



Securities Industry Association

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Ms. Barbara M. Angus
International Tax Counsel
Department of the Treasury
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Dear Barbara:

The Securities Industry Association ("SIA")¹ greatly appreciates the early basic guidance provided in IRS Notice 2003-79 concerning IRS and Treasury plans to put in place for years after 2003 new foreign issuer certification procedures for investors and brokers to rely on in fulfilling their tax reporting obligations with respect to foreign dividends.

SIA believes that providing foreign issuers with a user-friendly mechanism for clarifying the tax character of the distributions on their securities holds the promise of several important benefits: (i) improved investment decisions by investors who are better able to take tax characterization into account when investing; (ii) significantly reduced uncertainty costs for all those with a stake in correct tax characterization, due to the increase in easily accessible and reliable tax information; (iii) the elimination of the vast majority of duplicated efforts by taxpayers, financial advisors, those responsible for information reporting, and tax administrators grappling with the determination of the proper tax characterization of many distributions; and (iv) improved tax reporting by both taxpayers and those responsible for information reporting to investors. In the end, investors are the primary beneficiaries of any rules that serve to minimize the costs and market

¹ The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs 780,000 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2003, the industry generated an estimated \$209 billion in domestic revenue and \$278 billion in global revenues. (More information about SIA is available on its home page: www.sia.com.)

inefficiencies associated with obtaining the benefits of the greatly reduced tax rate on dividends.

This letter comments on a number of the issues relating to the anticipated certification procedures that we discussed with you and your staff when we met in April and that we believe will be central to whether the new certification procedures will end up providing the hoped-for benefits. SIA would welcome the opportunity to explore these (or other) issues further if it would aid in any way in the development of the forthcoming guidance.

I. Standardized IRS form. Section 5 of IRS Notice 2003-79 indicates that for years after 2003, foreign issuers will be permitted to make use of a certification procedure to ensure that their dividends are reported as qualified dividends. Those responsible for filing information returns will be required to report dividends as qualified "if the corporation has made an appropriate certification under penalties of perjury to the effect that:

1. for any security that is not a common or an ordinary share, the security is equity rather than debt for U.S. federal income tax purposes;
2. where a security is not readily tradable on an established securities market in the United States and where the foreign corporation is not incorporated in a possession, the foreign corporation is eligible for the benefits of a tax treaty with the United States that meets the requirements of the 2003 Act; and
3. the foreign corporation is not, in the taxable year of the corporation in which the dividend was paid, and was not, in the preceding taxable year, a FPHC, FIC, or PFIC."

In order to serve the dual purposes of increasing the reliability of the tax reporting of foreign distributions and significantly reducing system-wide investigative costs and uncertainties, SIA believes the IRS needs to develop a standard certification form to be used by all foreign issuers seeking to obtain reporting benefits. Without such a form, we believe based on our experience with the 2003 tax year that there would be significant costs associated with analyzing ambiguous wording and/or supplemental text that arguably qualifies or contradicts the required certification statements. Nonstandard certifications would also present the possibility with respect to some securities of varying tax treatment of the distributions by investors and those responsible for tax information reporting.

Foreign issuers, too, should benefit from a standardized form, as they would each be spared creating their own complex document and the planning costs associated with exploring alternative phraseologies.

II. Foreign issuers with SEC filings. SIA believes that foreign issuers that are required to file annually with the SEC should be permitted to elect to provide the necessary tax statements in electronically available documents filed with the SEC as an alternative to completing the IRS certification procedures. However, for the same reasons that a standardized form should be required from issuers participating in the IRS certification procedures, issuers choosing to instead rely on their SEC filings should be required (on a prospective basis only) to make the same tax statements that they would have been required to make had they used the IRS certification procedures. (See section VIII. below for a discussion of certifications for 2004.)

Guidance should specify the SEC forms in which the tax information must appear for this purpose. Any given issuer may have numerous SEC filings that are posted electronically at different times throughout the year, and investors and those responsible for tax information reporting should be provided certainty concerning where the relevant tax information can be found. In addition, to make the tax statements available in SEC filings easy to locate via electronic searches, it would be very helpful to require all issuers using this alternative to include at the beginning of their required certification statements a specified, unique set of characters (e.g., if there is an official IRS form, its number). Finally, guidance should require the issuer to provide a copy of the relevant portion of its SEC filing to the IRS in order to centralize all tax information from both alternatives in one place. (See section IV. below concerning centralized collection and publication by the IRS.)

