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## **Foreign Account Tax Compliance Act (FATCA), Section 502 – Repeal of certain foreign exceptions to registered bond requirements**

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***Operational guidelines and Frequently Asked Questions for issuance and processing of international debt global note securities deposited with International Central Securities Depositories (ICSDs), issued by issuers subject to U.S. tax law, as from 19 March 2012***

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## **1. Purpose**

The Foreign Account Tax Compliance provisions (FATCA), enacted into law on 18 March 2010 as part of the Hiring Incentives to Restore Employment (HIRE) Act, contain new requirements in section 502 of the Internal Revenue Code applicable to issuers having US source income (referred within this document as US issuers). The amendments to section 502 repeal the relevant tax exemptions that were granted for foreign-targeted bearer bonds by the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982.

The purpose of this document is to provide operational guidelines to issuers, advisors, issuer agents and arrangers of international debt securities on how Clearstream Banking S.A. and Euroclear Bank SA/NV (together referred to as the "ICSDs") will process international debt securities issued by US issuers primarily deposited with ICSDs, as from 19 March 2012, i.e. the date when the Section 502 amendments come into effect.

## **2. Disclaimers**

This document is provided for general information purposes only. The content herein is not intended to provide professional legal or tax advice and should not be relied upon in that regard. Readers should seek appropriate professional advice where necessary before taking any action based on the information contained in this document.

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## **3. Background**

Since the Tax Equity and Fiscal Responsibility Act (TEFRA) granted tax exemptions for foreign targeted bearer bonds back in 1982, both US and non US issuers have been issuing under the 'TEFRA' exemption for bearer global securities primarily deposited in ICSDs.

The section 502 amendments repeals these relevant tax exemptions applicable to US Issuers, including: the exemption from the US excise tax normally imposed on issuers of bearer debt securities; the possibility for issuers to deduct interest paid; and the portfolio interest exemption from 30% U.S. withholding tax in respect of interest paid on foreign targeted bearer debt securities.

As a result of the repeal of the TEFRA exemptions, which become effective on 19 March 2012, US issuers will effectively be able to issue only bonds that are either (1) in registered form or (2) in bearer form but deposited and transferable through a dematerialized book-entry system (or other systems as yet to be specified by the U.S. Treasury), provided these book-entry interests can NOT be exchanged into definitive bearer bonds (with the exception of some very limited circumstances). Only these two scenarios will enable US Issuers to qualify their issuances as being registered from a U.S. tax perspective, and therefore to avoid the sanctions normally applicable to bearer bonds.

Both FATCA Section 502 (as amended) and IRS Notice 2006-99, which provides guidance on dematerialized securities and certain book-entry systems in foreign countries, are still unclear about the treatment of bearer debt securities issued in global form and immobilized with the ICSDs.

The Notice 2012-20 issued by the US Treasury and IRS on 7 March 2012 provides guidance on certain open questions. Section 3 (Definition of a registered system) makes reference to "immobilization", as a condition to allow a global bearer bond deposited with the Clearing organizations to be deemed registered for the purpose of US tax. The Notice further defines a number of conditions that need to be fulfilled in order to limit the transferability of the global certificate and ensure immobilization, in particular that:

- i) The clearing organization (or it's agent) must have "arrangements that prohibit the transfer of the global securities except to a successor clearing organization subject to the same terms";
- ii) the global bearer can be exchanged into definitive bearer certificates in limited conditions subject to three circumstances only i.e.:
  - Termination of the clearing organization's business without a successor,
  - Default by the issuer
  - Upon a change in tax law that would be adverse to the issuer

This document aims at providing operational clarification as to how the ICSDs will process issuances from such US issuers as from March 19 2012.

