

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
SWISS RE AMERICA HOLDING CORPORATION]

[November 1, 2010]

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

RE: Swiss Re Comments on *Notice 2010-60* Priority Issues Identified for Forthcoming Guidance on the Application of Chapter 4 of the Code Issues of Interest to the Insurance and Reinsurance Industries

Dear Sir or Madam:

On behalf of Swiss Re America Holding Corporation and affiliates, I respectfully submit this comment letter in response to guidance published by the Internal Revenue Service and the Department of the Treasury in *Notice 2010-60*, *2010-37 I.R.B. 329*, with regard to the foreign account tax compliance provisions (“FATCA”) of the Hiring Incentives to Restore Employment Act of 2010, Pub. L. 111-147(the “Act”).

The Notice is an excellent first step towards determining how FATCA should be applied to the insurance and reinsurance industries. Uncertainty remains, however, as to how FATCA should be applied to insurance and reinsurance companies.

Accordingly, Swiss Re recommends that Treasury and the IRS issue the following further guidance which would clarify the application of FATCA to the insurance and reinsurance industries. Swiss Re believes that the following recommendations are consistent both with the policy considerations underlying FATCA, and with the approach to the insurance and reinsurance industries outlined in the Notice.

- *Treasury and the IRS should clarify that an insurance or reinsurance company engaged solely in issuing insurance or reinsurance contracts other than annuities or cash value insurance contracts may qualify for the exemption from treatment as a foreign financial institution even if it is not actively conducting a trade or business.*

The Notice states that Treasury and the IRS intend to issue regulations treating entities whose business consists solely of issuing contracts other than annuities and cash value insurance contracts as

non-financial foreign entities (“non-FFE”) for purposes of FATCA. The reference to entities whose “business” consists solely of issuing contracts other than annuities and cash value insurance contracts could be read to imply that an entity would not qualify for this exemption from treatment as a foreign financial institution (“FFI”) unless it were engaged in the active conduct of an insurance or reinsurance business.

It is not uncommon for special purpose insurers or reinsurers to issue one reinsurance contract, or a limited series of reinsurance contracts. In addition, especially in the case of reinsurance, foreign companies may not require the level of activity and number of personnel normally associated with the active conduct of a trade or business. Therefore, there is a risk that foreign insurance or reinsurance companies that are engaged solely in issuing insurance or reinsurance contracts that are not annuities or cash value insurance contracts may not be considered engaged in the active conduct of a trade or business under general U.S. tax principles.

The policy reasons for why a company engaged solely in issuing insurance or reinsurance contracts that are not annuities or cash value insurance contracts should not be treated as an FFI apply regardless of whether the entity is engaged in the active conduct of a trade or business. In addition, the term “business” appears in multiple locations in the FATCA legislation, but the prevailing view is that such references to “business” do not imply “active trade or business.” n1

Accordingly, the IRS should clarify that an insurance or reinsurance company otherwise engaged solely in issuing insurance or reinsurance contracts that are not annuities or cash value insurance contracts need not be engaged in the active conduct of a trade or business in order to qualify for the exemption from treatment as an FFI.

- *Treasury and the IRS should clarify that for purposes of determining whether an entity is engaged solely in the issuance of contracts other than annuities and cash value life insurance contracts, derivative financial instruments that are substantially similar to insurance contracts should be treated, for purposes of FATCA, identically to insurance or reinsurance contracts.*

Insurers and reinsurers frequently assume risks by way of derivative contracts, as well as by way of insurance or reinsurance contracts. Examples of such contracts would include weather derivatives and industry loss warranties, where the amount paid by the insurance or reinsurance company is computed by reference to an objective index (weather conditions in the case of a weather derivative, and overall losses in the case of an industry loss warranty). This is especially true in foreign jurisdictions, which may not impose the kinds of restrictions on entering into derivatives that exist in the United States. There are numerous reasons why parties might choose to enter into derivatives rather than insurance or reinsurance contracts, such as regulatory restrictions, ease of documentation, and the ability to offset income and losses from different transactions among the same parties against each other.

Because insurance or reinsurance companies that enter into derivative contracts are nevertheless performing the same function as insurers or reinsurers who enter into insurance and reinsurance contracts, the same policy considerations which require treating insurers and reinsurers as non-FFEs apply equally well regardless of whether the company enters into derivatives or insurance contracts. Accordingly, the IRS and Treasury should issue further guidance which states that for purposes of determining whether a foreign insurer or reinsurer is considered engaged solely in the issuance of contracts which are not annuities or cash value insurance contracts, insurance-related derivatives such as weather derivatives, industry loss warranties and similar instruments which are substantially similar to insurance and reinsurance contracts should be treated identically to insurance or reinsurance contracts.

- *Treasury and the IRS should clarify that the treatment given to “cash value insurance contracts” does not apply to property & casualty insurance or reinsurance*

The FATCA legislative history states that Treasury may prescribe special rules addressing the circumstances in which insurance companies will be treated as financial institutions, and the circumstances in which certain contracts or policies, such as annuity contracts and “cash value life insurance contracts,” will be treated as financial accounts or United States accounts for purposes of FATCA. The legislative history does not mention, nor authorize Treasury or the IRS to treat non-life insurance or reinsurance policies as, “cash value insurance contracts.” The legislative history makes clear that it was only annuities and cash value life insurance contracts that were a matter of concern for Congress.

Nevertheless, the Notice states that insurance or reinsurance companies that are engaged solely in issuing annuity contracts and “cash value insurance contracts” will not be treated as FFI. There is no evidence that there were any non-life policies which Congress felt would be treated as financial accounts for purposes of FATCA, or cause an insurance or reinsurance company to be treated as an FFI. Nor is it clear what kind of non-life policy would meet the definition of a “cash value insurance contract” since there is no property & casualty equivalent to the whole life policy. Finally, if Treasury and the IRS were to attempt to identify non-life cash value insurance contracts they would arguably be exceeding the authority granted by Congress with the enactment of FATCA.

Accordingly, Treasury and the IRS should issue further guidance that no non-life policies will be treated as cash value insurance contracts.

We appreciate the opportunity to comment on this very important tax matter and would welcome further discussions. Please feel free to contact me at cosette_simon@swissre.com if you would like to discuss this further or have any questions or concerns.

Sincerely,

Cosette Simon
Swiss Re America Holding

Corporation
Washington, DC

FOOTNOTES:

n1

See Lee A Sheppard, *News Analysis: Questions Posed by the FATCA Notice, 2010 TNT 205-1* (an entity need not have a trade or business to be an FFI).