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Gentlemen,

International Capital Markets Association/Comments on the Foreign Account Tax Compliance Act of 2009 (H.R. 3933, S. 1934)

On behalf of the members of the International Capital Market Association ("**ICMA**"), we thank you for the opportunity to comment further[1] on the proposed Foreign Account Tax Compliance Act of 2009 ("the **Bill**").

ICMA is a self regulatory organisation representing a broad range of capital market interests including global investment banks and smaller regional banks, as well as asset managers, exchanges, central banks, security depository and clearing institutions, law firms and other professional advisers amongst its 400 member firms. ICMA's market conventions and standards have been the pillars of the international debt market for over 40 years, providing a self regulatory framework of rules governing market practice which have facilitated the orderly functioning of the market. ICMA's primary debt market committees[2] gather the heads and senior members of the syndicate desks and legal transaction management teams of around 20 ICMA member banks most active in lead-managing syndicated eurobond issues. This is an €8 trillion market, with approximately 15% being accounted for by U.S. issuers. Approximately 80% of those U.S. issuances are in bearer form – i.e. just under €1 trillion.

We note that several features of the Bill create a meaningful framework to combat tax abuse – something the ICMA fully supports. We wish, however, to highlight our serious concerns regarding certain provisions of the Bill which could substantially restrict access to international credit markets by U.S. corporations at a moment when access to credit is critical to economic recovery, as well as causing major disruption to the international capital markets more generally. ICMA members are already noticing market impact, including transactions by U.S. issuers being postponed.

Section 101, Information Reporting by Foreign Financial Institutions

The Bill would impose a withholding tax of 30% on payments on securities of U.S. issuers if the financial intermediaries through which the payments are made do not comply with the reporting requirements set out

[1] ICMA's initial submission of 5 November can be found at: http://www.icmagroup.org/ICMAGroup/files/c3/c35cd9ae-60e6-44a7-9292-1b6224ca5032.pdf.
[2] http://www.icmagroup.org/about1/isma1/legal_and_documentation.aspx and http://www.icmagroup.org/about1/isma1/primary_market_practices.aspx.

in the Bill. This effectively imposes third party risk on investors, who will suffer the withholding not through their own wrong-doing, but because of the non-entry of a financial intermediary (over whom they will have no control) into the new reporting agreement contemplated by the Bill. Non-U.S. investors may not be able to recover the withheld tax unless they are permitted to do so by a relevant double tax treaty, and even then will suffer loss through the delay in receipt of the funds. It is very difficult for non-U.S. investors to assess the third party risk, because holding structures in the international markets often involve long chains of financial intermediaries. For example, the investor may hold a bond through a custodian, which will hold through a bank that is a participant in a clearing system. The bond will be held for the clearing system by a depositary bank, which will receive payments from the issuer's agent bank. If each of the institutions in this chain has to be compliant for U.S. tax purposes, then it will be impossible for the end-investors to properly assess the risk of non-compliance. The only information available to end-investors would be an assurance by their intermediary as to the both the initial and then the ongoing compliance status of the entire chain, which, if incorrect, would not protect the end-investors from imposition of the withholding tax. Indeed, even if the investor could properly assess that risk, it is highly doubtful whether he/she will wish to take it. Once they perceive this third party risk, investors in the international markets could well avoid investment in securities issued by U.S. entities, thus effectively closing the international markets to such issuers.

Section 102, Repeal of Certain Foreign Exceptions to Registered Bond Requirements

As currently drafted, section 102 of the Bill would potentially eliminate the ability of corporations to raise funds through the issuance of bearer bonds in the international capital markets. The Bill achieves this through its mandate that all capital markets debt instruments (other than certain short-term obligations) must be issued in registered form. As mentioned above, we estimate that at the present time approximately €1 trillion of Eurobond debt has been issued in bearer form by U.S. companies.

Under current law, both U.S. and non-U.S. issuers of debt instruments can issue bearer bonds, but only if the issuance complies with requirements of the Tax Equity and Fiscal Responsibility Act of 1982 ("**TEFRA**"). Those requirements are designed to ensure that U.S. persons do not acquire bearer bonds. This is accomplished through a number of mandatory bond issuance procedures, including a requirement that bearer bonds not be offered or sold to U.S. persons or to anyone within the United States, as well as by obliging participants in the issuance of bearer bonds to obtain certification confirming that purchasers are not U.S. persons, in a manner which complies with U.S. Treasury regulations. The sanctions which back up these requirements are severe. Failure to comply results in the loss of the interest deduction for the issuer, as well as an issuer excise tax equal to 1% of the face amount of the bearer bonds multiplied by the number of years to maturity.

