

**Confidential Treatment Requested by
Clifford Chance US LLP on Behalf of the
Institute of International Finance**

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February 27, 2020

Via E-mail

Makan Delrahim
Assistant Attorney General
Antitrust Division
Department of Justice
Main Justice Building
Room 3109
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: Institute of International Finance Request for Business Review Letter – Addendum

Dear Mr. Delrahim,

On behalf of our client, the Institute of International Finance ("IIF"), we submit this addendum to the IIF's May 19, 2019 request for a Business Review Letter ("Business Review Letter Request") concerning the IIF's proposed adoption of a set of Voluntary Principles for Debt Transparency ("Principles"). Since the IIF's submission of its Business Review Letter Request, an updated draft of the Principles ("June 2019 Principles")¹ has been published on the IIF's website for its members to review. A copy of the June 2019 Principles is enclosed for your reference. At the request of the Department of Justice, Antitrust Division ("Division"), the IIF submits the following clarifications:

First, under the Principles, no private lender will serve as the Reporting Host². There is a possibility that the Reporting Host may be funded using a public-private model. Regardless of the funding model, however, lenders will engage with the Reporting Host on an arm's length basis.

¹ Unless otherwise stated, the term "Principles" shall refer to the June 2019 version enclosed with this addendum.

² See paragraph 1 of the Principles.

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Second, with respect to the disclosure of information pertaining to Financial Transactions³, specific interest rates will not be disclosed. Rather, disclosure will be provided as one of a number of specified interest rate ranges.⁴ While the specific ranges of 1% to 3%, 4% to 7%, and 8% to 11% as noted in the Principles are not yet finalized, these ranges serve as close guidelines to the types of broad ranges contemplated for interest rate disclosure.

Finally, IIF clarifies that, with the exception of certain types of Financial Transactions where information is already publicly disclosed within a shorter timeframe in the ordinary course (e.g., bond issuances), the "cooling off" period for disclosure will be no earlier than 60 days and no later than 120 days after the date on which funds first move in connection with the relevant Financial Transaction.

The IIF plans to publish a document to assist parties with the implementation of the Principles from an operational perspective ("Implementation Note"). Therefore, the Principles have been drafted to provide sufficient flexibility for the Implementation Note to expand on the obligation to observe a "cooling off" period—primarily to allow for circumstances where if disclosure was readily available through another means,⁵ then the disclosure of Relevant Information⁶ could be made at the same time by the Reporting Host (i.e. earlier than 60 days after the date on which funds first move). For example, in the context of bond issuances, bond prospectuses are made available at issuance. Market participants have access to the Relevant Information and much more through widely used databases, e.g., Perfect Information. To artificially delay the release of the Relevant Information because of a cooling off requirement in these circumstances would produce an inequitable outcome for civil society organizations who may not have paid subscriptions to market information. Similarly, multilateral institutions such as the World Bank or and other multilateral development banks also publicize the loans for which they have provided guarantees or other forms of credit support, thus putting at least certain Relevant Information in the public domain at the time the support is given or approved (which can indeed be earlier). But other than in such specific circumstances/loan products, the intention is for the cooling off period to apply to all other circumstances.

³ See paragraph 4 of the Principles.

⁴ See paragraph 5, n. 6 of the Principles.

⁵ For example, bond prospectus information is provided by third-party vendors such as Perfect Information (<http://www.perfectinfo.com/>).

⁶ See paragraph 5 of the Principles.

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We would be happy to supply you with further information upon request and look forward to your statement of the Division's enforcement decisions.

Sincerely,

A handwritten signature in black ink, appearing to read 'TC', is positioned above the name Timothy Cornell.

Timothy Cornell

A new set of voluntary private sector principles to enhance transparency in sovereign debt markets

1. PREAMBLE

In recent years, a number of well-regarded public-sector initiatives have promoted transparency in sovereign debt markets including the IMF's Fiscal Transparency Code. In this context, since the launch of the *Principles for Stable Capital Flows and Fair Debt Restructuring (Principles)* in 2004, supported by the IIF under the auspices of the Group of Trustees of the *Principles*, the IIF has been increasingly active in advancing good practices in sovereign investor relations (IR) and data dissemination in emerging markets, publishing rankings of such practices since 2005. Many countries have made progress in enhancing IR and data dissemination practices, helping develop the investor base and build capital markets. However, transparency in respect of medium to long-term financing provided by the private sector to sovereign debtors could still be improved. Accordingly, this new set of voluntary **Principles for Debt Transparency** – conceived within the framework of the above-mentioned 2004 *Principles* and to be subject to the same governance – relate to financial transactions with both sovereigns and sub-sovereigns. While transparency and debt sustainability concern the full spectrum of lenders and borrowers, these new voluntary Principles for Debt Transparency are intended to apply to the private sector. They are designed to complement G20 and other public sector initiatives (notably the G20 Operational Guidelines for Sustainable Financing (G20 Guidelines)) aimed at improving transparency in public sector borrowing (whilst avoiding duplication). Robust implementation of such guidelines by both public and private sector creditors will be an essential element of the quest for better transparency in sovereign debt markets.

