imposed on participating FFI's by FATCA reporting requirements. n11 Part of the burden of FATCA to European insurers is that FATCA's date for compliance; (1/1/2013) is also the recently revised deadline for insurers to comply with EU Solvency II capital rules which will require them to calculate their capital resources using new regulatory guidelines. Final Solvency II rules are still forthcoming as of this writing. Once these rules are issued, the European Insurers' priorities will turn to implementing new IT systems compatible with Solvency II, thus compromising the IT resources available. This will create a hardship on European insurers who will have to devote IT resources to two very large tasks with the same deadline. Insurers may have to make tough choices on how their resources should be best allocated among competing priorities.

We recommend that FATCA reporting for European insurers be phased in to avoid the convergence of FATCA and Solvency II compliance effective dates.

Exclusion of low value and low risk insurance contracts

Section 1471(d)(2) defines a financial account as 1) any depository account, 2) custodial account, or equity or debt instrument maintained by a financial institution. The terminology used in the statute is not usually associated with insurance contracts. The terminology is more commonly associated with bank products. Regardless, the Congressional record does indicate intent to at least evaluate the application of FATCA to insurance products. The Notice specifies that contracts combining insurance protection with an investment component may present the potential for tax evasion that chapter 4 is designed to prevent. n12 The Notice also states that Treasury does "not view the issuance of insurance or reinsurance contracts without cash value as implicating the concerns of chapter 4." n13 The Notice then requests comments with respect to the appropriate treatment under chapter 4 of entities that issue cash value insurance contracts, annuity contracts, or similar arrangements, and with respect to the appropriate definition of cash value insurance contracts, annuity contracts and similar arrangements for this purpose. n14

We believe that two types of insurance products should be excluded from chapter 4; insurance products without cash value and insurance products that present a low risk of U.S. tax evasion. Therefore, we make the following recommendations.

- Group insurance contracts present a low risk of tax evasion by U.S. persons and should be excluded from chapter 4.
- Contracts with a cash value of less than \$ 50,000 should be excluded from chapter 4. This treatment would be consistent with the de-minimis limit on depository accounts excluded from the definition of a "U.S. account" in *Section 1471(d)(1)(B)*.
- Contracts subject to source taxation are unsuitable

as vehicles for U.S. tax evasion and therefore, present a low risk and should be excluded from chapter 4.

- Insurance products that allow for a return of premium upon certain events should not be considered to have an investment component and should be exempt from chapter 4.
- Specific products in specific jurisdictions may also present a low risk due to local tax and insurance regulations. Treasury should develop a procedure whereby such products could be exempted from chapter 4.

Affiliated group agreements

AEGON believes that Treasury should not preclude different members of an “expanded affiliated group” (as defined in *Section 1471(e)(2)*) from entering into their own agreements with the Internal Revenue Service under *Section 1471(b)(1)*, whether or not other members of the group have entered into such agreements. Some AEGON affiliates may be able to identify U.S. accounts and provide the information required by *section 1471* more easily than other members of the group. Other affiliates may be unable to provide the required information and have to accept the imposition of a withholding tax under the statute (whether initially due to resource constraints or permanently due to local regulations). Under such circumstances, life insurance company FFI’s that are able to comply with *Section 1471* should be able to enter into agreements with the Internal Revenue Service even if their affiliates may not be in a position to do so.

In this respect, AEGON supports the recommendation filed April 23 by the Banking Federation (the “EBF”) and the Institute of International Bankers (the “IIB”), at page 17 of their FATCA comments letter to Treasury:

“that (1) an electing FFI should be able to specify at the time of its election whether the election extends to other members of its worldwide affiliated group, and (2) to the extent specified by the FFI, this election extend to any entities formed, controlled or sponsored by the FFI (. . .). If an FFI indicates that it will file a consolidated FFI annual report on behalf of its group, then all members of the FFI’s worldwide group would be presumed covered unless the FFI specifies which entities or categories of entities it does not intend to cover in its reports.”

The EBF/IIB letter goes on to state that guidance should “permit various entities, divisions or locations within the affiliated group to file separate annual reports and should not require the consolidation of information that is gathered from separate data systems onto a single report.” We also request such guidance.

