

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
GERMAN INSURANCE ASSOCIATION]

CC:PA:LPD:PR (NOT-121556-10)
Internal Revenue Service
Room 5203
PO Box 7604
Ben Franklin Station
Washington, D.C. 202044
USA

07.06.2011

FATCA Notice 2011-34, German Insurance Association Position

Dear Sir or Madam:

This letter is written on behalf of our 469 member companies. The German Insurance Association (GDV) membership is diverse and includes every component of the insurance industry: life, health, property/casualty and reinsurance. Our member companies represent a combined market share of 97 percent in Germany.

FATCA Notice 2011-34

We refer to your last notice 2011-34 regarding the Foreign Account Tax Compliance Act (FATCA). In view of the wide-ranging impact of the Act's reporting and withholding requirements upon the German insurance industry, we appreciate the opportunity to provide you with our comments (primarily on life insurance matters).

1. Life insurance and private placement life insurance contracts

We fully support the main objective of FATCA, which is to tackle tax evasion by US persons who use Foreign Financial Institutions (FFIs) to shield their US tax status from the US tax authority. But we have to stress that in general insurance products do not pose a high risk of tax evasion.

Life insurance and annuity contracts are primarily designed for a specific purpose, meaning financial protection for old age and protection against an unforeseen event (e.g. mortality risk, disability etc.), rather than income-generation purposes. Insurance contracts are maintained over a long period of time. The duration can be anywhere up to 40+ years depending on the profile of the insured. For investment- or savings-related products, which are of more relevance to FATCA, the terms are typically shorter, usually under 5 years. In fact, termination of an annuity contract or withdrawal of a life insurance policy's cash value will be subject to termination charges and surrender charges that make these contracts far less attractive for investors.

The business model operated by German life insurers consists of selling life insurance products in its home (domestic) market and as such the overwhelming majority of policies do not have any connection with other countries. The number of policies sold which have a connection with other countries is therefore very small and even smaller when considering just the US.

Therefore the GDV strongly believes that German life insurance products normally should be excluded completely from the scope of FATCA.

We understand from *Notice 2011-34* that the IRS/the Treasury is mainly concerned about tax evasion of high net-worth-individuals. In this respect, the GDV believes that tax evasion of these individuals could be only addressed through the concept of private placement life insurance products. Insurance wrappers” (as they are called in Germany) ~ which may be the subject of this concern ~ are asset accounts “wrapped” with a contract in the form of an insurance contract, but very little or no insurance risk is involved. In this case the policy holder controls the investment component. Contributions to this contract can be made in monetary form or in the form of other assets.

We would not object if the Treasury tackled these products. In Germany “insurance wrappers” are e.g. not considered as life insurance contracts under the German framework of the Income Tax Act (‘Einkommen-steuergesetz’, section 20, para 1, no 6, s. 5). These special products (defined by law) are treated as an asset account for tax purposes.

If the Treasury/the IRS does not take into account a complete exclusion of life insurance products (when indicated without wrapper-products), the GDV would appreciate the following further simplifications:

2. Treatment of pre-existing contracts

Due to of German privacy law concerns, we strongly like to stress that all life insurance and annuity contracts sold prior to FATCA implementation must be generally out of the scope. Even if an insurer had information to report under FATCA, the German and European data protection rules prohibit insurers from transferring identification and personal data to US entities without explicit policyholder consent. Besides, Article 2 lit. h of the European Data Protection Directive 95/46/EC requires a “freely given consent”. This condition cannot be fulfilled if the insurer must ~ as FATCA proposes it for the refusal of a waiver ~ announce to separate from customers. Waivers were never obtained for insurance policies sold prior to FATCA.

Furthermore, for prior-to-FATCA contracts, the German insurance industry is not able to generate the information necessary to identify any US tax person for FATCA purposes. One of the main differences between private banking and insurance business is the fact that the information of an individual’s residence, citizenship, and activities described in *Notice 2011-34* is unknown to the insurance company. No one in the insurance underwriting process collects the detailed information about the policy holder’s financial activities and family relationships that a private bank account manager would/could have. Insurance systems are typically far less developed than those of other financial services systems such as banking. Primarily, all that is recorded ~ at time of contract conclusion ~ is name, date of birth,

address and health information. For unit-linked insurance products fund choices will also be recorded. This reflects the fact that insurance companies typically require less information from customers than other financial products.

In addition to this, insurance customers, unlike in banking, do not need the same level of interaction with insurance companies as a bank. In most cases, once a policy is issued, the only contact takes place when a client is issued annual statements.

Furthermore, the distribution models of banks and insurers differ significantly. Insurers sell most of their products by independent intermediaries like brokers or agents. Even if an independent intermediary (broker or agent) obtains a strong relationship with the customer, the insurance company does not have any right to access this knowledge.

