

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY  
TRYGHEDSGRUPPEN SMBA]

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Dear Mr Shay, Ms Corwin and Mr Musher

**Re: FATCA (new chapter 4) and notice with reference**

TryghedsGruppen smba (hereinafter TG) hereby hands in our comments in respect of the new proposed chapter 4 to the Internal Revenue Code and the previous notices given by you. We are concerned that FATCA will cause massive administrative and practical problems if a mutual company like TG is not exempted independent of the ownership of underlying subsidiaries.

TG is a Danish mutual company that acts as holding company for a general insurance company (Tryg Forsikring A/S) and uses the investment income from the investment in the general insurance company to invest in other businesses within health, rescue and safety and non-profitable activities such as donations to research in the same areas including various donations. Free excess funds are invested in ordinary securities including US-securities.

In this context, being mutual implies that the company is governed by a Committee of Representatives elected by and among Danish policyholders in a Danish general insurance company as well as Danish policy-holders in a Danish life insurance company, and that it is the policy of the Company that the

funds in the Company are to benefit not just one generation but also future generations. There is accordingly no access to distribution of funds and the policyholders have no right to receive funds when ceasing to be a policy-holder.

We believe that companies that are organized like TG ~ even though considered to be a Foreign Financial Institution ~ on the whole should be exempt from the requirements of chapter 4 as a class of persons that poses a low risk of tax evasion re. the suggested Chapter 4, *section 1471*, f) Exception for certain payments according to which no withholding shall apply if “any other class of persons identified by the Secretary for purposes of this subsection as posing a low risk of tax evasion.” The exception should as mentioned apply even though the Company is a holding company for a foreign financial institution.

In this relation it should be mentioned that the Company has no accounts as the financial accounts defined in *Section 1471 (d) (2)* and the fact that it is affiliated to a financial foreign institution should not be enough to include the Company under the rules.

In relation hereto it is acknowledged that the Company does not meet the conditions for exception as stipulated by you in notice 2010-60 regarding an exception of certain holding companies but it should nevertheless for other reasons be excepted based on the fact that it will be neither possible nor attractive to use the Company for tax evasion.

An exception of this kind of entity from the FATCA-legislation would accordingly not have a negative effect on the aim with the FATCA legislation and it would limit the number of entities that should have an agreement with the IRS.

It should be mentioned that when drafting this letter we have consulted Deloitte in Denmark to have their opinion on the content ~ description of our organisational structure and its relation to the purpose with the FATCA legislation in relation to the non existing risk for being used for US tax evasion. Their comments have been implemented in the letter.

### **Facts on the Company**

As mentioned in this context, being mutual implies that the Company is governed by a Committee of Representatives elected by and among the Danish policy-holders in a Danish general insurance company as well as Danish policy-holders in a life company.

The company is the result of a restructure of two mutual insurance companies.

As regards restructuring, the insurance activities were split into two limited liability subsidiaries (one non-life insurance company and one life insurance company) issuing shares as consideration for the received insurance activities. The life activities were sold in 2002 but the policy-holders continued as members of the Company.

## *Members*

There are no shareholders or owners in the Company, but there are “members” (policy-holders).

It follows from the Articles of Association that members are limited to Danish policy-holders of two Danish insurance companies. In this connection, a policy-holder is deemed Danish when the relevant person is a resident in Denmark or the enterprise has its registered office in Denmark.

It also follows from the Articles of Association that the members are not liable for the Company’s obligations and that a member, when resigning from the Company (due to the fact the he/she no longer holds a policy in the insurance groups in question), has no claim for any portion of the assets in the Company. There are no articles on distributions of fund and it is stated in the Articles of Association that the Company’s assets and income may only be paid to the members on dissolution of the Company and only if such dissolution does not take place as part of a merger with another company.

There are presently more than 1.000.000 members each one with equal influence on the company.

## *Dissolution of the Company*

The Company can only be dissolved if its Committee of Representatives decides to do so by qualified majority, meaning three fourths of the representatives. The Committee of Representatives is only quorate if half of the representatives are present, although a representative may also be present by proxy.

The Committee of Representatives is made up of 70 members elected by and among the Danish policy-holders of Tryg Forsikring A/S and Nordea Liv & Pension, livsforsikringsselskab A/S for a five-year period. In order to be elected, the member must be a natural person holding a policy with Tryg Forsikring or Nordea Liv & Pension and permanently residing in the electoral district. Nomination of a member is conditional on the member having 25 proposers.

Referring to “failure of assumptions”, a member of the Company has sought for years to have the Company found against for the dissolution thereof or, alternatively, to claim his pro rata share of the net assets in the Company. The Danish Supreme Court ruled against the claims in 2010, referring to, amongst others, the unusual nature of Company, including the members’ limited rights and obligations. Therefore, this could not be considered a case of disregard of an assumption of the policy-holder protected by law.