Retirement plans

In *Notice 2010-60* Treasury and the IRS anticipate that a foreign retirement plan will be identified as posing a low risk of tax evasion only if the plan:

- qualifies as a retirement plan under the law of the country in which it is established,
- is sponsored by a foreign employer, and
- does not allow U.S. participants or beneficiaries other than employees that worked for the foreign employer in the country in which such retirement plan is established during the period in which benefits accrued. n15

The Notice goes on to solicit comments on the definition of a retirement plan for the purpose of identifying the plan as posing a low risk of tax evasion and how such a plan could appropriately identify or document itself to a withholding agent to verify its compliance with any such definitional requirements. In addition, comments were requested as to whether other categories of foreign employee benefit or deferred compensation plans should be subject to the same treatment as foreign retirement plans for chapter 4 purposes. n16

AEGON believes for employer sponsored retirement plans, the three qualifications to identify a retirement plan as one that poses a low risk of tax evasion should be broadened to:

- include multinational plans, and allow for services to be provided in any country outside of the U.S., not just in the country in which the plan is established,
- exclude the employees’ families or beneficiaries from FATCA reporting in addition to the employee working for the foreign employer.

Additionally, we believe many non-employer retirement plans could also be exempted from chapter 4 withholding. Individual retirement plans focus on providing an appropriate individual retirement benefit to a citizen or resident. These individual retirement plans should be exempt from FATCA because of the low or non-existent risk of tax evasion due to the high degree of regulation to which such plans are subject. n17 While plan regulation differs by country we believe Treasury should

provide a list of factors which when present would exempt individual retirement plans from chapter 4. Those factors could include eligibility criteria, contribution limits, portability restrictions, etc.

Exclusion of low-risk funds

Although not specifically addressed in *Notice 2010-60*, AEGON would also like to take the liberty to emphasize our concerns about the impact of the proposed measures on the investment funds managed by AEGON. In this regard, AEGON proposes to exclude from the reporting and withholding obligations under Chapter 4 any fund that limits investment to any combination of the low risk investor types under the definition below.

AEGON proposes specifically that funds with a low-risk investor base be deemed compliant with the requirements on an FFI imposed under Chapter 4 of the Code. A fund established prior to January 1, 2013 would be permitted to determine its compliance with the prohibition against investment by specified U.S. persons based on the SEC definition of a U.S. person. Reasonable transition rules would apply to funds established before January 1, 2013.

A fund should be deemed to comply with the requirements imposed under Chapter 4 of the Code on an FFI if the fund does not allow investment by specified U.S. persons or if investment in the fund is limited to low risk investors described below. Such restrictions are required to be enforced by the fund under written procedures.

The fund meets the condition of prohibiting investment by specified U.S. persons if the fund prohibits investment by a U.S. person, other than either a person described under *Internal Revenue Code section 1473(3)(A)* through (J) or any other U.S. person that is excluded from this definition under a different provision of the Code or under any form of tax guidance.

A foreign person is a low risk investor described in this paragraph if it is within any of the following categories:

- A pension or employee benefits plan or arrangement that is generally exempt from income taxation in the foreign country in which it is established.
- A foreign government, any political subdivision of a foreign government or any wholly owned agency or instrumentality thereof
- A wholly owned and controlled entity of a foreign government.
- A foreign central bank of issue.
- Any international organization or any wholly owned

agency or instrumentality thereof.

- An investment entity wholly owned and controlled by a foreign government.
- An entity established in a foreign jurisdiction for a public purpose, e.g., religious, scientific, literary, educational or charitable purpose, operated exclusively for that purpose and generally exempt from income taxation in the jurisdiction in which it is established.
- A non financial foreign entity (“NFFE”) to which the reporting requirements under *section 1472(a)* do not apply.
- An NFFE that complies with the requirements under Chapter 4 of the Code.
- A pooled fund whose investors, directly and indirectly, are limited to persons in any combination of the above categories or whose investors are other pooled funds whose investors, directly and indirectly, are limited to persons in any combination of the above-described categories.

Taking into account the investment fund range offered by AEGON Asset Management, AEGON furthermore proposes that collective investment funds that are widely held be deemed compliant with the rules governing FFI’s under Chapter 4 of the Code.

For purposes of this proposal, a fund is defined as a vehicle, regardless of form, established and maintained for the purpose of pooled investment and regulated as such in the country in which it is established and maintained.