Please keep in mind that the existing systems have never been designed to capture and store this data and permit an electronic search or a data transfer to the IRS. As a result of this, the amount of historic data on insurance systems will be significantly less than on banking systems and we believe that it will not be of sufficient quality for an adequate systematic review. A manual review of files is also not possible as it would represent a wholly disproportionate burden on insurance companies and would be prohibitively expensive and would take too many years to complete.

In addition, experience has shown that policyholders have no incentive to agree to any reporting of their personal information to a foreign government.

Due to significant differences in the business models of insurers and banks, the process outlined in *Notice 2011-34* for banks is not applicable to existing insurance contracts.

3. Low “cash value” policies and high cash value accounts

In the event that the IRS does not accept our proposal (exclusion of all life insurance products/exclusion of all pre-existing contracts), the GDV believes that FATCA reporting should only apply to policies above a \$ 50.000 cash value threshold. For our 112 life insurance companies with their concluded approximately 95 million life insurance policies this minimum amount (= low risk of tax evasion) would be a little easier to apply and reduce the administrative burden.

In that regard, we urge the Treasury to adopt a definition of “*cash value*”. Cash value should be defined as *the net cash available after all fees, penalties for early termination and transaction costs*. German insurers are obliged to provide the policy holder with this value (net surrender value) on an annual basis.

In light of all relevant circumstances, and to prevent creating an excessive burden on reporting entities, the GDV welcomes the possibility outlined in the Notice which enables all members of the group to report separately. A consolidation of all accounts of one account holder across various FFIs of an expanded affiliated group is only feasible within a single electronic data base which even large insurance groups often do not have in different entities and countries.

Further, the GDV proposes a procedure of an electronic search for US-indicia within the existing client data base and would offer a more diligent search routine for high cash value accounts that exceed \$ 500,000. In case the FFI detects through electronically searchable information life policies with U.S indicia having a value of \$ 500,000 or more, insurers would conduct manual reviews of any paper files related to such policies for any potential US account holders.

4. New policies

In case of new policies, given sufficient time, there might be a possibility to be FATCA-conform and potentially collect the specific data and the written permission for data transmission to the Treasury from the new customers. Nevertheless, a low cash value exception (\$ 50.000 limit) is essential to reduce the administrative burden (see above) and we have to point out regarding the definition of a US person that for example it is technically not possible today for an insurance company to monitor the length of stay of a customer in the US.

5. Retirement plans/occupational pension

The GDV strongly supports the exclusion of foreign retirement plans (occupational pensions), but we recommend to use the following American Council of Life Insurers (ACLI) definition proposal, because retirement plans are designed differently across the world and are highly regulated in a different way:

“A foreign retirement individual plan or employer plan is one that provides pension or retirement benefits under the laws of the country in which it is established and is regulated with respect to contributions, distributions, reporting, sponsorship, and taxation. A retirement plan may also include provisions for insurance benefits to a disabled covered employee or to a deceased covered employee’s surviving spouse or dependent.”

6. Long term recalcitrant account holders

Notice 2010-60 and the new notice 2011-34 request comments concerning possible sanctions (including termination of an FFI agreement) of an FFI which has long-term recalcitrant account holders. The GDV recommends to reconsider the IRS intention to terminate FFI agreements, Otherwise the FFI would be penalized, even if it has complied with requirements to obtain evidence that the account holder is not a US person. If an insurance company shows that it does its best efforts vis-a-vis a recalcitrant customer, the IRS should not penalize such insurance company.

In this respect it is also important to note that there is no permission under German or European insurance law to cancel an insurance policy or to withhold on benefit payments.

7. Passthru payments

The GDV wants to stress that the concept of passthru payments outlined in *Notice 2011-34* is an example of a concept that may function in the custodial or depository institution model, but it is not applicable to insurance companies. The insurer, on the one hand, is not the custodian of payments and, on the other hand, the insurance company is the owner of the underlying assets.

8. Local deemed compliant FFI

We welcome the idea of a deemed compliant status for local FFI members of a participating FFI group. As noted life insurance business is mostly limited to the company's country of organization, especially for large multi-national insurance groups. Focusing on life insurance business, the GDV would like to propose a modified definition for the deemed-compliant status. We suggest that a local FFI (insurer) of a participating FFI group should be deemed compliant if it is a legal entity with

(a) no subsidiaries, branches and

(b) no marketing of products

outside its country of organization and must only be licensed and regulated as an insurance company in its country of organization.

9. Lead FFI

The designation of a single FFI as "lead FFI" seems to be helpful but it should just be a viable alternative for FFI groups to streamline the FATCA procedure.

10. Holding companies

We are still of the opinion that holding companies should not qualify as Foreign Financial Institutions as their investment activities are not comparable to those targeted by FATCA.

Sincerely,

(Dr. Schwark)

(Wagner)

GDV
Berlin