A further sanction which applies in the case of U.S. issuers is that bearer bonds which do not meet the TEFRA requirements are ineligible for the "portfolio interest exception" from the 30% U.S. withholding tax on interest. Most bond issuances require the issuer to "gross up" the interest paid to foreign holders of such instruments if a withholding tax is imposed, a significant further incentive for TEFRA compliance.

As a result of the sanctions and incentives described above, as well as the importance of the United States in the international capital markets, market practice has developed so that the TEFRA requirements are now a standard part of bearer bond issuances worldwide. U.S. issuers are therefore effectively placed on an equal footing with foreign issuers in gaining access to funding from world markets using bearer bonds. Further, non-U.S. issuers are free to do what is customary in their home markets while nevertheless complying with U.S. rules. It is important to recognize that, whilst it is possible that bond issuance in registered form may be acceptable to non-U.S. investors, the issuance of debt obligations in bearer form is currently the international norm and, indeed, in some major jurisdictions publicly-issued registered debt is highly unusual or even unknown. As the euromarkets are traditionally bearer and have functioned well as such, no investigation has ever been undertaken into the viability of registered paper for non-U.S. investors. Even if this investigation were to conclude that the use of registered paper only is viable, it is important to note that this would require a considerable amount of re-documentation which would be both very costly and time consuming.

Absent the TEFRA mechanics for the issuance of bearer debt instruments, issuers would be able to issue only debt instruments that are in "registered" form for U.S. tax purposes. As mentioned above, this could require the issuance of instruments which do not conform to market norms in most countries. In addition, non-U.S. investors in registered instruments of U.S. issuers would be required to obtain IRS Form W-8BEN (or similar forms, e.g. W-8EXP). Failure to comply with this requirement would result in, among other things, 30% U.S. withholding tax on payments of interest. It may not be practical, in the case of debt instruments that are actively traded between market participants, for financial intermediaries to collect Form W-8BEN from each purchaser from time to time of the instrument – particularly for those intermediaries that do not yet have the experience and systems to obtain W-8 forms in the scope of existing US securities' activity (e.g., as do Qualified Intermediaries) and so are today unfamiliar with these processes. U.S. registered debt is simply uncompetitive with bearer debt in the international marketplace, partly because of the reduced pool of intermediaries able to currently handle the forms as mentioned above, but more substantially as (i) this may not be legally possible in some jurisdictions and (ii) non-institutional non-U.S. investors will most likely be unwilling to invest in U.S. securities that require them to fill out U.S. tax forms.

Consequences for U.S. issuers

As we hope you can see, the net result of enactment of sections 101 and 102, of the Bill would be effectively to restrict the access of U.S. corporations to the international debt markets. It would deprive U.S. corporations of access to an important source of funding and leave them at a competitive disadvantage to their foreign competitors, which could continue to issue debt instruments without the third-party withholding tax risk and without the need to obtain Form W-8BEN or anything similar. Given the focus on improving access to credit in these difficult economic times, this must surely be a result to be avoided at all costs.

Qualification for "Registered" Form

It has been suggested that a possible solution to certain of the problems raised by section 102 of the Bill would be to cause issuers to issue debt instruments which are in effect "hybrids": "registered" for U.S. purposes but "bearer" for non-U.S. purposes. According to the Subcommittee's Technical Explanation of the Bill, for example, "[t]he IRS has adopted a flexible approach that recognizes that a debt obligation that is formally in bearer (*i.e.,* not in registered) form is nonetheless 'in registered form' for these purposes where there are arrangements that preclude individual investors from obtaining definitive bearer securities or that permit such securities to be issued only upon the occurrence of an extraordinary event."[3]

The reference is to IRS Notice 2006-99, which held that debt instruments issued through an unnamed dematerialized book-entry system will be treated as obligations in registered form when the holder may only obtain a physical certificate in bearer form if the clearing organization goes out of business without a successor.[4] The Notice is not, however, of general application to all clearing systems but only covers those with the specific characteristics it described. Further, in the Notice the IRS did not identify the circumstances under which clearing organizations will be treated as agents of issuers, a requirement of the relevant Treasury regulations for purposes of characterizing an obligation as registered.

