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To

Jesse Eggert, U.S. Department of the Treasury  
John Sweeney, Internal Revenue Service  
Karl Walli, U.S. Department of the Treasury

3 October 2011

**Ref: Section 502 of the HIRE Act – Repeal of certain foreign exceptions to registered bond requirements**

Dear Sirs,

We wish to thank you again for having taken the time to meet with representatives of Clearstream Banking on Tuesday 17 May 2011 to discuss the implications that Section 502 of the HIRE Act may have on the future of the international debt securities market. The International Central Securities Depositories, Euroclear Bank and Clearstream Banking (hereafter referred to as "ICSDs"), very much welcome the opportunity to have a dialogue with the U.S. Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") in order to facilitate the adoption of these new provisions by market participants. As suggested during our May meeting, we write to you to highlight certain aspects of the new rules where there is a need for clarification.

#### Background

As explained in Clearstream Banking's submission dated 15 July 2010 and Euroclear Bank's submission dated 10 November 2010, the ICSDs play an important role in the functioning of global debt securities markets by facilitating cross-border trade settlement and custody, through the central issuance platform and custody infrastructure that they jointly run for international debt securities. This central infrastructure is being used by many U.S. and non-U.S. issuers to raise significant amounts of debt in multiple currencies from investors located across the entire world<sup>1</sup>. This market operates along a number of rules and well-established practices promulgated by global trade associations such as AFME, ICMA, ICMSA, ISSA and SIFMA, and the ICSDs' objective is to work proactively with Treasury and IRS to facilitate a smooth adaptation of these practices to the new requirements.

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<sup>1</sup>At the end of 2010, the total outstanding value of international debt securities issued through and deposited with the ICSDs reached USD equivalent 11.3 trillions, representing ca. 41% of all international debt securities in circulation and ca. 12% of all outstanding debt securities worldwide. The total gross amount of debt raised every month through the joint ICSDs' infrastructure varies between USD equivalent 300 and 400 billions (sources: Bank for International settlements, ICSDs).



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Although the proportion of U.S. issuers in the international debt securities market is important<sup>2</sup>, the majority of the debt is raised by non-U.S. institutions coming from more than 90 different countries. The impact of the repeal of the TEFRA rules on these non-U.S. institutions must also be carefully considered to avoid market disruption.

#### Current issuance structure

Most of the international debt securities are today issued in global bearer form, the certificate being immobilized with the ICSDs during its entire life. Interests in the security, giving rights to principal and interest, are transferred and recorded only through the book-entry systems run by the ICSDs. The ICSDs nevertheless do not control all aspects of the issuance of international debt securities. The ICSDs' contractual documentation together with Belgian law (Euroclear Bank) and Luxembourg law (Clearstream Banking) define how transfers of interest in securities take place through book entries in their systems. However, the ICSDs do for example not decide which legal form each specific security should have. It is the issuer and its legal counsel that decide if it should be in registered form or in bearer form and under which conditions (if any) investors can request exchange of a global bearer certificate into definitive bearer certificates.

Most of the international debt securities issued in global bearer form through the ICSDs, whether issued by U.S. entities or not, whether issued under U.S. governing law or not, are structured to comply with the TEFRA provisions. The repeal, via the HIRE Act's Section 502, of these TEFRA rules for foreign-targeted bearer debt instruments issued by U.S. entities after March 18, 2012 raises a number of questions in the industry as to what changes must be brought to the current issuance patterns and to the existing market infrastructure to guarantee a continued and efficient access to markets for issuers and investors alike<sup>3</sup>.

#### Our current understanding

The ICSDs understand from the HIRE Act provisions and from our subsequent discussions with Treasury and IRS that:

- U.S. issuers will, as of March 19, 2012, have the option either to issue debt:
- in registered form, or in bearer form but in such way that they qualify for treatment as a 'registered' instrument under U.S. tax law, e.g. by issuing in a book-entry system and under the condition that these securities can not be exchanged into 'definitive' bearer certificates<sup>4</sup>.

