

THE ASSOCIATION OF GLOBAL CUSTODIANS

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August 20, 2018

SUBMITTED VIA E-MAIL

Mr. Peter Bach-Mortensen
Head of Division, Policy, Law, and Economics
Danish Ministry of Taxation
Nicolai Eigtveds Gade 28
DK 1402 Copenhagen
Denmark
pbm@skm.dk

Re: Proposed Amendments to Denmark's Tax Treaty Claims Process

Dear Mr. Bach-Mortensen:

We are submitting this letter on behalf of the members of the Association of Global Custodians ("AGC" or "Association")¹ to express interest in what we understand to be the proposals currently under consideration in Denmark to amend the procedures for foreign investors to claim withholding tax relief under Denmark's tax treaties.

In providing global custody services, AGC members routinely seek appropriate withholding tax relief on behalf of custody clients. We typically process millions of such relief claims in the aggregate each year, affecting substantial amounts of cross-border portfolio investment flows in and out of countries worldwide, including Denmark. As such, we experience on a daily basis the costs, inefficiencies, and excessive withholding that can arise when the procedures for

¹ The Association is an informal group of 12 member banks that provide securities safekeeping and asset servicing functions to cross-border institutional investors worldwide, including investment funds.

claiming lawful relief are unduly burdensome or complicated for the investors involved. The Association makes every effort to work with tax authorities around the world to identify and find ways to minimize problems arising from unduly complex withholding tax relief procedures.

The Association understands that Denmark is contemplating replacing its current tax reclaim procedure with a relief at source (RAS) procedure for claiming treaty relief. We applaud the decision to offer a RAS system. Providing a RAS system would be consistent with recommendations that have routinely been made by the major bodies that have studied the effect of withholding tax procedures on the fairness and efficiency of cross-border markets.²

The AGC fully appreciates that in any transition to a RAS system, important questions must be resolved regarding the features of the new system, including documentation requirements, reporting procedures, and standards of liability for withholding agents and intermediaries. As the bodies referenced above have acknowledged, care must be taken to ensure that those questions are answered in a way that results in a fair, balanced, and efficient system to address the needs of investors, financial institutions, and governments.

As one example, the AGC notes the importance of aligning with existing best practice recommendations concerning documentation requirements and other aspects of withholding tax procedures, in order to achieve the significant efficiency gains that will arise for all parties from international harmonization of procedures.³ We also believe it is important to ensure that domestic tax principles contain the basic foundational elements that are the preconditions for a smoothly functioning RAS system.⁴ We note, too, that particular features of any new system

² See, e.g., the EU Clearing and Settlement Fiscal Compliance Experts' ("FISCO") Group's 2007 "Second Report on Solutions to Fiscal Compliance Barriers Related to Post-Trading within the EU", available at http://ec.europa.eu/internal_market/financial-markets/docs/compliance/report_en.pdf; the OECD's Informal Consultative Group on the Taxation of Collective Investment Vehicles and Procedures for Tax Relief for Cross-Border Investors (the "ICG") 2009 Report on "Possible Improvements to Procedures for Tax Relief for Cross-Border Investors", available at <http://www.oecd.org/ctp/taxtreaties/41974569.pdf>; the European Commission's 2009 Recommendation on Withholding Tax Relief Procedures, available at <http://ec.europa.eu/transparency/regdoc/rep/3/2009/EN/3-2009-7924-EN-F1-1.Pdf>; the EU's Tax Barriers Business Advisory Group's ("T-BAG's") 2013 Report on "Workable Solutions for Efficient and Simplified Fiscal Compliance Procedures Related to Post-Trading Within the EU", available at http://ec.europa.eu/internal_market/financial-markets/docs/clearing/tbag/130524_tbag-report-2013_en.pdf; the European Commission's 2015 Action Plan on Building a Capital Markets Union, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0468>; and the European Post-Trade Forum's 2017 Report, available at https://ec.europa.eu/info/sites/info/files/170515-eptf-report_en.pdf.

³ Regarding the importance of achieving harmonized procedures, see, e.g., the ICG's 2009 Report on "Possible Improvements to Procedures for Tax Relief for Cross-Border Investors", available at <http://www.oecd.org/ctp/taxtreaties/41974569.pdf>; the OECD's 2013 "TRACE Implementation Package", available at http://www.oecd.org/ctp/exchange-of-tax-information/TRACE_Implementation_Package_Website.pdf; and the June 18, 2018 letter to the European Commission from Marc Bayle de Jessé of the European Central Bank, on behalf of the Eurosystem's Advisory Group on Market Infrastructures for Securities and Collateral ("AMI-SeCo"), regarding the European Commission's December 2017 Code of Conduct on Withholding Tax, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/code_of_conduct_on_withholding_tax.pdf.

⁴ These include, for example, the principle that entitlement to tax benefits with respect to dividends is fixed on the record date, based on record date holdings, and that market claims on dividends are treated as indemnities rather than taxable dividends; for a discussion of these issues, see the AMI-SeCo Group's January 2018 Eighth T2S Harmonisation Progress

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under consideration may warrant special care, whether due to their novelty, timing challenges, or other potential difficulties (e.g., post-payment “spot checks”, pre-payment online clearance procedures, etc.).

In addition to consideration of the design of the new RAS system, the Association would also like to stress the importance of maintaining a mechanism for obtaining refunds of withholding tax for the minority of cases in which circumstances preclude timely satisfaction of the requirements for RAS. The availability of such a refund mechanism alongside a RAS system was also one of the best practices recommended in each of the reports mentioned above. Our members’ experience with Denmark’s existing refund mechanism gives us particular insight into improvements that could be made to clarify and streamline the process of obtaining relief.

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The AGC would welcome the opportunity to engage with the Danish tax administration to share with you our insights into practical issues of application of any new RAS system and the existing reclaims system. We understand that a meeting on the new RAS system will be held with interested parties on September 11th in Copenhagen, and we plan to have representation at that meeting. In addition, the members of the Association would very much like to meet with you separately to discuss both the new RAS system and the existing system, and we will follow up with a separate request for such a meeting. Please do contact the undersigned if you have any questions concerning our positions.

Sincerely yours on behalf of the Association,



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