#### 4. Issuance and Custody Structure Operated by the ICSDs

The joint issuance and custody structures operated by the ICSDs to support the international debt securities market are based on the following principles:

- Selection by the issuer of the ICSDs as joint and primary place of deposit, issuance and settlement for their debt obligations;
- Deposit and immobilization of the global certificate in bearer/registered form with the ICSDs themselves (for instruments potentially eligible for Eurosystem operations) or with a common depository/safekeeper acting on the ICSDs' behalf. The physical transfer of the global certificate is only possible in very limited circumstances such as a change of ICSDs' common depository/safekeeper or an exchange into definitive bearer bonds if allowed under the terms of the obligation itself (see below);
- For registered securities, registration of the interests in the name of the nominee company of the ICSDs (for instruments potentially eligible for Eurosystem operations) or in other cases of the common depository acting on their behalf;
- Creation of book-entry records and participants' interests in the obligation in the ICSDs' book-entry systems upon legal closing and distribution, with daily reconciliation of the issue outstanding amount with the issuers and their agents;
- Transfer of participants' interests in the obligation via the ICSDs' book-entry systems upon settlement of primary and secondary market transactions; and,
- Exchange of participants' interests in the obligation against physical certificates in definitive bearer or definitive registered form is supported depending on the specific terms and conditions of each issuance.

#### 5. ICSDs operational guidelines and processes

##### *a) Identification of the issuing entity*

Under the Taxation Provisions of each Prospectus, Offering Circular, Terms & Conditions etc., there should be a clear statement as to the tax status of each Issuing entity involved in the transaction as this may not be otherwise immediately apparent in every case.

It should be noted that US Issuers in this document not only refer to US Resident Issuers but also to non-US Issuers with US Sourced Income (and therefore subject to US tax law) will be impacted. Particular attention should be given to:

- Off shore Finance Subsidiaries or Affiliates of such an Issuer
- Certain repackaging or other asset backed structures whereby the debt service assets will be sourced from US based assets
- Issues which are split partly from US Source and Non US Source.

Thus issuers should clarify with their tax counsels if they are subject to US tax law and thus to the TEFRA repeal or not. In case they are subject to US tax law, issuers are recommended to update their existing programme prospectus to clarify what treatment will be applied to new obligations to be issued as from 19 March 2012 (effective date). Likewise, Final Terms or other offering documents should be adapted ahead of the effective date. Updated documents shall be submitted as soon as possible to the issuer agents and to the ICSDs to allow for an adequate review and preparation.

#### b) *US Issuers*

US issuers or non-US issuers with US sourced income (see comment under “Determination of the Tax Status”) will effectively be obliged to issue in registered form as securities issued by such issuers in bearer form on or after 19 March 2012 will no longer benefit from the tax exemptions described in section 3 above.

Both ICSDs acting as Qualified Intermediary (QI) with primary withholding responsibility for US taxable securities, will rely solely on the issue documentation to determine the tax treatment of the security.

As per the relevant tax section of the Terms & Conditions of the registered issuance, the ICSDs will apply the standard US tax treatment as a QI :

- > receive gross income payments from depositories
- > collect (W8, W9) certificates from Participants (to apply the exemption)
- > apply 30% NRA WHT and 28% backup WHT on taxable securities
- > comply with 1042-S and 1099 reporting

For more information on ICSDs US tax processes please refer to respective ICSDs procedures.

NOTE: if specific circumstances impose the issue in bearer form, with the security still to be recognised as being in registered form for US tax purposes, advice should be obtained by the issuer from its legal & tax advisor(s).

For Bearer form securities, the ICSDs will check if the relevant tax section of the programme or drawdown documentation clearly states that the security is to be considered as 'Registered' for tax purposes (with relevant reasons for the same). This would be then considered as 'Registered' for tax purposes by the ICSDs and will follow the same tax treatment as noted above.

