CLEARY GOTTLIEB
Alert Memo
DECEMBER 14, 2012
www.clearygottlieb.com

Italy Lessens Tax Rules Applicable to Bond Issuances Made by Non-listed Companies

On December 13, 2012, the Italian Parliament passed a law (the "Law")[1] that, among other things, partially amends the tax regime applicable to notes (including bonds and securities similar to bonds) as well as commercial paper issued by non-listed companies (the "Securities"), recently introduced with Article 32 of Law Decree No. 83 of June 22, 2012, converted into law with Law No. 143 of August 7, 2012 ("Article 32").

The amendments approved with the Law ameliorate the overall regime established by Article 32, aimed at ensuring that the Securities benefit from the more favorable regime previously applicable only to debt instruments issued by banks and listed corporations[2].

In fact, due to the implementation of Article 32 and the various amendments made thereto in the subsequent months, Italian non-listed companies are now virtually on the same playing field as Italian banks and listed companies with respect to issuance of debt on international capital markets. The regime now applicable presents the following key features[3].

- No Special Limits on Deductibility of Interest Expense: the limitation on the deductibility of interest expense accrued on securities issued by non-listed companies[4] is lifted, provided that the Securities are either

1 Its entry in force is subject to its publication in the Official Gazette, which is expected to occur in the upcoming days.

2 The Law confirms, with amendments, Law Decree No. 179 of October 18, 2012, which, as illustrated in our previous Alert Memorandum of October 4, 2012, partially modified the tax regime applicable to the Securities recently introduced with Article 32. Article 32 was amended a first time when Law Decree No. 83 of 2012 was converted into law with Law No. 143 of August 7, 2012. See also our Alert Memoranda of June 15 and August 9, 2012. All such memoranda can be found at the following links: http://www.cgsh.com/italys_new_rules_on_notes_and_commercial_paper/, http://www.cgsh.com/italys_new_rules_on_notes_and_commercial_paper_update/. Please refer to such memoranda also for the corporate aspects of this reform.

3 In addition, the new regime contemplates a full deductibility of the expenses incurred in connection with the issuance on a cash basis, *i.e.* in the year in which they are paid, regardless of any different timing imputation for accounting purposes.

4 Pursuant to such rule (see Article 3, paragraph 115, of Law No. 549 of December 28, 1995), tax-deductible interest expense accrued on securities issued by non-listed companies cannot exceed the official reference rate set, at the time

© Cleary Gottlieb Steen & Hamilton LLP, 2012. All rights reserved.

This memorandum was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Throughout this memorandum, "Cleary Gottlieb" and the "firm" refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term "offices" includes offices of those affiliated entities.

(i) listed on a regulated market or multilateral trading facility in a EU Member State, or a State that is part of the European Economic Area and is included in the list of States and territories allowing an adequate exchange of information with the Italian tax authorities; or

(ii) held by qualified investors[5], that (x) do not hold, directly or indirectly, a shareholding representing more than 2% of either vote or value of the issuer, and (y) are beneficial owners of the relating income, resident either in Italy or in one of the States and territories allowing an adequate exchange of information with the Italian tax authorities.

Guidance from the tax administration as to the procedures to be adopted to ensure compliance with the requirements under (ii), above, and hence certainty for issuers on the overall cost of financing, is desirable to enable non-listed companies to resort to non-listed issuance to raise financing on international capital markets.

Despite the above, interest expense accrued on the Securities would still be subject to the ordinary interest expense limitation rules, including the rule generally providing a limited deductibility for such interest expense, up to 30% of the company's EBITDA for any amount in excess of interest receivables.

- Tax Exemption on Interest Income Earned by Certain Foreign Investors: Article 32 extended the scope of Legislative Decree No. 239 of April 1, 1996, to include Securities that are listed on a regulated market or a multilateral trading facility in a EU Member State, or a State that is part of the European Economic Area and is included in the list of States and territories allowing an adequate exchange of information with the Italian tax authorities.

  As a result, foreign holders of such Securities that are resident in white-listed countries benefit from an exemption from the ordinary 20% final tax generally levied on interest income accrued on securities issued by non-listed companies, if, among other things, they are the beneficial owners of the Securities and comply with certain standard certification procedures.

  This is an important development as it enables non-listed issuers to access international capital markets without having to bear a tax gross-up cost.

---

of issuance, by the European Central Bank increased by two-thirds if the securities are not listed, or doubled, if they are listed.

[5] For these purposes, qualified investors are the investors identified in Article 100 of Legislative Decree No. 58 of February 24, 1998 (the Italian Consolidated Financial Services Act), which include, among others, banks, investment firms, insurance companies, collective investment undertakings, pension funds, broker dealers and other institutional investors as well as large corporations.

CLEARY
GOTTLIEB

As a result, the current tax landscape would enable non-listed issuers to issue listed Securities without suffering from additional cost of financing in terms of interest expense allowance limitations and gross-up for withholding taxes. By contrast, non-listed issuances would continue to trigger withholding tax and, possibly, cost for administering procedures necessary to ensure compliance with the requirements set forth under the Law to avoid the specific interest expense disallowance discussed above. Nonetheless, depending on the features of the individual transaction (for instance, in terms of the identity and tax residence of the likely investors and of the expected liquidity of the Securities), non-listed issuances may also result in an appealing instrument now available to non-listed issuers to solicit debt raising on international capital markets.

* * *

If you have any questions concerning this memorandum, please feel free to contact Vania Petrella (+39 06 6952 2204) or Gianluca Russo (+39 06 6952 2680) in our Rome office or any of our other Italy-based partners and counsel listed under Capital Markets or Tax Practice Areas under the "Practices" section of our website at www.clearygottlieb.com, or any of your regular contacts at the firm.

CLEARY GOTTLIEB

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Cleary Gottlieb Steen & Hamilton (Hong Kong)
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI
Al Odaid Tower
Office 1105, 11th Floor
Airport Road; PO Box 128161
Abu Dhabi, United Arab Emirates
T: +971 2 414 6628
F: +971 2 414 6600

SEOUL
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099