

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
AVIVA PLC]

1 November 2010

Stephen E. Shay
Deputy Assistant Secretary for International Tax Affairs
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220
Stephen.Shay@do.treas.gov

Manal Corwin
International Tax Counsel
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220
manal.corwin@do.treas.gov

Steven A. Musher
International Revenue Service
Office of the Associate Chief Counsel (Int'l)
1111 Constitutional Avenue, NW
Washington, DC 20224
Steven.A.Musher@irs.counsel.treas.gov

Michael Danilack
Deputy Commissioner (Int'l) LMSB
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224
michael.danilack@irs.gov

Dear Sir/Madam,

Aviva plc's response on the Foreign Account Tax Compliance Act ("FATCA") provision incorporated into the Hiring Incentives to Restore Employment Act ("HIRE Act") (and to *Notice 2010-60* on that subject)

1. Introduction

Aviva plc ("Aviva") welcomes the opportunity to provide comments ahead of the drafting of the regulations to implement the Foreign Account Tax Compliance Act (FATCA) provisions in section 501 of the HIRE Act.

We would welcome the opportunity to discuss these points with you further.

Aviva is the world's sixth-largest insurance group and the largest insurance services provider in the UK. We are one of the leading providers of life and pension products in Europe and are actively growing our long-term savings businesses in Asia Pacific and the USA. Our main activities are long-term savings, fund management and general insurance.

We had premium income and investment sales of ?45.1 billion and ?379 billion of funds under management for the year ended 31 December 2009. We have 46,000 employees serving over 53 million customers in 28 countries around the world. Aviva also owns Aviva Investors which manages funds for Aviva and for third parties.

Regional overview

- **UK**

We are the only insurer in the UK active across all channels and both life and general insurance products with the added advantage of scale. We are the market leader in each major product category in which we operate.

- **Europe**

We provide 20 million customers across 15 countries with life, general and health insurance products. Our strategy is to create one market-leading, pan-European business to capitalise on the opportunities in the world's largest life and pensions market.

- **North America**

Our life insurance business in the US and general insurance business in Canada give us access to a strategically attractive population with a growing desire for products that offer peace of mind.

- **Asia Pacific**

We operate in nine countries across the region through both joint ventures and wholly-owned operations. India and China both with large populations and relatively high economic growth, are our key markets.

- **Aviva Investors**

Aviva Investors combines the group's asset management component into a single, global integrated business. Aviva Investors manages assets under management in excess of ?248 billion as at 30 June 2010 across a range of real estate, equity, fixed income, money market and alternative funds.

2. General comments

Input into other responses

Aviva plc's biggest life subsidiary, Aviva Life & Pensions UK Limited is a member of the UK Association of British Insurers and we have been heavily involved in the ABI's response of 20 August 2010 and fully support the proposals it contains, which are designed to facilitate the effective operation of FATCA while reducing the potentially very onerous compliance costs.

Similarly, Aviva plc's wholly owned asset management business, Aviva Investors, is a member of the UK Investment Management Association ("IMA") and a Corporate Member of the European Fund and Asset Management Association ("EFAMA"). We believe the IMA and EFAMA will provide responses to FATCA and Notice 2010-60 and, based on the conversations we have had, we support their responses in respect of fund management activities. In addition, we would also like to highlight additional points below which come from our extensive experience investing in and managing funds for Aviva and third party clients.

Our overseas businesses have also been involved in other Industry responses including those for the Dutch Association of Insurers and the European Insurance and Reinsurance Federation (the CEA).

Key aims of response

We respect the intention behind the legislation i.e. preventing the evasion of US tax. We offer the information and suggestions in this paper in the spirit of working constructively with the US authorities to promote an outcome that:

- secures the intention behind FATCA, whilst
- keeping the cost burden placed on us, our policyholders and investors proportionate to the risks.