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<sup>2</sup>U.S. issuers accounted for ca. 26% of the total outstanding levels of international debt in December 2010 (source: Bank for International settlements).

<sup>3</sup> See submissions made by the International Capital Markets Services Association (19 November 2009), the International Capital Markets Association (1 November 2010) and, more recently, the International Council of Securities Associations (28 June 2011).

<sup>4</sup>With the exception of certain extraordinary events, e.g. if the book-entry system goes out of existence, or if the issuer is declared bankrupt or becomes insolvent.



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Foreign issuers will, as of March 19, 2012, have the option either to issue debt:

- in registered form,
- in bearer form but in such way that they qualify for treatment as a 'registered' instrument under U.S. tax law, e.g. by issuing in a book-entry system and under the condition that these securities can not be exchanged into 'definitive' bearer certificates, or
- in bearer form, including under U.S. tax law – so TEFRA D certification is collected.

We further understand that, under US tax law, the terms and conditions of each debt issuance must be scrutinized to determine if the debt is in registered or bearer form even if the ICSDs would be considered "other book entry systems specified by the Secretary". This is because some of the aspects that are relevant for determining if a bearer form debt obligation deposited with the ICSDs can be treated as in registered form depend on certain choices made by the issuer and its counsel, as described above. We note that Treasury Regulations, Subchapter A, Section 5f.103-1(c), and IRS Notice 2006-99 already provide the required level of clarity as to the US tax treatment of dematerialized bonds held and transferred only through a book-entry system. Dematerialization is however not possible in an important number of foreign jurisdictions like Germany. Considering that the immobilization of global notes with book-entry systems is the norm in the international debt securities markets, clarifications from Treasury and IRS as to the treatment of these immobilized securities are required.

The ICSDs therefore request Treasury and IRS to issue a separate regulation or notice that clarifies that a global note in bearer form deposited and immobilized with the ICSDs or any other foreign book-entry clearing system will be considered held in an "other book-entry system specified by the Secretary" as provided in Section 502(c) of the HIRE Act, under condition that the global note may not be transferred by a depository prior to maturity or early retirement and the ownership of interests in such global note may be transferred only through the book-entry system. In this regard, we understand that the phrase "specified by the Secretary", when used in legislation, is usually understood to mean that specification will be made through regulations.

The ICSDs further request that Treasury and IRS clarify that global notes in bearer form held and immobilized through the ICSDs or any other book-entry system specified by the secretary will continue to be treated as in registered form for U.S. federal income tax purposes even if investors, in very limited circumstances, could get definitive bearer certificates, e.g. if a book-entry system goes out of existence, or if the issuer is declared bankrupt or becomes insolvent. The exact conditions under which definitive notes can be issued must be clarified. While U.S. issuers are expected to structure their international debt securities in bearer form so that they are treated as in registered form for U.S. tax purposes (and update their issuing documentation), it is possible that some non-U.S. issuers will structure their international debt securities in bearer form so that they are treated as in registered form for U.S. tax purposes while other non-U.S. issuers will want to maintain the same situation as today (i.e. where TEFRA D-like certification is collected in order to avoid the excise tax). We therefore think it is important that it is clarified by the Treasury and IRS that non-U.S. issuers issuing through the ICSDs or any other book-entry system specified by the secretary have this choice (within the same book-entry system) and that they are not forced to update their documentation by 18 March 2012.



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We finally wish to underline the necessity for issuers, arrangers and advisors to bring the required modifications to their issuance documentation well ahead of implementation date, a process which may take several months considering the size of this market<sup>5</sup>. Our aim is to assist the capital markets achieve a smooth transition to the new rules, so a prompt response and guidance from Treasury and IRS on the questions raised above would be greatly appreciated. We look forward to receiving your guidance on these important aspects and remain at your disposal should you wish to discuss this matter further.

Yours sincerely

Stephan Pouyat  
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<sup>5</sup>The joint ICSDs' infrastructure is home to more than 12,000 new international debt issuances per month.