

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY  
FFSA]

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References: 2010-10-29\_let\_ffsa-irs\_fatca\_comments

**Subject:** FFSA's response to *IRS Notice 2010-60* on implementation of Foreign Accounts Tax Compliance Act

Dear Sir or Madam,

FFSA, the French Insurance Association, which represents most of the French insurance and reinsurance undertakings, welcomes the opportunity to provide comments on the *IRS Notice 2010-60* regarding implementation of information reporting and withholding under the new Foreign Account Tax Compliance Act (FATCA) provisions.

Please find attached the FFSA position paper on this notice.

Should you require any additional information, please do not hesitate to contact us.

Yours faithfully,

Tax Director  
Francois Tallon  
Paris, France

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**FFSA, the French Insurance Association,** represents 248 companies accounting for 90% of the French insurance and reinsurance market. It welcomes the opportunity to provide comments on the *IRS Notice 2010-60* regarding implementation of information reporting and withholding under the new Foreign Account Tax Compliance Act (FATCA) provisions.

The Notice reflects the intention of Treasury and the IRS to identify certain classes of entities and describe their treatment under the FATCA. In particular, “Treasury and the IRS do not view the issuance of insurance or reinsurance contracts without cash value as implicating the concerns of Chapter 4”. They suggest that “other contracts such as life insurance (other than term life insurance contracts without cash value) or annuity contracts typically combine insurance protection with an investment component. Thus, such cash value insurance or annuity contracts may present the risk of US tax evasion that chapter 4 is designed to prevent”.

In this context, FFSA seeks to explain in this paper the types of French insurance policies that should be excluded from the scope of FATCA. FFSA also raises the practical difficulties in application of the FATCA, and the consequences it would suffer in case the insurance policies and the companies writing them are to remain within the scope of the regime,

FFSA’s comments are as follows:

## **1. GENERAL REMARK**

In general, we wonder why the FATCA provides a withholding tax on US revenues paid to foreign institutions since these revenues do not fall under the IRS objectives, i.e. risk of US tax evasion. The US/France double taxation treaty provides possibilities of exchanging information between the fiscal administrations, which should be the way to collect and transfer the US persons data required under the FATCA. We wonder why the FATCA requirements are applicable to entities established in countries in which transactions are totally transparent.

The FATCA provisions are very complex and expensive to implement.

## **2. FATCA SCOPE ~ FRENCH INSURANCE POLICIES TO BE EXCLUDED**

This section introduces the insurance and reinsurance policies sold by French insurance and reinsurance companies in France, which should be excluded from the scope of the FATCA provisions.

### **2.1. Non-life insurance and reinsurance**

- The **non-life insurance activity** consists in providing insurance policies under terms in which the insurer provides its policyholders with a payment upon the occurrence of the insured event. These policies do not generate any return on investment for the policyholders, but rather indemnities stated in the insurance contract.

According to the French and European insurance regulation, there are different branches of non-life insurance policies ~ like accidental damage, health, motor, aircraft, marine, goods in transit and fire

branches ~ which are issued to both natural persons and enterprises. In all these cases, the agreed sum paid by the insurer never exceeds the policyholder's financial loss arising from the insured event.

- **Reinsurance, both life and non life**, is an activity which consists in accepting risks passed on by an insurer or another reinsurer. It allows insurers to spread the risks at worldwide level, to have a higher underwriting capacity to engage in insurance business. The reinsurance operations are exclusively business to business transactions. Individual policyholders are in no way affected by reinsurance as the insurer remains liable to the policyholder for insurance policy benefits and claims.

We believe these non-life insurance companies and reinsurance companies, both in life and non-life, should be excluded from the FATCA requirements since their business consists solely in issuing contracts without investment return for the policyholders and so does not implicate the concerns of FATCA. Otherwise, including them as "Foreign Financial Institutions" (FFI) under the FATCA would not be appropriate for us, even if they belong to the same group as companies in the life insurance business.

## **2.2. Life insurance**

Life insurance is designed to offer protection against uncertain events such as death, survival or disability via a biometric risk cover included in the contract. The French insurance taxation regime and policyholder documentation requirements make the life and annuity insurance policies inherently unattractive to people seeking to evade tax. In particular, with regard to Anti Money Laundering (AML), some insurance customer information are required for underwriting, in particular name, address, date of birth, contact telephone of the customers and information relating to their revenues and occupation.

Please find below a list of French life and annuity insurance contracts that could not present a risk of US tax evasion:

### **2.2.1. Retirement policies**

There are various types of pension policies sold by the French insurance companies in France, which are in particular as follows:

- "Plans d'Epargne Retraite Populaire" or "PERP" are individual and facultative policies available to everyone. In principle, the insurer pays the policyholder annuities at the date of the retirement. It is allowed to pay a partial lump sum in particular situations

where the sum is affected to the acquisition of the first main home of the policyholder.

