



## **FATCA – Reporting on holders of U.S accounts**

Insurance Europe, the European insurance and reinsurance federation, welcomes the opportunity to provide the Financial Market Group with additional information on reporting obligations under Foreign Account Tax Compliance Act (FATCA) with respect to holders of US accounts and the availability of this information.

FATCA requires that "foreign financial institutions" ("FFI") obtain and report information with respect to a financial account which is held by a U.S. person. Failure to comply with FATCA reporting obligations results in a severe consequences for the FFI. Firstly, a 30% withholding tax on any U.S. source withholdable payment to the FFI will be imposed. Next, the FFI is obligated to cancel a contract to compel the policyholder to assist the FFI to comply with FATCA requirements. If European insurers cancel policies without a right to do so they run the risk of legal action by the policyholder for reinstatement of the policy and damages and sanctions by regulators up to an including suspension of insurance licensing. Insurers are thus not in the position to cancel long-term contracts and therefore are unable use this threat to compel their policyholders to assist the insurer in complying with FATCA requirements (requirements of a foreign law).

The draft FATCA regulations as published on 8th February include life insurance companies as financial institutions. The proposed regulations include any life insurance or annuity contract with cash value of more than zero. It is worth mentioning that FATCA reporting obligations apply to both existing (with a cash value of \$250,000 or more) and new policies.

Note that currently France, Germany, Italy, Spain and the United Kingdom are engaged in negotiations with the US to explore a common approach to FATCA implementation. These negotiations are focussing on utilising local tax authority reporting and reciprocal exchange of information based on existing bilateral tax agreement, as opposed to direct FFI reporting to the IRS. We welcome and support this approach and consider that as an EU wide solution it would simplify practical implementation and reduce FFI costs. However, these negotiations have not been concluded yet and their ultimate impact will depend on the manner in which they are implemented. In our view, the opinion of Art. 29 Working Party on FATCA would substantially reinforce this position and would encourage the European Commission/Member States in any future negotiations with the IRS/U.S. Treasury.

### **Reporting on U.S. citizenship according to FATCA provisions**

The proposed FATCA reporting obligations are detailed in Section & 1.1471-4 (4c) of the FATCA draft regulations (Identification procedure and documentation for individual accounts). According to these provisions, a FFI is required to enter into an agreement with the US Internal Revenue Service (IRS) and to obtain information to enable it to determine which (if any) of its accounts are United States accounts.

A U.S. account is defined under section 1471 (d) (1) as any financial account held by one or more specified US person. In order to determine a status of US person, the FFI is obliged to search for a wide range of indicia of US status. For this purpose, US indicia include: (a) identification of the owner as a U.S. resident or citizen; (b) U.S. place of birth; (c) U.S. resident address or mailing address; (d) U.S. telephone number; (e) standing instructions to transfer funds to a U.S. account; (f) power of attorney or signatory authority granted to a person with a U.S. address; or (g) an "in-care-of" or "hold-mail" address that is the owner's sole address. Furthermore, the FFI must perform a manual search of its records for all existing accounts that have a balance or value that exceeds \$1 million if the electronically searchable files do not contain sufficient information about the account holder.

### **Availability of information on U.S. citizenship under existing reporting systems.**

FATCA provisions go beyond the concept of beneficial owner on which existing EU legislation addressing questions of financial crime or tax evasion are based, such as Anti-Money Laundering provisions or the European Union Savings Directive. This presents a problem for European insurers as it means the information



required by FATCA to identify all US persons is not currently available in their records. As outlined below, we do collect information on addresses, so if records show a US address that can be reported.

■ Anti-Money Laundering

Anti-Money Laundering provisions are designed to prevent the use of the financial system for the purpose of money laundering by criminals and terrorists. In that regard, financial institutions, including insurance companies, are obliged to keep appropriate records, establish internal procedures to train staff and guard against money laundering and to report any indicators of money laundering to the competent authorities.

Furthermore, under the Anti-Money Laundering rules the identity of a new policyholder must be established, but as part of such checks the European insurance companies are not required to record the U.S. indicia. The personal data collected and that an insurer is able to retain is that required to meet legal requirements and maintain the policy. For example, for an investment bond application a life company will typically ask for name, address, date of birth, contact telephone, occupation, salary (for affordability) and bank details.

■ The European Union Savings Directive ("EUSD")

The aim of the EUSD is similar to the main objective of FATCA, meaning tackle tax evasion by individuals who use foreign financial institutions to shield their tax status from their home country tax authorities. In this respect, the EUSD established the system of exchange of information between Member States concerning interest payments paid to individuals. Each Member State needs to adopt and ensure the application of the procedures necessary to allow the financial institutions ("paying agent") to identify the beneficial owners ("individual receiving an interest payment").

The scope of existing EUSD does not include insurance products. However, the EUSD is currently undergoing revision. In this respect, the revised draft version of the EUSD extends its scope to certain life insurance products. It is worth mentioning that both the existing and revised draft version of the EUSD does not require financial institutions to report the U.S. indicia. The EUSD requires financial institutions to report on the following data: identity and residence of beneficial owner, name and address of the paying agent, the account number of the beneficial owner, or if there is none identification of the debt claim giving rise to the interest, either the benefit to the life insurance policy or the total amount of payment.

**Conclusions**

FATCA reporting obligations impose on insurance companies' obligation to search in their existing accounts (with a cash value of \$250,000 or more) for the US indicia and report on them. However, the information necessary to identify U.S. tax persons is not always available for review as provision of this information was never anticipated at the point of designing existing insurance reporting systems. Furthermore, insurance companies will be in conflict with EU data protection legislation as implemented in member states if they were to provide FATCA required data.