III. Content of certifications.

A. In general. The certification form should call for the issuer to provide a brief description of each of its securities intended to be covered by the certification, along with their CUSIP numbers and other standard security identifiers (e.g., ISINs, sedols). In addition, the issuer should be requested to identify with respect to each covered security the income source country and the exchanges where traded. Given the vast number of foreign issuers and securities, as well as the many varying identification systems in use in different countries and regional equity markets, it is necessary to have as much information as possible concerning covered securities in order to act upon the certification appropriately and efficiently.

For those cases involving a pass-through entity for U.S. tax purposes that owns one or more foreign equities, the certification form should also require information concerning the pass-through entity.

SIA's Committee on Tax Compliance and Administration has developed a draft certification for temporary industry use in an educational outreach program to foreign issuers seeking accurate tax information concerning their distributions.

A copy of this form is attached to this letter, and we would welcome the opportunity to discuss it with you.

B. Consent to IRS release of certification to public. Since participation in the new certification procedures will be voluntary, issuers that elect to participate should be required to sign a consent to the IRS release of their certification to the public. Inclusion of such a provision in the standard form would allow the IRS to maximize public access to the information received from issuers. (See discussion at section IV. below.) The IRS has incorporated a "consent to publication" paragraph in at least one 2003 form, the Form 8806, *Information Return for Acquisition of Control or Substantial Change in Capital Structure* (although the consent is optional rather than mandatory as we recommend in this context).

IV. Centralized collection and publication by the IRS. SIA believes that most of the benefits from certification procedures hinge on the extent to which investors, brokers and other third parties needing to determine the tax character of foreign distributions have reliable and cost-effective means of obtaining access to the certifications. Notice 2003-79 envisions both certifications that are "made available by the foreign corporation to the public" and "procedures under which a foreign corporation submits its certification to the IRS for date stamping." Since all participating foreign issuers will be providing their certifications to the IRS, all certifications will end up in at least one centralized location under the anticipated procedures. This fact should be exploited, and the IRS should provide the certifications to the public in order to minimize the systemic costs of gaining access to completed certifications.

If the new certification procedures fail to take advantage of the fact that all certifications are in IRS possession, investors and those responsible for tax information reporting will essentially be on their own attempting to compile the necessary information. For brokers responsible for tax reporting to their clients on a very large number of securities, the task of gathering the necessary information would be daunting. There are currently well over fifteen thousand dividend-paying securities of foreign issuers worldwide, and one would expect that number to increase annually. There are varied dividend payment flows in different countries and regions of the world, and a large number of paying agents and clearing organizations through which the dividends flow in those countries and regions. Not only is there typically no direct relationship between foreign issuers (or their paying agents) and the brokers responsible for U.S. tax reporting to their shareholders, but often the broker is several steps removed down the payment chain from the issuer.

SIA is assisting member firms in coming together to explore roles for third-party service providers in seeking certifications and aiding in the proper characterization of foreign distributions. Our member firms recognize that a joint effort will help them reduce their individual costs of obtaining the tax information necessary to counsel clients on their investments and fulfill tax reporting

obligations. However, there are limits to what brokers working together can accomplish. They can dramatically reduce the duplication of efforts, but only the IRS and Treasury rules can lower economy-wide costs by eliminating the need for a worldwide search for and compilation of certifications. Rules that provide for IRS release of certifications would eliminate costs associated with not knowing with certainty whether or not a given foreign issuer has certified or would be willing to certify with respect to a particular security, and the considerable efforts necessary to find something which is not there and is not obtainable.

We believe that it would be ideal for the IRS to make foreign issuer certification information available by means of a publication similar to existing Publication 1212, *List of Original Issue Discount Instruments*. The IRS publication could identify each security as to which the IRS has received a valid certification. This type of publication would have the benefit of making all information readily available and easily usable by investors big and small alike, as well as by all those responsible for tax reporting.