- “Regimes de retraite a? cotisations definies” defined in article 83 of the French tax revenue code are collective insurance contracts allowing the employees to constitute a supplementary pension in the form of annuities. The contributions to these policies are determined by the undertaking, but have to be equal between its employees, effective members of the policy. The annuities are paid when the employee retires.
- “Regimes de retraite a? prestations definies” defined in article 39 of the French tax revenue code are collective insurance policies by which the employer accepts to pay its employees a supplementary pension in the form of annuities. The annuities are paid when the employee quits and retires, in the condition that the employee works in the company until the date of the retirement. The amount of annuities is fixed in the terms of the insurance contract.

These pension policies are long-term contracts, which procure at the date of the retirement the assurance of receiving periodic payments during all the retirement period until death. They present some key characteristics for the policyholder, such as no surrender value with the benefits paid out only at the age of the retirement. They are without cash value.

In France, the annuities are subject to income tax according to the general tax scale after a standard allowance of 10%. The individual domiciled in France and attached to a French mandatory health regime has also to pay social contributions of 7.1% to such annuities.

The annuities have to be declared every year by the insurer to the French tax administration.

Considering the absence of cash value, access to incomes only after retirement age and taxation rules applicable to such incomes, we believe that the pension policies sold by insurance companies in France are not concerned by the objectives of the FATCA provisions. They should be excluded from the scope of FATCA.

**2.2.2. Life insurance policies that insure purely  
~ against risk of death and insurance policies that  
insure purely against risk of disability**

These policies are considered as pure risk insurance products. For them, the payout corresponds to a lump sum or income benefit upon death or disability of the insured person. These products can be subscribed individually or collectively, but they do not provide an investment return for the policyholder. The sums to be paid when the insured event occurs are fixed in the terms of the insurance contract.

Since these products do not generate any return on investment for the policyholders, they should be excluded from the scope of FATCA.

### **2.2.3. Other life insurance policies**

There are traditional guaranteed life insurance products which provide as payouts guaranteed benefits, and unit-linked life insurance products which allow policyholders to get a higher return but with an investment risk.

For these products, the insurer pays in general the policyholders a global lump sum at the end of the contract, but the payout of annuities is also possible.

The amounts of revenues are designed to be declared by the insurer to the French tax administration in a yearly combined fiscal summary, named “imprime fiscale unique” or “IFU”. This declaration by the undertakings summarizes all the client investment transactions and their revenues per year. It is applicable to French and non French clients. On this basis, we consider it must be more appropriate to exchange information between the French and US administrations while applying the complex FATCA rules. Despite the IFU, the undertakings do not have the capacity to determine if all their clients are US or non US persons (citizens or residents).

For the taxation regime of these life insurance contracts, there is no general tax deduction of premiums, and the interests are subject to income tax according to the general tax scale or if the policyholder prefers, to a withholding tax at a rate depending on the date of the payouts. In case of the option for annuities, these are subject in part to income tax depending on the age of the beneficiary. For the individual domiciled in France, the social contributions of 12.1% are also applicable to these interests or annuities.

In case a non French resident subscribes a French life insurance contract, the French taxation rules will be applicable only if the insurance contract holder is subject to some conditions provided according to the US/France double taxation treaty.

The Notice states that the FATCA is designed to prevent a risk of US tax evasion that some insurance contracts may present. Considering the above, we believe that the French insurance taxation regime and policyholder documentation requirements make a life insurance contract subscribed in France unattractive for people seeking to evade US tax liabilities.

## **3. PRACTICAL ISSUES**

In the event that French insurance companies are to be treated as “Foreign Financial Institutions” or certain policies are deemed to be “financial accounts” under the FATCA, accommodations will need to be made to ensure insurers will be able to comply with the reporting rules. The timing of commencement as well as the policyholder data available and the systems development limitations would make it impossible for the insurers to fully comply with the FATCA requirements for payments made after December 31, 2012 as stated in the law.

### **3.1. Personal data protection rules**

With regard to French and European data protection rules, the FATCA reporting requirements are very critical. The French law relative to personal data protection rules n1 allows the person in charge of a treatment to transfer personal data towards a non European state if this state guarantees the same level of consumer protection. Thus, an assessment of private life, liberties and fundamental rights protection must be done in the USA in comparison to the French and European level of protection. We notice that, according to the European Commission, the protection level in the USA is not equal to the one in Europe since the US constitutional law does not recognize the personal data protection whereas this protection is included in the Charter of Fundamental Rights of the European Union.

Moreover, the person in charge of a treatment must inform the concerned person of this transfer, who will have the same rights as the French processing of personal data. The consumer will have the rights of opposition for legitimate reasons as well as the rights of correction in case of mistake or misleading data.

The new FATCA requirements should then set up a system which can collect the opposition or correction of US person under such cases.

At European level, we would like to underline the Swift agreements which impose the control of Europol in the transfer of bank data towards the US Treasury in the context of terrorism prevention. Such system permits to have the same consumer protection rules as the ones present in European data processing. It would make sense if the FATCA requirements be under such European control to facilitate the access of personal data to consumers and to obtain the same level of private life and fundamental rights protection.

