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ICMA

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Chairmen of the Congressional tax writing committees
By fax and by post

5 November 2009

Dear Sirs,

The Foreign Account Tax Compliance Act of 2009

1. We write in relation to the bill (the "**Bill**") currently before the U.S. Congress concerning the above.

2. The International Capital Market Association ("**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, 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[1] 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 bond issues in Europe. Eurobond issuance so far this year has reached approximately USD 2.4 trillion (about half of total global debt issuance).

3. We understand the Bill is intended to clamp down on U.S. tax evasion and improve U.S. taxpayer compliance by giving the U.S Internal Revenue Service ("**IRS**") new administrative tools to detect, deter and discourage offshore tax abuses. We fully support Congress in this respect. ICMA does, however, have concerns that the Bill in its current form may have some serious side effects not intended by Congress and regarding which we would like to assist Congress.

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[1] http://www.icmagroup.org/about1/isma1/legal_and_documentation.aspx and http://www.icmagroup.org/about1/isma1/primary_market_practices.aspx.

4. In particular, we understand that one of the Bill's provisions would end the practice of selling bearer bonds to foreign investors under the 'TEFRA C' and 'TEFRA D' exemptions pursuant to the Tax Equity and Fiscal Responsibility Act. This would *inter alia* purport to cause non-U.S. borrowers issuing bearer bonds outside the U.S. to non-U.S. persons to be subject to a U.S. excise tax equal to 1% of the principal amount of such bonds multiplied by the number of years to their maturity.

5. We fear some of the Bill's other provisions that impose substantial new compliance requirements on non-U.S. institutions might cause some such institutions to reconsider their involvement with U.S. securities and/or U.S. market participants.

6. Like other international markets, the Euromarket has developed along historically different lines to the US market and ever since it became established in the 1960's it has been a bearer bond market. Since then, the Euromarket, through the various TEFRA exemptions, has co-existed successfully with the U.S. market.

7. The overwhelming majority of Euromarket securities are held through the Euroclear and Clearstream depositaries, which operate on a book-entry basis effectively similar to French, Italian and Spanish 'dematerialised'/'immobilised' bonds that are deemed to be in registered form for U.S. tax purposes. We note IRS Notice 2006/99 in this respect. Congress's aim on tax evasion seems rather to primarily relate to bearer bonds in 'definitive' form that are physically held by individual investors – we wish to assist Congress in this aim.

8. From the above, it seems the timeline for passing and implementing of the Bill needs to be revised to allow further evaluation of its potential impact. In particular, Congress may wish to consider:
   - market stability (as mentioned above) – the proposed changes may affect issuers' willingness to go to market and may affect stability of bond markets generally;
   - the increased compliance cost burden on the international debt markets – aside from the above, there would be consequential changes to clearing systems, tax treatments (including impacts on many tax treaties), documentation etc.;
   - potential fragmentation of markets and corresponding lack of global liquidity;
   - restricting U.S. borrowers' and investors' ability to access international funding and investment;
   - practicalities for transitional arrangements, including re-financing and other transitional issues and, in relation to US issuers, allowing sufficient time for the relevant markets to put systems in place to collect and deliver the relevant IRS forms (failing which U.S. issuers may be at a significant albeit temporary competitive disadvantage to non-U.S. multinational issuers); and
   - the practicality of the Bill's stated 180 day implementation timetable.

9. ICMA would be happy, at your convenience, to explain its concerns and suggestions (including possible clarification that book-entry bearer bonds are not treated as bearer debt for the Bill's purposes) in more detail.

Yours faithfully,

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Martin Egan, BNP Paribas – Chair, ICMA Primary Market Practices Committee
Kate Craven, Barclays Capital – Chair, ICMA Legal & Documentation Committee