As we discussed with your staff when we met in April, if the IRS determines that such a comprehensive publication is not feasible in the short run due to time or resource constraints, we believe that a simple IRS publication consisting of a copy of each certification filed, without IRS analysis or approval of any kind, would be extremely useful. This would involve almost no IRS resources, and yet by efficiently placing the certifications in the public domain would greatly aid investors, those responsible for tax information reporting and all others seeking correct tax information. We would hope that over time the IRS would find the resources to "upgrade" its release of information to an IRS Web site, even if the release remained on a "no analysis" basis. For a relatively modest cost, this would vastly improve access to the certifications for many investors and small brokers. Finally, it would be very helpful if copies of the certifications received by the IRS were also released to the IRS Reading Room on an "as is," real-time basis, enabling earlier access to the information by interested parties.

As mentioned above (see subsection III.B. above), the IRS should make issuer consent to release of its certification to the public a required component of the standard certification form. Qualified foreign issuers should welcome this mechanism for efficiently disseminating the tax information necessary to aid their shareholders subject to U.S. tax.

V. Timing of filing and publication of certifications. We believe that issuers generally should be required to file their certifications with the IRS no later than 30 days following the declaration of their first dividend for the year, in order to enable their tax information to be available as early as possible during the calendar year. Guidance also needs to specify an annual deadline for filing certifications with the IRS for the calendar year in order to obtain the reporting benefits of the program. Brokers and others responsible for information reporting

(or third parties acting on their behalf) need to obtain the necessary certification information by November 30 in order to be able to incorporate it into their computer systems and meet their tax reporting obligations. Working back from that date, foreign issuers should be required to file their certifications with the IRS by the date that is no later than the date that would permit the IRS to release its publication by November 30. If an issuer failed to meet the filing deadline, those responsible for information reporting would be permitted (but not required) to report the distribution as nonqualified. (See discussion at section VII. below.)

VI. Renewal of certifications. Because the facts and legal analysis underlying the great majority of certifications will not change from year to year, we believe that certifications should remain valid for three years as a general rule, and generally not be required annually as anticipated in Notice 2003-79. However, issuers should have a duty to update their certifications upon any change in fact or law affecting the tax character of their distributions as qualified dividends.

VII. Effect of no certification. Notice 2003-79 envisions a foreign issuer participating in the new certification procedures in order to ensure that its distributions on its equity securities are reported as qualified dividends. The notice appropriately indicates that those responsible will be *required* to report as qualified dividends any distributions on securities with respect to which there is an effective issuer certification (or appropriate statement in an SEC filing).

It is our understanding that those responsible for information reporting will be permitted (but not required) to report a distribution as nonqualified in the absence of an effective issuer certification (or appropriate statement in an SEC filing) by a prescribed due date. We believe that the new guidance needs to explicitly state this, as there will be many instances in which an issuer will fail to certify.

Securities dealers and others in the financial services industry are committed to aiding their investors obtain the maximum benefits to which they are entitled under the new dividends tax laws. However, brokers anticipate that many foreign issuers will fail to provide the IRS with a certification with respect to their equity securities, for a variety of reasons (e.g., lack of knowledge of U.S. tax rules, very few U.S. shareholders sensitive to U.S. tax rates, language barriers, etc.). Further, in many instances brokers simply will not have a reasonable means for reliably confirming that a distribution is a qualified dividend. We believe that the new rules need to provide clear guidance for these situations.

VIII. Certification procedures for 2004. While we believe a standard IRS certification form would be extremely useful and we hope one is developed as soon as possible, we believe its use should be made optional for 2004. For 2004, we believe investors and those responsible for tax reporting should be able to rely on any reasonable foreign issuer statements under penalties of perjury (or statements in appropriate SEC filings) to the effect that the basic statements set

forth in section 5 of Notice 2003-79 are at least more likely than not true, so long as they are timely filed with the IRS as provided in the forthcoming guidance.

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Thank you for your consideration of our views. Please do not hesitate to contact me (at 202-216-2031 or by email at pmcclanahan@sia.com) if you or your staff would find it helpful to discuss further any aspect of anticipated foreign issuer certification procedures.

Sincerely,

Patti McClanahan
Vice President and Director for Tax Policy
Securities Industry Association

Attachment (1)

cc: Michael Caballero
Andrew Froberg
John Harrington