In case the tax section states that the security has to be treated as bearer or the tax section is unclear or missing, the ICSDs will apply a withholding tax of 30%, without portfolio interest exemption (subject to any relief available), on all income payments before distributing the proceeds

Remark – As stated in Section 3 of this document, the Notice 2012-20 provides conditions to allow global bearer bond deposited with the ICSDs to be deemed registered for purpose of US tax. According to our interpretation, it defines a number of conditions that need to be fulfilled in order to limit the transferability of the global certificate and ensure immobilization, in particular:

- i) on the ICSDs' side, there must be "arrangements that prohibit the transfer of the global securities except to a successor clearing organization subject to the same terms";

The ICSDs are considering options to ensure that this provision is fulfilled and provide the issuer with the appropriate level of comfort that the global security would meet the conditions set by the Notice to be deemed registered for US tax purpose.

- ii) the security documentation must limit cases where a global bearer can be exchanged in definitive bearer certificates under three circumstances only i.e.:
  - Termination of the clearing organization's business without a successor,
  - Default by the issuer
  - Upon a change in tax law that would be adverse to the issuer

The Notice provides that, if any of these circumstances arise, the security will no longer be considered as being in registered form, "regardless of whether any option to obtain a physical certificate in bearer form has actually been exercised". It is to be noted that the US Treasury and IRS request comments as to whether any exceptions should be provided to this general rule.

*d) Issue of short term securities (below 183 days maturity)*

Interest on obligations with an original term to maturity of 183 days or less were exempt from 30% withholding tax. Special rules allowed such obligations to be issued to non-

U.S. persons in a foreign-targeted offering without having to obtain U.S. tax documentation in order to avoid 28% "backup" withholding.

There were questions as whether these special rules would continue to be in effect after 18 March, 2012 on the basis that they cross-referenced rules that were being repealed under FATCA. The Notice 2012-20 clarifies that these special rules for obligations with an original term to maturity of 183 days or less issued to non-U.S. persons in a foreign-targeted offering will remain in effect after 18 March 2012.

*e) Other Issuers*

According to information available to date, non-US Source Income issuers will be able to continue issuing bearer bonds subject to TEFRA rules and exemptions existing prior to March 19<sup>th</sup>, with the application of the appropriate certification requirements. It is again important that the tax provisions in the Terms & Conditions are clear on this point.

*f) Application of the Security Act provisions*

Certain provisions of the US Securities Act will remain applicable, both for securities that will continue to be issued in bearer form under TEFRA and for issues that will be issued in registered form. In particular, in connection with the certification of beneficial ownership required under U.S. law, both ICSDs have a comprehensive certification for incorporation in automated certification procedures.

For more information on ICSDs processes for certification of beneficial ownership under US law, please refer to respective ICSDs procedures

*g) Grandfathering*

International debt issues which are issued on or prior to 18 March 2012 will be grandfathered until their maturity. However, securities outstanding as of 18 March 2012 may lose their grandfathered status if the terms of the securities in question are subject to a material modification after that date.

It is, at this stage, still unclear whether a tap of a grandfathered debt issuance after 18 March 2012 will itself be grandfathered. Further guidance from your tax counsel should be obtained on that point.



*h) Summary Table*

The attached table provides a summary of the options offered to all issuers i.e. the US Source Income and the others in terms of debt issuance structures through the ICSDs before, on and after 18 March 2012.

| <b>Issuer Type</b>       | <b>Issued on or before 18 March 2012</b>  | <b>Issued after 18 March 2012</b>   |
|--------------------------|---|---|
| US Source Income Issuers | (1) Bearer form, subject to TEFRA D<br>(2) Registered form, subject to 30% WHT with portfolio exemption (W8/W9 certification)                   | (1) Registered form, subject to 30% WHT with portfolio exemption (W8/W9 certification)  |
| Other Issuers            | (1) Bearer form, subject to TEFRA C or D<br>(2) Registered form, not subject to 30% WHT<br>(3) Bearer form without TEFRA (if no US involvement) | (1) Bearer form, subject to TEFRA C or D<br>(2) Registered form, not subject to 30% WHT<br>(3) Bearer form without TEFRA (if no US involvement) |

NOTE: The Notice 2012-20 provides, in its Section 4, for a temporary extension of portfolio interest exception to foreign-targeted registered obligations. Advice should be obtained from your legal counsel on this temporary extension, and in particular as to its scope.

