

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

**Stephen E. Shay**

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

**Michael Danilack**

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

cc: Notice.Comments@irscounsel.treas.gov

7 June 2011

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 2011-34* on that subject)

**1. Introduction**

Aviva plc (“Aviva”) welcomes the opportunity to provide comments ahead of the issue of regulations to implement the Foreign Account Tax Compliance Act (FATCA) provisions in section 501 of the HIRE Act and, in particular. *Notice 2011-34*.

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 total sales of £47.1 billion and funds under management of £402 billion as at year ended 31 December 2010. We have 45,000 employees serving over 53.4 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**

Aviva is the leading insurance brand and customer franchise in the UK. We are the UK’s largest insurer with 19 million customers, and one in three households has a relationship with us. We are ranked as one of the UK’s top ten most valuable brands.

- **Europe**

We provide 18 million customers across Europe with life, general and health insurance products through our multi-channel distribution network. We are creating one market-leading, pan-European business to capitalise on the opportunities in the world’s largest life and pensions market

- **North America**

The North America region is home to two of the world’s largest and richest economies. We are focusing on building our position and competitiveness to capitalise actively on Aviva’s financial strength and leverage our strong, high quality relationships with our distribution partners.

- **Asia Pacific**

We operate in eight countries across the region through joint ventures and wholly-owned operations. We have further sharpened our focus on markets where we have strength and scale such as China and India where we expect to generate a significant proportion of our new business growth.

- **Aviva Investors**

Aviva Investors is the integrated asset management business of the Aviva Group, managing funds for Aviva as well as a growing range of third party clients. Aviva Investors manages assets under management in excess of £260 billion as at 31 December 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 involved in the ABI's response of 7 June 2011 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 2011-34 and based on the consultation process, 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 net 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 previously described the policies we currently provide in greater detail in our letter dated 1st November 2010.

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 even if the IRS and Treasury issue the same or similar steps in *Notice 2011-34* (applicable to Private Banking Accounts) to identify existing US indicia holding insurance policies. We believe the costs are disproportionate to the risks and that pre-existing accounts should be excluded from FATCA reporting unless they are enhanced after the effective date.

### ***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. Please note, some umbrella companies will have a separate tax identification number for each sub-fund (e.g. UK Open Ended Investment Companies) however some umbrella companies will only have one tax identification number for the whole umbrella company (e.g. Luxembourg SICAVs).

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 ~ for example less than 5% of the fund's assets under management or Net Asset Value. 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.

### ***Data protection***

We are concerned that two notices have been issued since the HIRE Act was enacted in March 2010, but we have yet to see any guidance notes dealing with data protection law. All FFLs based in the European Union are subject to EU data privacy law and potentially local provisions and cannot transfer personal data about their account holders except in prescribed circumstances. It is not likely that the rules would allow personal information about account holders to be given to the IRS. This situation can only be resolved between the US and the EU authorities (and any other authorities which have data privacy law to prevent personal data from being transferred outside of its home jurisdiction).

### ***Delay of implementation date for insurance companies and investment funds***

At present the policyholder/investor data held on our systems, resource limitations for systems development and the timing of 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 also 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.

Insurers are not bankers and the private banking concepts and definitions set out in *Notice 2011-34* do not have any parallel with the insurance and asset management businesses, in particular the concept of a Client Relationship Manager. Should insurance and/or asset management businesses be required to undertake procedures similar to those described in *Notice 2011-34* for private banks, we request that the IRS and Treasury delay the start date for insurance companies and investment funds to 1 January 2014.

It should also be noted that the requirement to provide W-8BEN or W-9 forms is likely to lead to increased numbers of “*recalcitrant accounts*” due to difficulties of obtaining responses from policyholders/investors. For example, in relation to our ‘pure life’ policyholder’s, we may not need to communicate with them during the duration of the policy as the policyholders executor would normally contact us after an event has occurred to make a claim against the policy. In such circumstance, we may not have a record of their current mailing address. By delaying the implementation date, insurance and asset management businesses would have a better chance of being FATCA compliant whilst trying to minimise the cost and complexity associated with FATCA on its businesses.

### **3. Specific comments in relation to *Notice 2011-34***

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) Procedures for Identification by Participating FFIs of Preexisting Individual accounts ~ Insurance Companies and Investment Funds: pages 7-19**

Whilst *Notice 2011-34* does ease some of the difficulties of dealing with existing accounts, it still poses significant challenges with resultant costs on insurance products and investment funds. It should be noted that a Client Relationship Manager does not necessarily exist in these industries; therefore Step 5 (Accounts of \$ 500,000 or More) would further exacerbate the cost of implementing and being FATCA compliant. We therefore ask that any regulations applicable to insurance products and investment funds should be limited to electronic searches within databases.

We further ask that the same procedure requirement be applicable to post 1 January 2013 accounts for insurance and investment funds to prevent businesses having two operating and reporting processes, therefore minimising the administration burden as much as possible.

#### **ii) Calculation of Passthru Payment Percentage: pages 22-29**

##### ***a) Calculation of “passthru payment percentage”***

The calculation of “passthru payment percentage” would already be a significant challenge to implement, therefore we ask for the option that the calculation be based on the FFls/NFFE’s accounting period end rather than quarterly to reduce the extra cost of FATCA. By aligning the “passthru payment percentage” calculation date to accounting period end date, FFls/NFFE’s can limit the costs of valuation, pricing, reporting and publication of accounting information which is traditionally provided annually rather than quarterly, which would be required based on *Notice 2011-34*.