### **3.2. Insurance policies issued before 2013**

The insurance contracts are usually long-term contracts for which there are no necessarily client transactions in a year. For example, some life insurance contracts require only a single premium or no further premiums. In this situation, the insurers cannot collect data on a regular and timely basis. They will not have the data required by the FATCA enabling them to identify all categories of US persons in their files, and may not be able to obtain it from policyholders of existing policies without time and expenses. They collect the main customer information only at the date of underwriting. Although the insurers register the name, address and date of birth of their customers, they do not collect the information allowing them to determine if a policyholder is a US or non US person.

The application of the customer information and reporting requirements to payments made under existing contracts from the effective date of the FFI agreement would require the companies to check all the customer data of these contracts in its existing systems. They would be obliged to check whether their policyholders are US or non US persons and otherwise, ask them for this information. However, the risk taking rules which apply to European insurers make the number of US clients in their portfolios extremely limited, which only concerns some very special cases. The application of these requirements to payments made under existing contracts would also allow the company to amend the general terms and conditions of all the existing contracts to be conformed to the new rules. The FATCA requirements are very disproportionate.

According to these considerations, we request that the customer information and reporting requirements should not apply to all insurance policies issued before 2013.

We also recommend that the FFI agreement contains a “best efforts clause” stating that the company will not be considered non-compliant for failing to identify all US persons in their files as long as the company adhered to all of the procedures in good faith.

### **3.3. New insurance policies**

For the insurance policies issued from 2013, the contract terms and conditions have to be adapted to the new FATCA requirements. New application forms have to be created to collect the information required, like documentary evidence establishing US or non US customer status or US customer waiver of data protection restriction to enable information disclosure to the US authority. In case the policyholder becomes a US person during the contract’s fulfillment, this one should be in charge of alerting the insurer on it and giving the authorization by a waiver to transfer the information required to the US authority.

For the identified insurance policies hold by US persons, the insurer should report the customer information only upon payments and not on an annual basis.

We believe that the French insurance companies need more time ~ at least two years ~ to comply with the FATCA reporting requirements for new insurance policies in the FATCA scope. Indeed, insurers will have to adopt more robust information gathering procedures and new systems to collect the information required by FATCA. If reporting is required annually (no option to report on payment), insurers will also need to develop additional system enhancements in order to collect, verify and follow new information on their clients. There is here again a distortion between the costs to accommodate FATCA changes and the very limited number of US persons in the insurers’ portfolios.

### **3.4. Compliance costs**

Full compliance with FATCA will create a high level of compliance costs and administrative burdens for the insurance companies, such as the development of data collection and transfer system for new and existing insurance contracts. The collection of information and the identification of US persons

regarding each holder of each policy will be a demanding and costly task for the insurance companies. Thus, the expenses may ultimately be covered by all policyholders and not only by US policyholders.

The FFI agreement process should be made as simple as possible. Accordingly, the requirement for compliance should be at the individual company level and not the worldwide affiliated group approach.

### **3.5. Recalcitrant insurance policy holders**

The case of recalcitrant insurance policy holders needs to be given special consideration.

It seems difficult for the insurers to explain to their US policyholders why a withholding tax would be applicable on their revenues because of their recalcitrance. We wonder about the basis to justify such provision. The French law states that the contracts have effects only between the parties and cannot harm a third person. However, the agreement between the IRS and the foreign financial institution under the FATCA would provide the application of withholding tax to payments made by the FFI to recalcitrant policyholders. This provision would then constitute a negative effect to third persons, namely the insurer's recalcitrant clients.

Moreover, the fact that the insurer applied the withholding tax on policyholders' revenues wrongly could create some disputes and requests of returns for undue withholding tax.

The insurer should not systematically be "non compliant" under FATCA, if its policyholders are recalcitrants, in the conditions that:

- they fail to comply with requests for the information or to provide a waiver under the FATCA, despite several reminders from the insurer, or
- their status has changed during the contract without the insurer being informed.

The contractual terms of policies and the nature of relationships may prevent an insurer from terminating unilaterally the policies concluded with US policyholders.

On this point, we recommend that the FFI agreement contains a "best efforts clause" stating that the company will not be considered non-compliant for failing to identify all US persons in their files as long as the company adhered to all of the procedures in good faith.

Otherwise, the FATCA implementation rules should contain some threshold amount of US source income attributable to either an individual recalcitrant or the insurer's total recalcitrant account holders for withholding tax to be assessed.

## **4. CONCLUSION**

Given the above mentioned information, we conclude that the following elements are essential for the insurance industry with regard to FATCA requirements:

- according to the regulations applicable in France, life and annuity insurance contracts sold by insurance companies in France are not attractive for people seeking to evade US tax liabilities,
- otherwise, FATCA reporting should apply only to policies issued on or after January 1st, 2013,
- the FFI agreement contains a “best efforts clause” stating that the company will not be considered non-compliant for failing to identify all US persons in their files as long as the company adhered to all of the procedures in good faith, and
- the requirement for compliance should be at the individual company level and not the worldwide affiliated group approach.

**FOOTNOTES:**

n1

Law N°78-17 January, 6th 1978