Exclusion of widely held funds

Interests in our widely held funds typically are sold through a distribution chain whereby the fund and its manager typically do not have knowledge of the beneficial owner of the investment. Rather, the knowledge of beneficial ownership rests with financial intermediaries in the chain of distribution that are foreign financial institutions subject to Chapter 4 and are expected to either agree to the Chapter 4 due diligence procedures or suffer the consequences of not agreeing to do so. The adoption of regulatory rules that deem widely held funds as defined below to be compliant with the FFI provisions under chapter 4 would be logical from the perspective of fostering cross-border investment and minimizing disruption to capital markets. This policy concern is reflected in *Section*

1471(d)(2)(c) which excludes equity interests that are publicly traded from the definition of a financial account.

In addition, we believe that such treatment would not compromise the achievement of the policy goals of FATCA because such funds present a very limited risk of abuse by U.S. persons for tax evasion purposes given the absence of the ability of an investor to effectively control the assets held by the fund and the fact that investments in a widely held fund are predominately made through intermediaries, most of which would likely be Chapter 4 compliant.

Nevertheless, we appreciate that it may be appropriate to require such funds to report the identities of direct U.S. interest holders under a procedure that would be reasonable in terms of burdens versus benefits. Such a procedure could be further developed in cooperation with EFAMA. Widely held funds may furthermore put appropriate procedures in place to exclude direct U.S. investors.

For further details on the definition of widely held funds we refer to the EFAMA letter dated July 7, 2010.

Investment restrictions applicable to U.S. account holders

In *Notice 2010-60*, Treasury and the IRS also specifically requested comments from the public on possible restrictions prohibiting U.S. accountholders from participating in foreign collective investment vehicles. n18

AEGON proposes that FATCA guidance provide a general rule that a fund must put in place adequate safeguards to ensure the implementation of applicable investor restrictions. FATCA guidance should also provide examples of such adequate safeguards, but the examples provided in guidance should not be exhaustive. If a fund uses procedures that are not described in the examples, an expedited procedure for IRS clearance should be made available.

For a complete list of the possible restrictions AEGON proposes to prohibit U.S. accountholders from participating in foreign collective investment vehicles please refer to the Appendix following this letter.

For further comments in this regard, we refer to the letters submitted by EFAMA on July 7, 2010 and August 10, 2010, to Treasury.

Conclusion

To summarize, AEGON understands and agrees with the stated goal of FATCA to combat tax evasion. We recognize the difficulty in writing effective yet practical regulations and applaud initial guidance provided in the Notice.

The biggest challenges AEGON confronts in complying with a new reporting regime are the inability to assess the U.S. status of pre-existing contracts and the legal restrictions on providing customer data

to the U.S. government. We request that the FATCA reporting requirements be applied prospectively and allow sufficient time for the local governmental and regulatory approvals and procedures to be put in place to access that information. We appreciate the government's willingness to adapt procedures to different industry practices and to acknowledge the exclusion of contracts as well as investment funds which provide a low risk of tax evasion. Targeting those contracts presenting a high risk of tax evasion and promulgating rules with which companies can comply without conflict with and violation of home country rule will most effectively enable success of the U.S. government's goals to enhance reporting of U.S. accounts and prevention of tax evasion.

We appreciate your consideration of our recommendations and would be happy to discuss them further with you.

Yours Sincerely,

Jan Nooitgedagt
CFO of AEGON

Darryl Button
Exec. VP and CFO ~ AEGON USA LLC
on behalf of Mark Mullin CEO ~
AEGON USA LLC

APPENDIX

In *Notice 2010-60*, Treasury and the IRS also specifically requested comments from the public on possible restrictions prohibiting U.S. accountholders from participating in foreign collective investment vehicles. n19

AEGON proposes the following methods to exclude U.S. accountholders:

- The fund documents and agreements that provide the rights and obligations of the investors in the fund as well as of the fund distributors and administrators and the offering documents ("fund documents") must describe the applicable investor restrictions. Under these restrictions the fund and each of its distributors must agree to offer to sell and sell fund interests only to persons authorized to invest in the fund.
- Under the investor subscription procedure, the fund and each distributor must obtain investor certification, as follows:
 - The investor is a person that is within the category

of persons permitted by the fund to invest and is not within a category of persons prohibited by the fund from investing, or

