

US

Morrison & Foerster

Guidance on registered bonds

The Foreign Account Tax Compliance Act, which was enacted as part of the Hiring Incentives to Restore Employment Act, ends the practice by US issuers (and controlled foreign corporations) of selling bearer debt to foreign investors under TEFRA C and TEFRA D after March 18 2012. As a result, debt issued after that date must be issued by US issuers in registered form.

The Foreign Account Tax Compliance Act codified US Internal Revenue Service Notice 2006-99, providing that debt obligations cleared through dematerialised book-entry systems would be treated as being issued in registered form.

On March 7 2012, the US Internal Revenue Service released Notice 2012-20, which addresses, among others, the circumstances under which certain bonds are treated as in registered form, and temporary relief from the requirement to collect US Internal Revenue Service Forms W-8 in order to qualify for the portfolio interest exemption from US withholding tax on interest. The US Treasury Department said it intends to issue regulations implementing the provisions included in Notice 2012-20.

Notice 2012-20 states that a debt obligation will be considered to be in registered form for US federal income tax purposes if the obligation is issued through a dematerialised book entry system in which beneficial interests are transferable only through a book entry system maintained by a clearing organisation (or its agent); or a clearing system in which the obligation is effectively immobilised.

Pursuant to the Notice, an obligation will be treated as immobilised if the obligation is represented by one or more global securities in physical form that are issued to and held by a clearing organisation (or its custodian or depository acting as its agent) for the benefit of purchasers of interests in the obligation under arrangements that prohibit the transfer of the global securities except to a successor clearing organisation subject to the same terms; and beneficial interests in the underlying obligation are transferable only through a book entry system

maintained by the clearing organisation (or its agent).

According to the Notice, dematerialised or immobilised obligations are issued in registered form even if holders may receive bearer bonds in the following circumstances: (i) termination of the clearing organisation's business without a successor; (ii) default by the issuer; or (iii) issuance of definitive securities at the issuer's request upon a change in tax law that would be adverse to the issuer but for the issuance of physical securities in bearer form. The Notice provides that, if any such circumstance occurs, regardless of whether any option to obtain a physical certificate in bearer form has been exercised, any obligation as to which a holder has a right to obtain a physical certificate in bearer form will no longer be considered in registered form.

The US Internal Revenue Service indicates in Notice 2012-20 that it has received comments that there may be difficulties in obtaining US Internal Revenue Service Forms W-8 in certain non-US markets in connection with the issuance of registered debt. Such forms are required to qualify for the portfolio interest exemption from 30% US withholding tax on interest payments.

In response to these comments, the Notice provides that no Forms W-8 are per se required for obligations issued in registered form after March 18 2012 and before January 1 2014 provided the obligations are issued in compliance with the foreign-targeted registered obligation rules (these rules were suspended by Notice 2006-99 and have now temporarily come back to life).

To qualify for the portfolio interest exemption from the 30% US withholding tax on interest payments, however, a US withholding agent must receive either Form W-8 or documentary evidence certifying that the beneficial owner of the registered obligation is not a US person. The foreign-targeted registered obligation rules generally require any registered obligations to only be sold to non-US persons pursuant to procedures similar to TEFRA D but permit certain intermediaries to certify as to the holder's non-US status.

Notice 2012-20 confirms that the TEFRA C and TEFRA D procedures will remain in existence for purposes of an exception from information reporting of interest with respect to certain short-term obligations (term of 183 days or less) and for purposes of avoiding the excise tax

(equal to 1% of the principal amount of the obligations times the number of years to maturity) with respect to obligations that are not issued in registered form for US federal income tax purposes.

Thomas A Humphreys, Rimmelt A Reigersman and Jared B Goldberger

Contacts:

1290 Avenue of the Americas
New York, NY 10104-0050
United States

Tel: +1 212 468 8000
Fax: +1 212 468 7900
Web: www.mofo.com