Insurance products

Aviva provides both pure risk life insurance policies (i.e. policies that pay out only on death or disability) and also life policies that do have an intrinsic cash value. Those policies that pay out only on the happening of an insured risk (e.g. of death or disability) pose no risk of tax evasion. We believe that even those Aviva life insurance policies that do provide investment returns create very little risk of tax evasion by US persons because:

- they are not marketed to US residents, and
- many of them are taxed at source in the local tax jurisdiction and/or have significant investment restrictions imposed by local tax authorities/regulators that

make them inherently unattractive for those seeking to evade US (or any other) taxes.

We will describe the policies we provide in greater detail later in this document.

We believe that appropriate exclusions could be based on the characteristics of policies that indicate low risk to US tax revenues. We would suggest that low risk policies are excluded from the definition of “*financial account*” and that insurance companies that sell low risk policies should be deemed compliant with FATCA or excluded from the definition of Foreign Financial Institution (FFI).

We believe that policies should be classified as low risk when they have one or more of the following characteristics:

- they have no investment element and the payout from the policy is wholly contingent upon the happening of the insured risk;
- they are primarily marketed in the home jurisdiction of the insurance company and not actively marketed into the US;
- they suffer tax at source of more than a nominal rate in the home jurisdiction of the insurance company, and that tax is not refundable to the policyholder by the insurance company;
- profits received by the policyholder are reported to the tax authorities of the home jurisdiction of the insurance company under the home jurisdiction’s tax law and there is an appropriate exchange of information agreement between the US and the home authorities;
- they have limits imposed by the law of the home jurisdiction of the insurance company on the amount that can be invested in them which are at a level considered not to present a significant risk to US tax revenues;
- they have restrictions imposed by the law of the home jurisdiction of the insurance company on the timing (e.g. minimum age) and manner of any monetary withdrawals;
- they are designed to provide benefits in retirement or on death if earlier.

At present, the current policyholder data held would make it extremely difficult for Aviva to be able to fully comply with FATCA requirements. For existing policies we do not hold data enabling us to identify all categories of US persons within our policyholder base, as the necessary information was not collected at outset. System changes needed to collect the relevant information can only be prospective and will require time and financial resource to implement. The timing of system changes also needs to take account of other system development demands on UK and European insurance companies such as the implementing of the European Solvency II requirements that come in to effect at the end of 2012.

We note the reference to “*Grandfathered Obligations*” on Page 2 of Notice 2010-60 and would hope that such a provision would alleviate the potential problems with our existing book of business. However, we are concerned that this provision might not apply to “*any instrument treated as equity for US tax purposes*”, particularly if such an exclusion would catch investment life insurance policies linked to equities. Also, we are concerned with the exclusion for “*any legal agreement that lacks a definitive expiration or term*” as many of our investment life policies expire only on death (or earlier encashment).

We would appreciate confirmation that these exclusions will not apply to life insurance policies.

Investment management

As indicated above, based on the conversations we have had with the IMA and EFAMA, we support their responses in respect of fund management activities.

For umbrella companies with multiple sub-funds, we ask that the IRS and Treasury confirm that each sub-fund will be looked at on a stand-alone basis rather than treating the umbrella company as an investment fund or account in its own right.

We also think it is important in the context of funds to allow a level of exposure to US assets without becoming subject to FATCA rules. Such a de minimis limit should be set at a level to protect the large number of funds which have a relatively small exposure to US assets from the administrative burden of FATCA provisions. Without a de minimis level many funds may simply decide not to invest in US assets.

We suggest that, in order to be workable, further grandfathering provisions are required which would relate to investment funds. We would propose that the provisions should provide a lower burden on the funds in terms of identifying the residence of investors for investments made prior to 1 January 2013. However, it should be noted that there would still be difficulties to be addressed in terms of funds distributed through platforms and other distribution arrangements under which the fund manager is not in a direct relationship with the investor.

3. Products offered by Aviva and Aviva Investors

The following section is based mainly on the products sold in the UK but the majority of the points below are relevant to Aviva's products worldwide.

i) Life and insurance policies that insure purely against risk of death and disability (e.g. term insurance and critical illness insurance)

These policies are designed to pay out upon death or disability of the insured. They can be regular or single premium policies but they do not provide any investment return for the policyholder. Payouts are contingent upon the happening of the insured event and fixed in the terms of the insurance contract. Therefore, the policies do not have a "cash value" except on the happening of the insured event (or when such an event is almost certain). They therefore present no risk to US tax revenues and should be excluded from the scope of FATCA.

