

## **Joint AFME/BBA submission on the “Part IIIA: Controlled Foreign Company (CFC) interim improvements” consultation document**

The Association for Financial Markets in Europe (AFME) and the British Bankers' Association (BBA) welcome the publication of the discussion document “Part IIIA: Controlled Foreign Company (CFC) interim improvements” in November 2010 and the opportunity to offer comment.

We would, of course, be happy to clarify any points raised in these comments and discuss any issues related to our understanding of HM Treasury (HMT) and HM Revenue and Customs' (HMRC) intentions. We look forward to continuing this dialogue and to further meetings with officials at the appropriate stage.

AFME and the BBA re-affirm their commitment to transparency and openness in dealings between their members and HM Government and the observations and comments that follow are provided in that light.

### **General**

We do not have any specific comments on the measures as drafted. We believe that the interim improvements will have limited impact for our members and we look forward to receiving details on the banking specific proposals in due course.

### **Capital structure test**

We are disappointed to see that the proposals to relax the 15% limit in the capital structure test (which we understand were being considered at one stage) have been dropped. We believe that the test is restricting business and is putting artificial constraints on genuine activities.

It is clear that a test that was appropriate at a time when banks were relatively free to determine their own level of capital and when banking activities were confined to arguably straightforward transactions is in urgent need of updating. In times of high and increasing regulation of the banking business it could be argued that it should be sufficient for a bank to be regulated locally in order to satisfy the EAT and we hope that this may be reflected in the final CFC legislation when it is introduced in 2012. However in the meantime we believe that a relaxation in the 15% limit in the capital structure test would be a significant benefit to many of our members and would, in our view, fall squarely within the stated aim of the interim improvements.

We would also strongly urge HMRC to consider relaxing the requirement for the 15% test to be computed on a daily basis. We feel that an average test or some other measure could provide the same protection for HMRC whilst significantly reducing the compliance burden for our member banks.

## **Current issue regarding s.755D (1A), TA88**

We believe that the interim improvements should be used to correct what we understand is an unintended consequence of the existing CFC legislation.

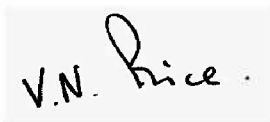
S.755D(1A)(c) ICTA 1988 was inserted by FA 2008 with effect from 12 March 2008, with a deemed split of accounting periods that straddle this date. It deems for Controlled Foreign Company (CFC) purposes that a company has control of another company if it is entitled to the greater part of the assets available for distribution on winding up.

S.756 ICTA 1988 applies s.417(9) ICTA for the purposes of the CFC rules. Under this sub-section a person carrying on the business of banking is not deemed to be a loan creditor in respect of loan capital and debt for money lent by the bank in the ordinary course of the banking business.

However, the strict technical position appears to be that s.755D(1A)(c) contains nothing that specifies the capacity in which a company receives assets on a winding up as being relevant for the test. This contrasts with the close company rules in s.416 and 417 ICTA 1988 where participators are expressed to include loan creditors but s.417(9) excludes a bank from being a loan creditor.

If a bank were deemed to control a CFC by virtue of s.755D(1A)(c) then any apportionment would have to be on a "just and reasonable" basis under s.752(4). Where the bank has lent to an unrelated company in the ordinary course of the banking business and ends up in a position where it would be deemed to control the company under s.755D(1A)(c) because of a deterioration in the financial position of the entity or simply because the bank is the primary funder then nothing would be apportioned to the bank on a "just and reasonable" apportionment. However on a strict basis the unrelated company should be reported on the CFC pages of the tax return for the UK bank undertaking the lending or the UK parent of an overseas bank undertaking the lending but with a nil apportionment.

The strict technical position is totally unworkable for our members as it would mean that each banking group would have to consider every single corporate borrower globally to consider if s.755D(1A)(c) could apply. We believe that the legislation should be amended to exclude any amounts which a bank might receive in a winding up in respect of lending made in the ordinary course of its business as being excluded from the definition of control for these purposes.



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**AFME** (Association for Financial Markets in Europe) promotes fair, orderly, and efficient European wholesale capital markets and provides leadership in advancing the interests of all market participants. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME participates in a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association through the GFMA (Global Financial Markets Association).

AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

For more information please visit the AFME website, [www.AFME.eu](http://www.AFME.eu).

The **British Bankers' Association ("BBA")** is the leading association for the UK banking and financial services sector, speaking for over 200 banking members from 60 countries on the full range of UK and international banking issues. In addition, 40 professional firms are also associated with us. Our members, whilst predominately banks, engage in activities which range widely across the financial spectrum, encompassing services and products as diverse as primary and secondary securities trading, insurance, investment advice and wealth management, custody, as well as conventional and non conventional forms of banking.