## *Objective of the company*

According to Article 2 of the Articles of Association, the mutual Company’s objective is

- to directly or indirectly hold shares in companies which carry on insurance business in Denmark or abroad or any other business which is permitted under Danish or foreign legislation on financial business;

- to hold shares in companies which carry on security building business other than the business as referred to in item 1;
- to carry out regular asset management of own funds;
- to support activities for the benefit of Danish policy-holders in general, including ~ but not limited to ~ damage prevention, sickness prevention, safety and security building activities;
- to support activities benefitting society and activities ensuring quality of life, including ~ but not limited to ~ education and training as well as for cultural, scientific, social and environmental purposes in Denmark.

#### *Activities*

The Company is as follows from the Articles committed to security, health and well-being ~ both in commercial matters as well as non-profit matters.

The philosophy and strategy of the Company is that the funds in the Company are to benefit not just one generation but also future generations in Denmark. This is done through health and insurance activities considerably contributing to health and security in the Danish society as well as through non-profitable benevolent activities such as donations and support to:

- Research in the designated areas of interest ~ deceases, health care, safety
- Hospitals,
- A program with life guards on Danish beaches during the summertime,
- Reduction of the number of traffic casualties,
- Prevention of and reducing risks from fire ~ education programs etc.
- Health care projects of various kinds with the aim of increasing the general health situation of the Danish population

- Preventive projects against violence and harassment

The Company holds 60% of the shares in a General Insurance Group, which is a listed company with 40%. This company is Denmark's largest and Scandinavia's second largest non-life insurance group with risk policies.

Besides this the Company owns and invests in shareholdings in companies operating in the health care, rescue and safety sectors in the Nordic Region ~ fitness centres, home care and other private healthcare businesses. The percentage of shareholding in the companies ranges from 45% to 100% but most of the investments are majority shareholdings.

Finally, the Company makes investments as part of regular asset management of its own free capital and it is this part of the activities in the Company that includes investments in US securities and payments from US.

#### **New Chapter 4 - Taxes to enforce reporting on certain foreign accounts**

The new Chapter 4 to the Inland Revenue Code contains rules for taxes with the aim to enforce reporting requirements on certain foreign accounts and the legislation is enforced on Foreign Financial Institutions.

Foreign Financial Institutions are under *section 1471(d)(4)* defined as any financial institution which is a foreign entity, (A) accepts deposits in the ordinary course of a banking or similar business, (B) holds financial assets for the account of others as a substantial portion of its business, or (C) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities.

The Company in question ought not itself qualify as a Foreign Financial Institution itself following the above definition why the FATCA rules should not be applicable hereto.

It however follows from notice 2010-60 that a holding company may also be considered a foreign financial institution and it is in the notice indicated that certain holding companies will be excluded from the FATCA legislation. At the same time it is mentioned that the holding company of a foreign financial institution not will be exempted from the FATCA legislation. In this relation, a holding company is defined as a company holding more than 50% of the interest in the subsidiary.

The existing FATCA rules accordingly encompass the Company based entirely on the fact that it is a holding company to a Foreign Financial Institution not taking into account the de facto organization of the Company.

According to notice 2010-60 section III B it is possible to be treated as deemed compliant as "local FFI members" of an affiliated FFI group. The provision provides that the FFI member must maintain no

operation outside its country of organization, not solicit account holders outside its country of origin and follow the same procedures as all other FFI's to identify US accounts.

If companies such as TG cannot be exempted from the FATCA-legislation we suggest that the documentation requirements are lowered based on the fact that it is a question of a low risk.

### **Arguments for an exemption from the FATCA-legislation**

It is our belief that TG, on the basis of the below-mentioned facts, poses a low or no risk at all for tax evasion for US tax purposes and accordingly should be exempted from the FATCA requirements:

- The company has no shareholders and it can best be described as a private foundation with no owner interest.
- Instead of shareholders there are members, and in order to be member of the Company it requires that you hold an insurance policy in two specific Danish insurance companies and that you are considered a Danish policy-holder. According to the Articles of the Company, in order to be considered a Danish policyholder it requires that the policy-holder is a resident in Denmark or if a legal person has its registered office in Denmark.
- That the Company according to the Articles is not able to distribute any funds to its members and that the members have no right to any part of the assets in the Company when the policy-holder ceases to be a policy-holder in the specific Danish insurance companies.
- That any payment of funds to the members requires the Company to be liquidated which requires a drastic change in the present business philosophy/strategy as well as it will be very difficult based on the quorum requirements in the Articles of the Company.
- That the members have no accounts with TG and that TG has no accounts for others.
- If the company cannot be exempted in itself it should at least be exempted based on the fact that it is holding company to a general insurance company that has no insurance policies with any face value.

It should be mentioned that the fact that the Company qualifies as holding company to a foreign financial institution not should be enough to be encompassed by FATCA. It is still a question of a Company with low or no risk for US tax evasion.

An exemption should of course apply to any other company or fund with similar characteristics posing a low or no risk for US tax evasion.

If you have any comments or questions to the facts or our views please do not hesitate to contact us for more details.

Yours sincerely

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