As described above, qualification as "registered" is not the only obstacle to capital markets access that section 102 would create for U.S. issuers. Even obligations that are treated as issued in registered form will only qualify for the portfolio interest exception from U.S. withholding tax if certificates of non-U.S. beneficial ownership are provided by the holders. While today a high number of players have an agreement with the IRS as Qualified Intermediaries, and fulfill collection and reporting obligations, it is far from certain whether every local country clearing system has in place, or has the capacity quickly to put in place, mechanisms to administer the collection of IRS Form W-8BEN certifications of beneficial ownership from individual investors. Even if this were the case, the difficulty of obtaining such certificates from holders of instruments which frequently change hands would put U.S.-issued obligations at a competitive disadvantage to those issued by non-U.S. corporations.

Conclusion

If adopted as currently drafted, sections 101 and 102, of the Bill would cause major disruption to the international capital markets and weaken the ability of U.S. corporations to raise funds by restricting their

[3] Joint Committee on Taxation, *Technical Explanation of the "Foreign Account Tax Compliance Act of 2009"* (JCX-42-09), October 27, 2009.
[4] Notice 2006-99, 2006-2 C.B. 907.

access to markets on which they currently rely. It strikes at the core of the U.S. and global financial markets and imposes on them new burdens at a time of significant instability and need for liquidity.

Moreover, section 102 contemplates an extraterritorial extension of U.S. tax law that will be costly and difficult to enforce. Restricting foreign-targeted bearer bonds in the manner contemplated by the Bill subjects all bearer bond issuers to the U.S. excise tax, even non-U.S. issuers targeting non-U.S. investors. As such, the proposed legislation raises serious questions of international comity.

We urge you to consider the disruption likely to be caused by the repeal of the foreign-targeted bearer bond exceptions. Various provisions of the Bill (including the Information Reporting provisions) could, if effectively structured, provide a robust framework to reduce tax evasion, as well as administrative tools to combat tax abuse, in relation to bearer as well as registered securities. In this respect, section 102 seems to risk substantial additional disruption to U.S. issuers accessing international funding without manifest additional benefits in terms of controlling tax evasion.

More generally in relation to section 101, much of the potential economic disruption we have outlined above could be mitigated substantially by effective structuring of, and (just as importantly) by allowing markets appropriate time to adapt to, the new framework. Tax compliance objectives can therefore be achieved without unnecessarily and unfairly penalizing responsible actors in international capital markets and legitimate cross-border economic activity.

Specifically, we would recommend that:

- in relation to the Information Reporting provisions of section 101, the Treasury Department be given the necessary powers and time to develop regulations establishing workable compliance mechanisms and procedures; and
- in relation to section 102, (i) abolition of the TEFRA regime outlined above be deferred, (ii) the Treasury Department be directed to study and report back to Congress on the effects of such an abolition (including consideration of a narrower prohibition more specifically targeted at bearer bonds in definitive form held outside book-entry systems) and (iii) the Treasury Department be directed to issue guidance as to what qualifies as "registered" for U.S. tax purposes.

Congress may also wish to note the tax information sharing mechanisms developed in Europe pursuant to the European Union's Directive on the taxation of savings[5] and any potential U.S. / E.U. cooperation in this respect.

Finally, there seems to be an oversight in the Bill's effective date provisions. The section 102 abolition of the TEFRA regime is to be effective for obligations issued more than 180-days after the date of the Bill's enactment. This may, however, effectively be overridden by the effective date of the section 101 Information Reporting provisions (applicable to any U.S. bearer-form obligation issued after the date of first Committee action). This should at least be harmonised by grandfathering bearer-form obligations issued prior to the effective date of any abolition of the TEFRA regime.

Thank you for the opportunity to present our evaluation of this proposed legislation. We hope that our perspective on the international capital markets will be useful to you.

Yours sincerely,

R. Eg

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Kate Craven, Barclays Capital – Chair, ICMA Legal & Documentation Committee

[5] Directive 2003/48/EC.