

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY  
THE VIG GROUP

May 24, 2011]

**VIG Group's second response to IRS Notice 2010-60 and IRS Notice 2011-34 regarding the implementation of Foreign Account Tax Compliance Act (FATCA)**

The VIG Group on behalf of VIENNA INSURANCE GROUP AG Wiener Versicherung Gruppe and its subsidiaries welcomes the opportunity to provide comments on the IRS Notices 2010-60 and 2011-34 regarding implementation of information reporting and withholding under the new Foreign Account Tax Compliance Act (FATCA) provisions.

VIG Group is one of the leading insurance groups in Central and Eastern Europe, headquartered in Vienna, Austria. VIG Group represents more than 50 insurance companies in 24 European countries. VIG Group's product portfolio includes a wide range of insurance products for both individual and corporate customers, such as property and casualty insurance, health and life insurance and reinsurance.

In the context of FACTA, we consider the business of European insurance companies to be low risk from the perspective of U.S. tax evasion as European insurers mainly address local markets in doing business. For this reason, the portion of U.S. persons related to the portfolio of a European insurer is generally negligible.

VIG Group has already provided initial comments to IRS Notice 2010-60 on 30 November 2010 which are still valid given the lack of changes and further specific guidance on the insurance sector in recently published IRS Notice 2011-34. Therefore, VIG Group would like to generally refer to its initial comment letter and rather focus on specific additional topics and issues that were considered in the meantime whilst also taking into consideration relevant aspects of Notice 2011-34 published by the IRS on April 8, 2011.

**Decentralized group organization and delays/non-compliance within an expanded affiliated group**

We understand that the IRS requests a common decision of an expanded affiliated group of FFIs whether to participate in the FATCA regime (and be compliant with FATCA upon a contractual agreement with the IRS) or not with the decision being binding for all members of the expanded affiliated group.

We also understand that all companies within an affiliated group structure including (at least) one participating FFI therefore need to be either participating FFIs or deemed compliant FFIs.

VIG Group represents more than 50 insurance companies in 24 European countries with various acquisitions of group companies having been made within the last few years. VIG group anticipates that some companies located in certain CEE countries might not be able implement FATCA in time to be in line with the rest of the members of the expanded affiliated group. The reasons may vary but will to a large extent be due to organizational, economic or structural constraints.

Consequently, VIG group expects to have a delay for the implementation of FATCA for certain members of the expanded affiliated group and therefore recommends considering transitional regulations providing guidance and exceptions for those situations so this does not pose risks and penalties to the rest of the group being FATCA compliant.

In this respect, we therefore recommend to include (e.g. in the FFI contract) a “best efforts clause” that pays attention to such issues. This clause should also be structured in a way to ensure that the IRS abstains from levying penalties and fines in any cases where an FFI makes its best effort to ensure compliance with the FATCA regime but is not able to correct specific mistakes being made given the tight deadline for implementation. VIG group assumes that this might also be the case for various other larger groups operating in the insurance industry.

#### **Restriction on data collection and reporting on insurance contracts that are issued before January 1, 2013**

Insurance contracts (in particular life insurance) run for many years resulting in portfolios often dating back significant time duration. There is limited client interaction in the insurance business compared to other financial services industries. The information required for conducting the life insurance business is less than in other financial service industries due to the nature of insurance contracts. As a result, many insurance companies do not have as advanced and comprehensive data systems as those established in other financial service industries (this relates to know-your-customer information as well as to asset tracking).

Regarding the collection of the necessary data the insurance company could only request the information from the contract holder, but has no power to compel the provision of the information.

VIG Group would not only have practical limitations on their ability to solicit such information but also legal limitations (including but not only limited to Austrian privacy law, see also below). This would result in many policyholders being defined as recalcitrant account holders and subject to a 30% withholding tax. As far as existing policies are concerned, we doubt about the legal basis to justify such provision (contracts generally cannot harm a third person) and the legal right to cancel existing policies and contracts because of a refusal to provide the required information.

VIG Group is also concerned that the data collection could be prevented by the European Union Data Protection Directive (Directive 95/46/EC), We understand that there should have already

been discussions on this topic with the IRS, Therefore this issue should be investigated in detail in order to determine, if the European Commission and the IRS need find a common solution on a European level in this case.

Furthermore, the application of FATCA on contracts that are issued before 1 January 2013 would attack the personal rights of individuals (also of non U.S. persons!) as this would mean an intervention in existing contracts.

Summarizing, it would be difficult and create significant expenses for the insurance industry to gather the information that has to be provided to the U.S. tax authorities under the scope of FATCA if the policy holder agrees respectively and moreover, the insurance industry might have no power to enforce provision of the required data by policyholders.

Considering these concerns VIG Group strongly recommends that all existing contracts as of January 1, 2013 should be grandfathered and the FATCA provisions are applicable only for new contracts written from that date onwards.

If the IRS cannot provide this grandfathering rule, we recommend excluding all policies and contracts that do not possess the attributes of a tax-evasion financial instrument (e.g. life insurance etc). Contracts that include a specific risk component are not likely to being used for tax evasion by US investors and therefore should also be excluded from the FATCA regime for this reason. Contracts and policies that are considered to give rise to potential tax evasion (which should—given to the lack of risk involved—be limited to insurance wrapper products) should be subject to a certain threshold (e.g. USD 1,000,000).

### **Prohibition for US persons to sign insurance contracts that are issued after January 1, 2013**

If Treasury and IRS do not come to the conclusion that insurance companies are generally treated as NFFEs, practicable solutions for European insurance companies not issuing policies after January 1, 2013 to U.S. account holders have to be established.

If a European insurance company prohibits U.S. account holders to sign its insurance contracts, the company should be treated as meeting the requirements of a “*deemed compliant FFI*”. VIG Group believes that additional guidelines should be released by the U.S. tax authorities in this matter. Such guidelines will be necessary to detail the procedures that an insurance company has to follow in order to ensure that the company does not maintain U.S. accounts (e.g. necessary documentation that there are no U.S. accountholders related to the portfolio).

In this respect, VIG Group proposes to treat insurance contracts as meeting the requirements if the insurance company can provide evidence that no U.S. resident persons is allowed to sign insurance contracts of the respective insurer. Residency should be defined according to the residency rules for U.S. tax purposes (Section 7701(b) Internal Revenue Code).

Such evidence could be obtained by a written clause within the terms of all *new insurance contracts* (as of 1 January 2013 onwards, for the general exclusion of old insurance contracts please refer to above) stating that no U.S. resident person is allowed to sign insurance contracts. By signing the insurance contract the respective contract holder would have to confirm that he is not a U.S. resident person according to U. S. tax law. The respective account holder would also have to confirm to notify the insurer if he becomes a U.S. resident person and take the necessary steps—which would have to be defined by the IRS in further guidance—to ensure FATCA compliance.

We agree that such a self-assessment might be subject to specific rules and guidelines issued by the U.S. tax authorities. VIG Group believes that this suggestion would be an appropriate means to provide evidence that the insurance company does not issue new policies to U.S. account holders.

From Notice 2010-60 issued by the IRS we understand that certain insurance products are deemed not to pose risk of tax evasion by US persons and are not considered to be in scope of FATCA. The remaining products that are currently still being discusses because the impact is not yet clear, should only compose of life insurance products.