We note that Page 11 of *Notice 2010-60* confirms that "*Treasury and the IRS plan to issue regulations treating entities whose business consists solely of issuing such contracts as non-financial institutions for purposes of chapter 4*". However, whilst we do write this business, our product range is not restricted solely to 'term life insurance contracts'.

We believe that this business should be excluded from reporting requirements even if it is not the sole product written by the financial institution.

ii) Life insurance based savings and investment policies

Aviva provides insurance policies designed to produce an investment return as well as life cover. The returns from these policies can be linked to a number of asset classes such as equities, fixed interest securities, real estate or a combination of such assets. There are no limits on the amounts that can be invested.

We recognise that at first sight these might look like potential opportunities for US persons who want to deposit money outside the US and evade taxes. However, there are three reasons why we believe such policies are very unlikely to pose any significant risk to the US, and that they should be excluded from the scope of FATCA.

a) On withdrawal of funds from an investment product most territories require the local tax authority to be notified (as an example, in the UK for investment bond gains the UK Chargeable Event Certificate regime applies and we are aware of similar regimes in the major European territories).

b) Due to the legal and taxation consequences of marketing policies to US residents, we vigorously avoid such activity from all non-US territories. This is due to US securities law and SEC regulations.

It is also worth noting that we have US resident associate companies which service that market.

c) A number of the tax authorities (and notably the UK) tax returns on investment policies which makes these policies unlikely to be used for tax evasion.

As an example, under the UK tax system corporation tax is levied (at 20%) on income and gains as they accrue to the policyholder under the UK's "I minus E" system. This levies tax on both the company profits and the policyholder investment returns in a single system. The tax levied in respect of the policyholders' investment return effectively satisfies their liability to UK basic rate income tax (also currently 20%), but cannot be reclaimed by a non-taxpayer (whether UK resident or otherwise).

iii) Registered pension scheme policies

A number of jurisdictions have pension scheme arrangements. We note on Page 16 of *Notice 2010-60* you set out how you will identify foreign retirement plans that pose a low risk of tax evasion. One requirement is that the retirement plan "qualifies as a retirement plan under the law of the country in which it is established", which is perfectly acceptable. However, the other two requirements appear to depend on the retirement plan being sponsored by a foreign employer. However, you should be aware that, whilst many retirement plans are employer sponsored, there are also arrangements where an individual can set up his own non-employer sponsored retirement plan which still qualifies under local pension law and subject, of course, to the relevant pension regulations.

We believe that employer sponsorship should not be a condition for exemption, and that the legislation and rules governing the retirement plans should be taken more into consideration.

Given the significant restrictions on eligibility, making contributions and how benefits must be taken, it is highly unlikely that such a policy would be used for US tax evasion.

UK pension schemes

Again, the UK is a good example to illustrate the points above.

There are various types of pension policies designed to provide benefits in retirement (or on earlier death):

- Stakeholder and Personal Pensions are individual policies. The investments backing them are typically held in internal funds managed by the insurer or are invested in collective investment vehicles managed by an investment management company which may be a fellow group company or a third party. The investments may be in equities, fixed interest securities, real

estate or a mixture of these.

- Retirement Annuity Contracts (RACs) ~ are a type of pension plan that individuals could take out before 1 July 1988 and were available to the self employed and to those in employment where there was no access to an occupational scheme. They were available to UK residents with UK earnings. From 6 April 2006, RACs were put on the same basis as personal pensions.
- A Group Personal Pensions (GPP) is simply a collection of personal pension plans usually sponsored by an employer for its employees. Both employers and employees may contribute to such plans.
- Self-Invested Personal Pensions (SIPP) ~ are personal pension accounts that provide more flexibility in terms of the investment choice and are designed for people who want to have more control over the management of the investments backing their pension policies. However, they have the same restrictions as other registered pension plans in respect of investment and age limits.