Greater transparency across all debt transactions should improve the flow of information and reduce the risk of adverse shocks arising as a result of undisclosed public liabilities appearing in central government liabilities. Greater transparency will assist borrowers, creditors and the official sector in the ongoing assessment of debt dynamics and debt sustainability. In this respect these Principles also complement the World Bank Group and International Monetary Fund (IMF) multi-pronged approach for addressing emerging debt vulnerabilities.

Private sector lenders fully recognise the importance of debt sustainability, believing it to be a fundamental element in the evaluation of creditworthiness. Lenders value and regularly refer to the data, analysis and guidelines of the IMF and IDA's Non-Concessional Borrowing Policy (NCBP), including Article IV consultation reports (which benefit from greater disclosure of debt coverage), the Debt Sustainability Framework (DSF) and the medium-term debt management strategy (MTDS) as recommended by G20 Guidelines. This publicly available data and analysis is important information considered in the decision-making process for credit extension together with other third-party sources and in-house credit risk assessment.

These considerations parallel the recommendations of the G20 Guidelines, which highlight the responsibility of borrowing countries to maintain sustainable debt levels as well as the important role of lenders in this regard. Recently the Chinese Ministry of Finance has also published a debt sustainability framework for participating countries of the Belt and Road Initiative.

These voluntary Principles for Debt Transparency acknowledge the importance of private sector lenders and the part every such lender can play to support transparency and official sector debt sustainability objectives and hence the stability of the global financial system. These Principles require the public disclosure by private sector lenders of certain commercial terms of underlying transactions to a reporting entity hosted by an appropriate international financial institution (to be determined) (Reporting Host).

Consistent with G20 efforts and other initiatives aimed at improving transparency in public sector borrowing, the expectation is that borrowers, guarantors and other relevant obligors will facilitate and support this private sector transparency initiative. Such assistance from public sector lenders as well as borrowers will also be key to the success of this debt transparency initiative. These Principles are supported by the IIF, and every effort will be made to promote awareness of them and adherence more broadly.

2. IMPORTANCE OF TRANSPARENCY IN FINANCIAL TRANSACTIONS

The purpose of these voluntary Principles for Debt Transparency is to promote consistent and timely disclosure in connection with financial transactions:

- (a) entered into by the sovereign (central government)
- (b) entered into by sub-sovereigns (whether in the form of state, provincial, or regional government or local government) or any other public corporations¹
- (c) entered into by any other entity which are guaranteed by any of the above

which represent debt liabilities of the sovereign debtor, sub-sovereign or any public corporation including in the context of public-private partnerships (PPP), in each case, included in the sovereign balance sheet or explicit contingent liabilities of the sovereign debtor, sub-sovereign, or public corporation.²

All such entities listed in (a) to (c) are referred to in these Principles as 'Public Sector Entities'.

The benefits of improved transparency and public access to information relating to financial transactions are known to support sound practices in public debt management and include:

- good governance;
- accountability of government and other key decision makers;
- fiscal discipline and transparency;
- sound risk management practices;
- facilitating the fight against corruption;
- ethical conduct;
- improved efficiency and effectiveness in both public finances and, more broadly, public sector decision making;
- increased confidence of investors, lenders, international financial institutions (IFIs), donors and the general public in public sector decision making; and
- reducing vulnerability to market shocks.

As noted above, greater transparency across all debt transactions should improve the flow of information and mitigate against the risk of an adverse shock arising as a result of undisclosed public liabilities appearing in central government liabilities. Greater transparency will assist borrowers, creditors and the official sector in the ongoing assessment of debt dynamics, which will greatly aid in supporting debt sustainability.

3. SCOPE OF PRINCIPLES

These voluntary Principles for Debt Transparency aim to support and enhance existing private sector practices which those contemplating arranging or otherwise entering into Financial Transactions (as defined below) with a Public Sector Entity follow. These typically include, as noted above, consideration

¹ As defined in the IMF's Public Sector Debt Statistics Guide for Compilers and Users.

² This is intended to include explicit but not implicit contingent liabilities as understood under the IMF's Public Sector Debt Statistics Guide for Compilers and Users.

of the repayment profile of other known outstanding transactions made to Public Sector Entities of the same country as well as other elements of applicable DSA and MTDS frameworks. Where relevant, careful consideration would typically be given to any aggregate debt ceiling recommended by the IMF or the IDA Non-Concessional Borrowing Policy, with particular attention to low-income countries (LICs) reliant on concessional financing.

Whilst these new voluntary Principles for Debt Transparency are relevant for all countries, initially the priority will be to apply them in respect of financial arrangements entered into with PRGT – eligible countries³. Under adverse circumstances, these countries are more likely to encounter problems with repayment of market-rate financing and ultimately with debt sustainability. Should it be considered that the debt sustainability of a wider group of countries would materially benefit from application of these Principles, the potential extension of the borrowing countries in scope could be considered by the adherents.

