International
Capital
Market
Association

ICMA

U.S. Department of the Treasury (UST)
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Attention: Manal Corwin, Deputy Assistant Secretary (Intl'n Tax Affairs), Michael Caballero, Deputy International Tax Counsel and Jesse Eggert, Attorney Advisor (Office of Intl'n Tax Counsel)

Internal Revenue Service (IRS)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Attention: Steven A Musher, Associate Chief Counsel (Int'l)

(by e-mail)

16 November 2011

Dear Sirs,

Foreign Account Tax Compliance Act (FATCA) – Request for clarification

The International Capital Market Association (ICMA) is making this submission further to its November 2010 submission[1] (the ICMA 2010 submission) on this topic and to the International Council of Securities Associations' June 2011 submission[2] (the ICSA 2011 submission).

ICMA is a self regulatory organisation and an influential voice for the global capital market. It represents a broad range of capital market interests including global investment banks and smaller regional banks, as well as asset managers, exchanges, central banks, law firms and other professional advisers. ICMA's market conventions and standards have been the pillars of the international debt market for over 40 years. See: www.icmagroup.org.

ICMA is responding in relation to its primary market constituency that lead-manages syndicated bond issues throughout Europe. This constituency deliberates principally through ICMA's Primary Market Practices Sub-committee[3], which gathers the heads and senior members of the syndicate desks of 25 ICMA member banks, and ICMA's Legal and Documentation Sub-committee[4], which gathers the heads and senior members of the legal transaction management teams of 19 ICMA member banks, in each case active in lead-managing syndicated bond issues in Europe.

ICMA's submission is set out in the Annex to this letter and ICMA would be pleased to discuss it with you at your convenience.

Yours faithfully,

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[1] http://www.icmagroup.org/ICMAGroup/files/93/936081ea-872d-4120-b71e-ca1018a6d339.pdf.
[2] http://www.icmagroup.org/ICMAGroup/files/e7/e7614021-a8d4-4bbc-919f-caa7e6e8bfd5.pdf.
[3] http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Primary-Market-Practices-Sub-committee.aspx.
[4] http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Legal-and-Documentation-Sub-committee.aspx.

Annex

Background

The clarification needs set out in the ICMA 2010 submission and the concerns set out in the ICSA 2011 submission (notably concerning the pass-thru scenario) are ongoing.

FATCA

Reliable identification of non-compliant intermediaries – ICMA understands that IRS has confirmed that there will be some form of official publication relating to intermediaries' current compliance status. This should, inter alia, enable the end investors to easily obtain certainty as to the status of the whole of their intermediated holding chain, or, at least, enable each accountholder to obtain certainty as to the status of its immediate intermediary further up the chain. For example, this might involve publication of a list of compliant intermediaries that would be valid (and could be relied upon by intermediaries in terms of their payments to the next level down the holding chain) for a set period.

There is also a need for clarity on five further aspects.

Financial subsidiaries of non-financial companies – The IRS has stated that if an entity (1) primarily engages in financing and hedging transactions with or for affiliates that are not themselves FFIs and (2) does not provide such services to non-affiliates, such an entity may be excluded from the definition of FFI, provided that the group of which it is a part is primarily engaged in a non-financial institution business. Confirmation that this is the case is necessary if UST / IRS intend firms to rely on this statement.

Post-18 March 2012 debt issuance fungible with earlier (grandfathered) issuance – Confirmation is needed as to whether such fungible 'tap' issuance will be also be grandfathered (and if so, during what further period of time). The absence of such further grandfathering will likely result in some funding limitations for US issuers. For example a US$ 100 million three year stand-alone issue may not draw investor interest because of its small size and consequent likely illiquidity, whilst a similar issue fungible with an existing US$ 600 million five year issue that has three years left to run. A 5 year horizon would be sufficient in this respect.

Post-18 March 2012 significant change in terms to earlier (grandfathered) issuance – ICMA understands IRS has confirmed that a post-18 March 2012 significant change in terms (i.e. a restructuring) of a security issued prior to 19 March 2012, and so grandfathered, will cause such grandfathered status to be lost. Clarification is therefore needed as to whether there are circumstances where it would be appropriate to provide relief, particularly where issuers and investors are modifying terms in an attempt to preserve value in a distressed investment.

Cumulative withholding – ICMA understands that IRS will confirm cumulative withholding will not be required. This would mean that a FATCA-compliant intermediary, who receives a net payment from a non-compliant intermediary that has been withheld against (say US$70 from the US$100 due from the issuer), would, if paying on to a further non-compliant intermediary, not need to effect a further withholding of US$23.33 (and so pay on just US$46.67). Such a confirmation is crucial.

Commercial paper – Withholding procedures are not really compatible with the short-term (under one year) of commercial paper and the consequential streamlined nature of related issuance and payment structures. Confirmation that commercial paper will be exempted from scope is therefore needed (as has previously been the case under US tax rules concerning paper with a term of less than 183 days).

Structured finance vehicles - In the absence of clarification or relief, a wide range of non-U.S. structured finance vehicles (including most securitisation issuers) may fall within the foreign financial institution definition, giving rise to new reporting obligations and potential tax liabilities for such vehicles. Given the nature of such vehicles (i.e. that they are limited purpose companies without an internal administrative function and with tightly modelled cashflows which do not accommodate the

payment of unforeseen tax liabilities), the application of FATCA gives rise to significant issues, particularly in the case of existing deals as there will not be provision under the contractual arrangements to enable compliance (from a resource or cost perspective) and it may not be possible to amend the arrangements to add this. These issues may result in the payment of reduced amounts to securitisation investors and rating downgrade risks for relevant securitisations in general. Given the significance of the securitisation market to the ability of EU lenders to extend credit to the real economy and the already fragile state of the market, the risks raised by FATCA in a securitisation context should not be underestimated (particularly given US government concerns at the state of the European economy). Provision for deemed compliance with FATCA by structured finance vehicles and/or for relief to be provided in another appropriate manner would therefore be invaluable.

Related TEFRA aspects

Immobilised global bearer bonds – In particular, confirmation is still needed that securities in global bearer form immobilised (and not only dematerialised) in book entry clearing systems (for example within the two international central securities depositaries, Euroclear Bank and Clearstream Banking Luxembourg) will be deemed to be in registered form for US tax purposes (presumably as an "other book-entry system specified by the Secretary"). Confirmation is further needed that this will be so:

(a) for non-US as well as US issuers;

(b) notwithstanding provision, in the following 'in extremis' circumstances, for the securities to be exchanged from global into definitive form and withdrawn from such clearing systems: (i) collapse of the relevant clearing system(s), (ii) issuer default (an uncured breach of the terms of the security, notably non-payment of interest)[5] or insolvency and (iii) tax law requirements;

(c) notwithstanding provision, in circumstance (ii) above, for the vesting of direct rights, against the relevant issuer, in favour of the relevant clearing system account holders (necessary as issuers in default are unlikely to comply with any provision to deliver definitive form securities);

Confirmation is also needed that non-US issuers will otherwise continue be able to rely on TEFRA exemption procedures (notably TEFRA D certifications).

Conclusion

In the absence of timely guidance on the above (namely publication of final FATC regulations), the previously confirmed grandfathering of term debt securities issued before 19 March 2012 may well need to be extended if UST and IRS intend to minimise disruption to US issuance (as several months may be needed for existing issuance structures to be reviewed and updated).

[5] This is because clearing systems generally limit themselves to clearing services and so will not enforce investor claims against defaulting issuers.