Investment in pension policies is limited to those who are resident in the UK for tax purposes. UK tax reliefs are available on pension contributions (within strict limits) and provide an incentive to save into pension accounts. However, the reliefs are limited by reference to earnings chargeable to UK income tax. The UK Government recently announced that from 6 April 2011, the amount of pension contributions each year that will qualify for tax relief will be restricted to £50,000.

The rules on when payments can be taken from a registered pension scheme, without penal tax charges are, we understand, much more restrictive than US retirement accounts. Funds in pensions cannot be accessed before the minimum retirement age of 55, except in circumstances of serious ill-health.

The pension accounts provide the funds from which income is drawn in retirement. A maximum of 25% of a fund can be drawn as a tax free cash lump sum, and the balance must be used to provide an income for life, which is then subject to income tax at the point of payment (i.e. through the UK Pay As You Earn withholding system) in the same way as any other employment income. The income can be taken in the form of an annuity or by simply taking withdrawals (within strict limits) from the pension fund. In either event income tax will apply to the payments.

The UK revenue authorities regularly conduct audits of UK insurers to ensure that the rules and eligibility conditions are strictly enforced. HM Revenue & Customs ("HMRC") require detailed annual

returns from personal pensions providers of all personal pension holders who have received tax relief on their contributions in a tax year.

For the above reasons, it is highly unlikely that such a policy would be used for US tax evasion. Amongst other things, the US person would have to be UK resident in order to contribute.

iv) Life annuity

A life annuity is a financial contract under which a life insurance company makes a series of regular (usually monthly or annually) future payments to the annuitant in exchange for the immediate payment of a lump sum or a series of regular payments prior to the onset of the annuity. These can be purchased with funds from any source. Similar products are available in a number of territories.

Annuity contracts do not allow surrenders/withdrawals other than the pre-agreed monthly/annual amount. This amount is based on the purchase price and the expected longevity (due to age, gender and possibly state of health) of the customer.

Once again, as a company we avoid selling annuities to US residents. In any event, given the risk involved, it is unlikely that a US investor would use such products to try to evade US tax.

v) UK specific ~ Overseas Life Assurance Business (OLAB)

In the UK, life assurance and annuity business which is with a policyholder who is not UK resident is subject to different tax rules. OLAB policies can be marketed only to persons not habitually resident in the UK, and the OLAB investment fund is not subject to corporation tax on its income and gains. This might of course make it more attractive to US persons trying to evade US tax.

Whilst we have written this type of investment business in the past, the regulations that govern it are complex which leads to an increased cost of administration. The amount of OLAB we have is a very small proportion of our total business.

OLAB is also subject to the Chargeable Event Certificate reporting regime referred to above.

However, as already mentioned we actively avoid marketing investment policies (including OLAB) to US residents due to the existing legal and taxation consequences. Also, we understand that UK life contracts do not qualify as life insurance under US tax law and annuity investment contracts do not meet the US tax law requirement for annuity contracts. The result is that the owners of such contracts may be subject to different bases of taxation under both tax regimes, making these unattractive to US residents.

vi) Investment funds

We do not propose to cover the points that the IMA and EFAMA will cover in their responses, which we fully support.

De minimis

We would, however, like to propose that any investment fund that has a de minimis exposure to US assets should be “*deemed FATCA compliant*”. A number of funds, and particularly funds aiming at a global exposure, will have an allocation to US assets. The amount of US assets is often very small but these would technically still be subject to FATCA rules.

As a consequence, fund managers may need to make a decision from a cost/benefit perspective to either be FATCA compliant so the funds can claim the relevant US treaty withholding tax rate (where applicable) or sell down the US assets because the benefit of the US exposure would not merit the cost of becoming FATCA compliant. Allowing a reasonable level of US investment in funds (as a % of funds under management) before FATCA provisions are triggered would reduce the compliance burden for fund managers and would avoid a wholesale selling of US investments by funds with limited exposure to US assets.

