

John Buckley, Chief Tax Counsel  
Melissa Mueller, Tax counsel  
House Ways & Means Committee  
1102 Longworth House Office Building  
Washington DC  
U.S.A.

November 19, 2009

Dear Mr Buckley and Ms Mueller,

**Comments on the Foreign Account Tax Compliance Act of 2009 (H.R. 3933, S. 1934)**

On behalf of the members of the International Capital Markets Services Association ("ICMSA"), we thank you for the opportunity to comment on the proposed Foreign Account Tax Compliance Act of 2009 ("the Bill").

ICMSA<sup>1</sup> is a London-based self regulatory organization representing international financial and non-financial institutions active in the provision of services to the International Capital Markets. Our membership includes universal banks, registrars, stock exchanges, law firms, International Central Securities Depositories ("ICSD"s) and other service providers specialised in specific product segments such as the processing of tax reclaims. The primary purpose of the association is to foster the highest standards in the practice and management of international capital market services, thereby facilitating the efficient functioning of the market. In its day-to-day activities, the ICMSA is predominantly focusing on the operation of the International Securities Market<sup>2</sup>, which has outstanding issuance levels exceeding U.S. Dollar (USD) 13 trillions, i.e. about half of the overall international debt securities outstanding volumes reported by the Bank for International settlements<sup>3</sup>.

We wish first to confirm our full support to the overall objective of the Bill which we understand is intended to prevent the avoidance of tax by U.S. persons. We however would like to express our serious concerns regarding Section 102 of the proposed Bill (Repeal of Certain Foreign Exceptions to Registered Bond Requirements) which, we fear, could result in a severe disruption of the international capital markets' current economic fundamentals and operating practices at a time when global access to cost-efficient funding is pivotal to achieve economic recovery. Please note

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<sup>1</sup> More information on the association can be found on [www.capmktsterv.com](http://www.capmktsterv.com).

<sup>2</sup> i.e. securities primarily issued and deposited with the ICSDs, Clearstream Banking and Euroclear Bank.

<sup>3</sup> BIS Quarterly Review, September 2009

that many of our members have also expressed serious concerns over other aspects of the Bill (for example the new “foreign financial institution” regime in Section 101, which will affect the financial community worldwide and may deter foreign investment from US securities). These concerns have been and will be addressed by members either individually or through other industry groups.

The International Securities Market has overwhelmingly adopted the bearer legal form as the preferred form for security issuance, moving from definitive bearer instruments at its inception to a custody structure where global bearer notes are now immobilized with the ICSDs and settle through a book-entry system. Approximately 80% of the securities in the International Securities Market have been issued in global immobilised bearer form under the TEFRA<sup>4</sup> D rule, regardless of the nationality of the issuer (U.S. or non-U.S.), effectively becoming the norm in the market and representing therefore a very important and efficient funding vehicle for all issuers, U.S. or non-U.S..

An elimination of the foreign-targeted bearer bond exemptions, as we understand the current draft of the bill is proposing, on which the market is based would inevitably lead to wide-spread market disruption and would impose substantial costs and additional complexities (different legal documentation, restricted placement opportunities due to a more limited investor base, additional registration services, additional certification and tax processing procedures, etc) to those actors, across the entire chain from issuers to investors, forced or willing to comply with the new requirements. This would ultimately translate into a higher cost of borrowing for those issuers forced to adopt the registered format for their international securities issuances and thus expose them to sub-optimal funding conditions. This could therefore put U.S. issuers seeking foreign funding at a disadvantage compared to their non-U.S. peers, who chose to continue issuing in the global bearer format<sup>5</sup>.

U.S.-incorporated issuers represent today a significant portion of the International Securities Market. These entities mostly tap this market to raise funds in Euros and British Pounds (i.e. alternative funding to USD) with European- and Asian-based investors, thereby diversifying their funding base, and they do so very efficiently and effectively through the issuance of global bearer notes immobilized with the ICSDs. Because these transactions are foreign-targeted and that the mechanisms in place under the TEFRA rules already provide appropriate safeguards against offering to U.S. persons, we believe that the measures proposed in section 102 will produce marginal benefits in terms of reducing U.S. tax evasion compared to the disruption they will provoke.

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<sup>4</sup> Tax Equity and Fiscal Responsibility Act, which requirements and procedures are designed to ensure that the concerned securities are not offered to or acquired by U.S. persons.

<sup>5</sup> Whether or not these non-U.S. issuers would then be exposed to U.S. sanctions such as the Excise Tax is linked to the question of U.S. tax laws extra-territoriality.

Moreover, we note that, in some markets, it is simply not feasible to issue obligations in registered form, which would leave some foreign issuers with no choice but to be exposed (at least in principle) to a very significant excise tax.

In light of these elements, we urge the U.S. House of Representatives and the U.S. Senate to reconsider the possibility to maintain the existing exceptions for foreign-targeted bearer bond until such time as the potential impact has been thoroughly investigated. Over time these exemptions have served issuers, intermediaries and investors worldwide very well and that have helped maintain a level-playing field access to the international capital markets. In our view, the repeal of these exceptions needs to be carefully planned and considered to avoid a major disruption in a multi-trillion dollar market which would affect U.S. issuers, non-U.S. issuers, many market intermediaries including the major U.S. banks, and, ultimately, the investors. To this effect, the ICMSA supports the recommendation made by other industry groups that Congress requests a report regarding the potential consequences of the repeal of the foreign-targeted bearer bond exceptions.

We thank you again for the opportunity to present our understanding of the proposed legislation and of its likely consequences should the current draft be adopted. We hope the arguments and recommendations we have put forward in this letter will be considered and will provide useful guidance in the elaboration of any proposed legislation .

Yours Sincerely

Graham Cox  
Chairman  
ICMSA