- The investor is a financial institution acting as a distributor.
- Each distributor must agree to obtain the certification above from each incoming investor and to reject an investor subscription if the distributor has actual knowledge that the certification is false at the time of the subscription.
- Each distributor must agree to redeem interests that it holds for the account of any person who the distributor learns is not a person permitted to invest in the fund under the fund's investor restrictions.
- Each distributor must agree to notify investors purchasing interests in the fund of any investor restrictions and that the fund has a right to repurchase any interests if the interests are, at any time, owned by a person that does not meet the investor restrictions.
- Each distributor must agree to provide to the fund, on request, a summary description of procedures that are presently applied to give assurance that the distribution restrictions in the fund prospectus and/or in the distribution agreement are enforced effectively.
- Each distributor must agree to inform the fund as to the identity of any person who the distributor learns is not a person permitted to invest in the fund under the fund's investor restrictions promptly on the distributor learning of such circumstance or to request the fund to redeem the interests in the fund held by that investor.
- The fund documents must provide for meaningful consequences for a distributor's failure to obtain the certification above from an investor. Therefore, for example, the indemnity and liability provisions between each distributor and the fund will permit the fund to discontinue

its relationship with a distributor that does not comply with its obligations with respect to implementing investor restrictions and will permit the fund to redeem all interests in the fund held through that noncompliant distributor.

FOOTNOTES:

n1

Trade associations in which AEGON is active that have submitted or are submitting comments on FATCA include the American Council of Life Insurers, CEA, Canadian Life and Health Insurance Association, Association of British Insurers and Dutch Association of Insurers

n2

Coder, Jeremiah, Tax Analysis Document Number: Doc 2010-23015, Electronic Citation: 2010 WTD 206-2

n3

Technical Explanation of the Revenue Provisions Contained In Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," Under Consideration by the Senate, JCX-4-10, February 23, 2010, p 44

n4

Notice 2010-60(II)(B)(2), p. 11

n5

Notice 2010-60(V)(H). p. 61

n6

Notice 2010-60 (IV)(B) p. 50

n7

European Union Data Protection Directive 95/46/EC (on the protection of individuals with regard to the processing of personal data and on the free movement of such data), and as an example of local enactment, the Data Protection Act 1998 within the UK

n8

Personal Information Protection and Electronic Documents Act (PIPEDA), 2000, c. 5

n9

For example, under UK law, a UK FFI owes its customer a contractual duty of confidentiality as established in the UK Court of Appeal Case *Tournier v. National Provincial and Union Bank of England*. *Tournier* applies to all information on the customers account acquired by the FFI. Exceptions to the contractual duty include compulsion by UK law, a public duty to disclose, protection of the FFI's interest and customers consent to disclose. In the absence of any UK law compelling disclosure or customers consent the provisions of FATCA will not allow UK FFI's to breach their duty of confidence. In addition to *Tournier*, UK FFI's are subject to the EU Data Protection Act of 1998 ("DPA"). The DPA makes no provision for a UK FFI to avoid its duty of confidentiality, or its duties to process personal data fairly and lawfully even if required to do so under a foreign law. Further, the DPA specifically limits the instances where a UK FFI can pass any personal data to the U.S. and establishes that a UK FFI would be vulnerable to legal sanctions in the event that it disclosed personal data in certain circumstances without the customer's consent. Similarly, Canadian life insurance companies would not be permitted to disclose any personal data relating to a policyholder except as required by Canadian governmental statutes, regulations, forms or similar authorities or pursuant to a waiver granted by the policyholder.

n10

UK law allows unilateral closure of accounts only in certain limited circumstances none of which apply to the FATCA requirement for closure. Thus UK law prevents compliance with the requirements of FATCA (either by disclosing personal data about its customers in the first instance or denying them account facilities in the second) unless they can obtain consent to do so. In relation to existing accounts where customers do not supply the relevant information, it is at best doubtful whether the UK FFI would be able under UK law to either withhold tax on behalf of the U.S. government and/or unilaterally withdraw from the relationship without a UK Court Order. In similar fashion, Canadian insurers are not permitted under applicable Canadian Law to either terminate a policy or withhold on a policy, as the policies are contracts that cannot unilaterally be abrogated or modified.

n11

Supra. Note 4

n12

Supra. Note 3

n13

Id.

n14

Id. at p. 11,12

n15

Notice 2010-60(II)(C), p. 16

n16

Id.

n17

For example, retirement plans under Canadian law must be registered with the Canada Revenue Agency, have contribution limits tied to employment or earned income, and are taxable by Canada as payments are made. In addition, penalties are imposed under Canadian law for excessive contributions to the plans. In the UK, non-employer retirement plans are subject to no less regulatory oversight than employer plans.

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Notice 2010-60(V)(E), p. 58

n19

Notice 2010-60(V)(E). p. 58