We believe having a de minimis limit is a realistic and reasonable proposal that would enable fund managers to continue to invest in the US after 1 January 2013.

Grandfathering

For investment funds, the grandfathering provision offers little relief as funds are either likely to fall within the exclusions which apply to “*any instrument treated as equity for U.S. tax purposes*” or “*any legal agreement that lacks a definitive expiration or term*”.

The latter would appear to exclude any open ended funds from the grandfathering provisions. Typically funds which are widely available will need to be open ended to provide investors with liquidity. There are regulatory restrictions in a number of countries which require funds to be liquid to provide investor protection.

We suggest that, in order to be workable, further grandfathering provisions are required which would relate to investment funds. A similar approach is outlined below for insurance products. We would propose that the provisions should provide a lower burden on the funds in terms of identifying the residence of investors for investments made prior to 1 January 2013. However, it should be noted that there would still be difficulties to be addressed in terms of funds distributed through platforms and other distribution arrangements under which the fund manager is not in a direct relationship with the investor.

Without improved grandfathering provisions it is difficult to see how the asset management industry can be FATCA compliant by 1 January 2013. This is likely to be the case even if the arrangements proposed by EFAMA were implemented to deal with funds where US investors are excluded by the fund and by distributors.

4. Administrative issues: pre-existing accounts

At present the policyholder/investor data held on our systems, resource limitations for systems development and the timing of the commencement would make it extremely difficult for Aviva Group to fully comply with FATCA requirements. We do not hold data enabling us to identify all categories of US persons (e.g. US citizens) within our existing policyholder/investor base. System changes to remedy this can only be prospective and will require time and other resources to implement. The timing of system changes needs to take account of the system development demands on UK (and European) companies of implementing the European Solvency II requirements that come in to effect at the end of 2012.

Notice 2010-60, at Page 26, appears to concentrate on “*depository accounts*”. We would appreciate clarification as to how this will apply to insurance policies.

We note that, at the top of Page 27, reference is made to “*electronically searchable information maintained by the FFI*” and indicia of potential US status are then set out. However, the last paragraph of Page 28 states that we would have to “*obtain additional documentation from an accountholder only where the above-described documentation was not previously collected*”. That suggests that we would have to contact all policyholders/investors (amounting to several millions) if any information had not been acquired at outset. In the past we have not, for example, sought information as to US citizenship.

Seeking that information in retrospect would be a big and costly task. It is likely that many policyholders/investors, for various reasons, would fail to respond and these might ultimately have to be classified as “*recalcitrant accounts*”.

Also, it appears from the guidance that pre-existing accounts will eventually have to be treated in a similar way to new accounts. Again, that would lead to significant cost unless there was some way of better targeting potential US persons rather than having to contact all policyholders/investors.

A potential solution would be to concentrate on accounts with a US address. That could be identified from the database.

5. Compliance costs

Our primary concern is the level of compliance costs and administrative burdens (both set up and annual) that will fall on us and our policyholders/investors, particularly in view of the very low level of US policyholders we believe we have or investment funds with few US investors and a relatively small exposure to US assets. These costs will comprise not just the obvious initial system development to capture and report new data requirements, but of generating annual reports, ongoing systems development to accommodate business changes and any FATCA changes, dealing with policyholder/investors enquiries, staff training and familiarisation, auditing of processes and procedures to ensure correct application and function, seeking agreement of compliance from US authorities. Those costs will ultimately fall on all of our policyholders/investors, not just US policyholders/investors, as the contractual basis for policies will not provide for such an allocation of costs or direct charging.

Similarly with investment funds, unless separate share classes can be created for US investors, the costs of compliance would fall on all investors.

The FFI agreement process itself should be made as simple as possible given the potential volume of data and compliance costs for businesses involved.

Inevitably occasions will arise where refunds will need to be made of tax withheld, with a corresponding need to process refund claims from beneficial owners who would qualify for either statutory or treaty reductions amounts paid to them. We urge that alongside the withholding provisions and mechanics an efficient and timely process for the refund of excess withholding is developed.