***b) Partnership and other flow-through entities***

Such entities already have legal agreements in place to allocate income, expenses, profits and losses between the various parties and we would therefore suggest that any “passthru payment percentage” under FATCA be based on the allocation percentages for the entity. For example, partnerships are traditionally tax transparent so each partner accounts for its share of the income, expenses, profits and losses according to the partnership agreement. Introducing any “passthru payment percentage” calculation for such structures would be an extra cost of investing in the US which may result in disinvestment

**iii) Passthru percentage information: page 27**

We suggest the IRS/Treasury maintain a centralised database where FFls/NFFE’s can retrieve the information in real time to maintain their FATCA obligations, including but not limited to, FFls/NFFE’s EIN, any special deemed-compliant status or exempt status and US and total assets figures for passthru percentage information. We anticipate the calculation of passthru payment percentage to be a complex and labour intensive process, thus, any assistance from the IRS/Treasury with the information gathering process would greatly assist FFls and NFFE’s.

**iv) Possible exemptions from definition of passthru payments: page 29**

We suggest that the IRS and Treasury continue to work with international industry bodies to identify deemed compliant/low tax risk/exempt products (rather than defining possible exemptions from the definition of passthru payments) such as:

- insurance products with no or low cash in value;
- products that are already taxed locally or require withholding tax to be deducted on any distributions made to non-resident policyholders/investors; or
- pension vehicles (including life assurance companies engaging in pensions business). These generally have significant restrictions on eligibility, making contributions and how benefits must be taken and therefore it is highly unlikely that such a pension policy would be used for US tax evasion.

**v) Local FFI Members of Participating FFI Groups: pages 30-31**

Many global insurance groups would have FFI members that would fulfil the criteria of a deemed-compliant FFI referred to on pages 30-31. Given the severe consequences of a deemed compliant FFI member in a participating FFI Group not being FATCA compliant, compliance should largely be self-regulating. As such, we do not think any additional certification should be required. We anticipate FFI Groups implementing internal procedures and sign-off processes to ensure that each and every one of its member is making reasonable endeavours to be FATCA compliant.

We suggest that the IRS and Treasury designate such categories of FFIs (and other any exempt categories of FFIs) with a special designated letter of the alphabet to help the identification and reporting process.

For non-Group situations, again, we do not believe the IRS and Treasury should be concerned with how an FFI is able to demonstrate to the IRS that it meets the requirements described on pages 30-31 as we would anticipate shareholders of such FFIs to require those FFIs to be FATCA compliant as the financial penalty is too high to ignore.

**vi) Low tax risk entities: pages 33-34**

The following text is largely from our previous letter highlighting entities and types of business where the risk of US tax evasion is low and hence which should be excluded from the FATCA rules.

**a) 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 or deemed FATCA compliant as a bare minimum.

**b) 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.

i) 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).

ii) 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.

iii) 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).

### **c) Registered pension scheme policies**

A number of jurisdictions have pension scheme arrangements. We note on page 33 of *Notice 2011-34* that you intend to issue guidance providing certain foreign retirement plans that pose a low risk of tax evasion under *section 1471(f)* be exempt from withholding under *section 1471(a)*. We ask that you widen the requirements of a deemed low risk foreign retirement plans (referred to in *Notice 2010-60*) to take into account other wider foreign retirement plans that are legislated and governed under local retirement rules. 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 out 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.

#### **d) 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 setting 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.

#### **e) 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.

#### **f) Segregation of different streams of business for FATCA reporting**

As you may be aware, insurance companies often write a mixture of different businesses within one single legal entity, therefore, we ask that the IRS and Treasury allow FFIs to segregate the different books of business for FATCA reporting so FFIs may be able to exclude certain books of business from FATCA reporting.

#### **g) 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 (for example less than 5% of the fund's assets under management or Net Asset Value) 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.

#### **vii) Expanded Affiliated Groups of FFIs: pages 40-45**

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 initial system development to capture and report new data requirements, but additional costs of:

- generating annual reports;
- ongoing systems development to accommodate business changes and any changes to the FATCA rules;

- dealing with policyholder/investors enquiries;
- staff training and familiarisation;
- auditing of processes and procedures to ensure correct application and function, and
- 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 allocation of costs of 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.

Whilst the concepts behind expanded affiliated groups of FFIs would reduce the number of contracts entered into with the IRS, from a group perspective, any global procedure/process requires a lengthy implementation period and significant financial commitment is required to implement such a global project. We ask that the IRS and Treasury do not underestimate the amount of time and financial resource that large multi-national groups will need to spend and invest in order to be FATCA compliant. This further suggests that the current timetable for implementation needs to be extended.

We also suggest appointing a lead FFI should be optional rather than mandatory. The expanded affiliated group of FFIs presents many challenges and complexity to administer, therefore we ask that the process itself should be made as simple as possible given the potential volume of data and compliance costs for businesses involved

#### **4. 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 justified on the basis that there is a 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 partial solution for existing accounts is to limit the required searches to electronic searches only for insurance companies and investment funds.

- Delay the Implementation to 1 January 2014 for insurance products and investment funds given that the rules for these businesses are still not certain and will arguably need more changes and take longer than banks to implement

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  
Aviva plc  
London

#### 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.

n3

Based on 2010 published life and pensions PVNBP on an MCEV basis, total investment sales and general insurance and health net written premiums, including share of associate's premiums.