International
Capital
Market
Association

ICMA

CC:PA:LPD:PR (NOT-121556-10), room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
20044 Washington, DC

(by e-mail to Notice.Comments@irscounsel.treas.gov)

1 November 2010

Dear Sirs,

IRS Notice 210-60 – Information reporting and withholding under the Hiring Incentives to Restore Employment Act (HIREA)

The International Capital Market Association (ICMA) is responding to the IRS's request for comments concerning the above notice.

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[1], which gathers the heads and senior members of the syndicate desks of 21 ICMA member banks, and ICMA's Legal and Documentation Sub-committee[2], 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.

We set out our response in the Annex to this letter and would be pleased to discuss them with you at your convenience.

Yours faithfully,

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[1] http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Primary-Market-Practices-Sub-committee.aspx.
[2] http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Legal-and-Documentation-Sub-committee.aspx.

Annex

ICMA is aware that many industry participants have been separately involved in industry discussion concerning HIREA implementation, not least via the Institute of International Bankers (IIB) and the European Banking Federation (EBF), including as to the various intermediary certification and reporting requirements raised in Notice 2010-60. ICMA also understands that the International Banking Federation (IBFed) is filing a response to Notice 2010-60. Consequently, ICMA is just raising five discrete concerns for consideration by the IRS, in the context of the distribution and raising of capital in the form of bonds by US issuers globally.

Repeal of TEFRA and status of ICSD-deposited global bearer bonds

HIREA repeals (except in relation to the US excise tax on bearer debt for non-US issuers) the Tax Equity and Fiscal Responsibility Act (TEFRA) exemptions relating to bonds in bearer form (with substantial resulting US tax sanctions on bearer bonds of US issuers, namely loss of the portfolio interest exemption from 30% withholding tax on interest and non-deductibility of interest for US federal tax purposes). However, bonds held in a dematerialised book-entry system, or other system specified by the US Treasury, will be deemed to be in registered form for US tax purposes (and not subject to the above US tax sanctions). In this respect, US issuers will only be able to issue bonds from 19 March 2012 that are either (i) in registered form or (ii) in bearer form held in a dematerialised book-entry system or other system specified by the US Treasury (the bonds will in either case be treated as registered for US tax purposes and so be subject to the related certification requirements, such as under forms W8).

Bearer form can, for various reasons and aside from any potential local legal requirements, be the commonly accepted or sole form for debt issuance in some non-US markets and US issuers may be disadvantaged (to a greater or lesser extent) in terms of investor demand if they do not follow such local practices. ICMA is therefore keen for the US Treasury to confirm:

(a) that bonds in global bearer form deposited with one of the two international central securities depositories (ICSDs), Euroclear and Cleastream, or one of their common depositaries or common safekeepers, will be characterised as being held in a dematerialised book-entry system; and

(b) what, if any, conditions such characterisation will be subject to (for example in terms of any restrictions on convertibility of bonds from their global form into definitive form).

ICMA may then need to consider what, if any, consequential amendments will be necessary to Eurobond documentation and practices (for example removal of the holder option to convert into definitive form previously necessary to ensure bearer status for TEFRA reliance) and any consequential changes in characterisation under various European and other national laws.

ICMA understands that representatives of the ICSDs are willing to enter into discussions with the US Treasury and IRS and ICMA would consider such discussions as the most efficient forum to develop a practical outcome.

Intermediary certification and reporting requirements

HIREA will require specified intermediaries effecting US-source payments to enter into substantial reporting agreements with the IRS concerning accounts of US customers. This is to be backed by a 30% withholding tax sanction on payments to non-compliant intermediaries.

In this respect, ICMA is concerned that, in the context of intermediated holding chains common in debt capital market transactions, end investors worldwide may be subject to withholding without having:

(a) knowledge of the identity of intermediaries further up the holding chain;

(b) authoritative knowledge of the compliance or otherwise of their initial custodian;

(c) knowledge (authoritative or not) of the compliance or otherwise of intermediaries further up the holding chain; or

(d) the ability to influence the structure of the holding chain further up the holding chain from the initial custodian.

The concern is all the greater given that withholding of portfolio interest may be complex to reclaim (for sophisticated investors in jurisdictions with compatible tax treaty provisions) or even impossible (in the absence of such treaty provisions or, practically speaking, in the case of relatively unsophisticated retail investors). This may lead to investors preferring the securities of non-US issuers.

ICMA therefore supports the development, sufficiently ahead of the 2013 deadline to avoid US issuers being victim of any market perception of withholding risk concerning them, of workable implementing procedures. These 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. In the latter case, for example, the IRS might consider publishing 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.

ICMA's member committees do not include members' staff involved in custody or corporate trust functions and in this respect ICMA has shared its concerns with the International Capital Market Services Association (ICMSA) and the ICSDs, who are involved in industry discussions concerning HIREA implementation (including via IIB/EBF work streams).

Identification of 'US issuer'

ICMA understands that investors may sometimes be unclear in their identification of US issuers in the HIREA context, i.e. in terms of indentifying US source income. Whilst some issuers, such as well-known US corporates, are widely understood to be US issuers, this may not be the case in the context of certain other issuers such as some special purpose vehicles. Developing further market clarity may be worthwhile in this respect.

Practical problems concerning gross proceeds

HIREA's scope covers the gross proceeds of sale of bonds as well as payments emanating from issuers. Whilst in the later case the nature of the payment is known down the holding chain (including the ICSDs), this is not always the case in the context of secondary bond sales, where funds may be transferred, in whole or in part, separately from the bonds themselves and without any identifying link. This problem can occur even in the context of matched securities/cash debit/credit delivery-versus-payment instructions within the ICSDs as the instructions could be part of a large set of movements outside the ICSDs.

Again, ICMA understands that representatives of the ICSDs are willing to enter into discussions with the US Treasury and IRS and ICMA would consider such discussions as the most efficient forum to develop a practical outcome.

FFI election t be withheld upon

HIREA allows certain intermediaries to elect to be withheld upon. ICMA understands that certain complexities may arise for the intermediaries immediately further up the holding chain in consequently having to withhold against the electing intermediary (notably in relation to the gross proceeds aspect mentioned above). In this respect, ICMA understands further detail would be welcome on how such elections will work and their intended effect. On a practical basis, leaving such election to agreement between the two intermediaries concerned (with subsequent notification to the IRS) would be helpful in terms assisting relevant working relationships to be established. ICMA also understands that intermediaries are unlikely to be in a position to waive, as required for the election, any rights that parties further down the holding chain may have under any U.S. tax treaty with respect to the amount to be deducted and withheld.