6. Identification of US persons

The Act requires FFI's to obtain such information regarding each holder of each account maintained by such institutions as is necessary to determine which (if any) of such accounts are United States accounts. The challenge of identifying US customers for our existing accounts differs substantially from that of identifying US customers setting up new accounts.

Our existing life savings policies may have been written many years ago, in accordance with the then applicable take-on procedures. In most territories, take-on requirements for new policies have typically become stricter over time, but there is often no UK requirement which retrospectively applies new take-on procedures to in force policies. Typically, the identity of a new policyholder must be established as part of anti-money laundering requirements. However, insurers may not be required to record such details as the citizenship of prospective policyholders.

Anti-money laundering checks are typically carried out by the regulated person giving the investment advice and they make a declaration to that effect. The personal data collected that an insurer is able to retain is that required to meet legal requirements and maintain the policy. For example, for an investment bond application a life company will typically ask for name, address, date of birth, contact telephone, occupation, salary (for affordability) and bank details.

We urge the US Treasury and IRS to consider changing the grandfathering provision for pre-existing accounts/investment funds so that only new accounts opened or investors investing in the fund after a prescribed future date will be fully subject to the legislation. Alternatively, the definition of US person might be narrowed simply to US residents for existing business, so that FFI's have a better chance of capturing the information necessary to enable compliance with FATCA.

It should be also noted that monitoring any changes in status of policyholders or investors would also place a significant burden on FFIs.

7. Legality of UK withholding on recalcitrant accounts

UK life insurance savings policies are contractual in basis. The policyholder does not have a direct legal interest in the underlying investments, which are owned by the life company, but contractual

rights under the terms of the policy. Naturally, the policy terms do not provide for withholding of tax under FATCA. UK tax law on insurance policies sets out a comprehensive scheme of taxation that defines the limits of taxation in the UK and which does not provide for withholding on payments to particular classes of policyholder (e.g. US citizens) in the circumstances circumscribed by FATCA.

We believe that the contractual terms of policies will not provide for discretionary withholding by insurers of sums lawfully due to policyholders without changes to UK law.

The same may be true of policies in other territories.

8. Conclusion

Given the very low risk to the objectives of FATCA presented by life insurance policies, we believe they should be excluded from FATCA. We also believe that investment funds where the US assets are not a significant part of the total assets of the fund should similarly be excluded. We believe this can be done on a principled basis due to the low risk to US tax revenues, as explained above.

Where the US authorities believe that a particular class of policy or investment fund presents risk of tax evasion by US persons, we would suggest that the following steps be taken to minimise the costs and administrative burden associated with the introduction and operation of the new regime:

- The regulations should require the FFI Annual Report to contain the minimum amount of information necessary, as each data element that must be captured will increase costs to the FFI.
- The treatment of pre-existing accounts should be reconsidered in light of the information currently available on systems, and the high cost (and likelihood of success) of obtaining further information from existing policyholders. A potential solution for existing accounts is to limit the search to those with US addresses.
- The “*Grandfathered Obligations*” rules should be reconsidered in the light of our previous comments i.e. confirmation that the exclusion regarding equities and accounts with no fixed term will not apply to life insurance policies. Similarly, “*Grandfathered Obligations*” rules should be extended to all investment funds (including sub-funds of umbrella companies) launched prior to 1 January 2013.
- The exclusion for term life insurance contracts should

not apply only to those providers whose business consists solely of issuing such contracts.

- The rules for qualifying retirement plans should allow for non-employer sponsored arrangements.
- An efficient and timely process for the refund of excess withholding should be developed.

We welcome the opportunity to work with you throughout the implementation of FATCA and please do not hesitate to contact me with any questions regarding our written comments.

Yours sincerely

Roger Adams
Tax Risk & Technical Director

cc:
Notice.Comments@irscounsel.treas.gov

FOOTNOTES:

n1

Based on gross worldwide premiums for the year ended 31 December 2009.

n2

Typically includes motor, household, creditor, health, commercial motor, commercial property and commercial liability insurance.