## 6. Questions and Answers (Q&A)

Q1: What is the impact of The US Hiring Incentives to Restore Employment Act of 2010 (the "HIRE Act") on TEFRA dispositions for issuers of international debt securities?

*A: Section 502 "Repeal of Certain Foreign Exceptions to Registered Bond Requirements" has the effect to repeal the TEFRA (Tax Equity and Fiscal Responsibility Act) rules for foreign-targeted bearer debt instruments issued by U.S. entities after 18 March 2012.*

Q2: What are the consequences for US Source Income issuers that issue and deposit their international debt securities with the ICSDs?

*A: US Source Income Issuers will effectively no longer be able to issue under TEFRA rules without incurring heavy penalties. U.S. issuers will effectively, as of 19 March 2012, have to issue debt in registered form for US Tax purposes.*

Q3: What are the consequences for non- US Source Income issuers that issue and deposit their international debt securities with the ICSDs?

*A: There will be no change, non- US Source Income Issuers will, as of 19 March 2012, have the option either to issue debt:*

- in registered form, or*
- in bearer form, including under TEFRA.*

Q4: Will the US Treasury (UST) publish a list of recognised book-entry system?

*A: U.S. Treasury indicated that it is not their intention to publish a list of book-entry systems recognised as such. The guidelines aim to illustrate how issuance of debt securities via the ICSDs facilitates compliance with the conditions set under U.S. tax laws. The Notice 2012-20 provides, in its Section 3 (definition of a registered system), conditions that allow global bearer bond deposited with the ICSDs to be deemed registered for purpose of US tax. The Notice defines a number of conditions that need to be fulfilled in order to limit the transferability of the global certificate and ensure immobilization,*

Q5: Who is responsible to determine whether an obligation qualifies as being registered (after March 18, 2012) for the purpose of US tax?

*A: The qualification of an obligation as "registered" for purpose of US tax will be determined by an issuer via the Terms & Conditions of the issue.*

Q6: Can a non-US Source Income issuer still issue in bearer form under TEFRA?

*A: Yes, non-US Source Income issuers will be able to continue issuing in bearer form, under TEFRA.*

Q7: Which will be the tax certification obligations requirements for investors in securities obligations that will be issued in bearer form through the ICSDs (after 18 March 2012), but considered registered under U.S. tax laws as per the Tax section in the Terms & Conditions of the securities?

*A: Currently, securities issued under TEFRA D are subject to the following certification requirements:*

- *Collection of certification of non-U.S. beneficial ownership before the exchange of temporary global into permanent global format at the end of the 40 days restriction period;*

*Certification obligations after 18 March 2012 will be:*

- *Use the same non-US beneficial ownership certification as above for remaining provisions of the US Securities Act (e.g. RegS cat 3), and*
- *Require the collection of US tax certificates as per each ICSDs tax procedures.*

Q8: What will be the certification requirements after 18 March 2012 for securities that would be issued by non-US Source Income issuers under TEFRA D?

*A: No change, meaning:*

- *Collection of certification of non-U.S. beneficial ownership before the exchange of temporary global into permanent global format at the end of the 40 days restriction period;*
- *No collection of US tax certification requirements as the securities are considered as not US taxable*

Q9: What changes, if any, do issuers need to incorporate into their issuance documentation?

*A: No changes are needed to deal with stand-alone issuance of obligations to be made on or prior to 18 March 2012 (grandfathering). Programme documents and other Offering Information that will cover issuances of obligations after 18 March 2012 by US Source Income issuers should be reviewed and updated to address the changes introduced by FATCA Section 502.*