Similarly, although potentially relevant for transactions in all currencies, these Principles will initially relate to foreign currency borrowings. In stressed economic or market circumstances, foreign currency borrowing (given the currency mismatch) may be more problematic than local currency borrowing, particularly in countries that do not have ready access to foreign currency revenues. Moreover, sovereign borrowing in local currency is more often conducted in bond markets, where transparency is generally adequate. Should it be considered that inclusion of local currency would materially benefit the effectiveness of the Principles, potential inclusion of local currency transactions could also be considered.

4. THE RANGE OF APPLICABLE FINANCIAL TRANSACTIONS

Included

For the purposes of these voluntary Principles for Debt Transparency, Financial Transactions include:

- (a) any arrangements, irrespective of their form, which have the economic effect of borrowing; and
- (b) any guarantee or other assurance provided against such arrangements⁴,

which, in each case, is entered into or provided by one or more Public Sector Entities.

This therefore includes, without limitation:

- Loans
- Debt securities which are not subject to public disclosure
- Securities repurchase agreements (repos)
- Other forms of asset backed lending or commercially equivalent arrangements, whether secured by commodities revenues, in the form of margin loans, gold loans or gold swaps or otherwise
- Financial derivatives but excluding derivatives entered into solely for hedging purposes
- Islamic financing transactions which are debt related
- Financial transactions with private parties in PPP projects (including debt assumptions commitments or similar).

³ <https://www.imf.org/external/Pubs/ft/dsa/DSAlist.pdf>

⁴ Including explicit but not implicit contingent liabilities as understood under the IMF's Public Sector Debt Statistics Guide for Compilers and Users.

All such transactions, but not including those listed below as excluded, are referred to as 'Financial Transactions'.

Excluded

1. Any transaction denominated solely in the local currency of the applicable sovereign.⁵
2. Any transaction where transparency is neither the norm or appropriate. These include:
 - (a) Transactions conducted by a central bank in classic monetary policy arrangements (e.g. purchases or sales of government securities to influence the domestic interest rate through open market operations)
 - (b) Trade finance transactions with an original maturity of one year or less involving the import or export of goods and/or services including through the issuance of documentary letters of credit
 - (c) Short term financings in the form of overdrafts or working capital facilities which are repayable on demand and have a maturity not exceeding one year
 - (d) Transactions undertaken by commercial banks to comply with local liquidity or regulatory requirements by placing assets with a local central bank or other public sector body.
3. Transactions which already benefit from existing transparency and disclosure standards based on international agreements or conventions or legal and regulatory requirements and market norms, for example:
 - (1) To the extent cover is provided, transactions with an official export credit agency as a party
 - (2) Transactions with development financial institutions and multilateral organisations including multilateral development banks or agencies as parties
 - (3) Internationally or domestically placed, listed, public bond issuances.

In the context of export credit agencies, it is understood that if any such export credit agency requests private sector lenders to permit disclosure in the context of public sector initiatives to improve transparency in public sector borrowing then that request would be favourably considered.

5. SCOPE OF DISCLOSURE

As referred to above, whilst the intention is not to attempt to add to the disclosure burden where existing disclosure and transparency standards are adequate (as is generally the case in international bond and export credit markets), these voluntary Principles for Debt Transparency aim to enhance transparency by promoting public disclosure of the following information for each Financial Transaction:

- Borrower (or equivalent) and initial recipient of financing (if not the borrower and known at signing)
- Guarantor/provider of indemnity (if any) or equivalent, the beneficiaries of the guarantees/indemnities or equivalent and maximum amount payable thereunder
- Type of financing (e.g. loan, bond, repo etc.)
- For bilateral financings, the lender (or equivalent) at signing

⁵ Any transaction in local currency governed by foreign law would not be regarded as a local currency transaction.

- For syndicated financings, the mandated lead arrangers and the facility agent (or equivalent) in each case at signing
- Applicable agent/trustee/transaction intermediary (for syndicated deals or those with multiple providers of financing/underwrites)
- Ranking (e.g. senior, subordinated etc.)
- Amount which can be borrowed/raised and details of disbursement period, if prolonged
- Applicable currency or currencies
- Repayment or maturity profile (including any puts or calls where applicable)
- Interest rate (or commercial equivalent), specified as falling within one of a number of specified ranges⁶
- Intended use of proceeds on drawdown
- Governing law
- Extent of waiver of sovereign immunity
- Dispute resolution mechanism
- Applicable collateral/security/assets subject to repo

All such information is referred to as 'Relevant Information'.

Where the amount which can be borrowed, the interest rate or the repayment profile of a Financial Transaction is amended or varied, the amended or varied elements which fall above should, on the effective date of such amendment or variation, be subject to the same disclosure and timing requirements.

The disclosure template will be developed to set out the information fields during the implementation phase.

6. TRANSPARENCY RECOMMENDATIONS AND TIMING

Private sector lenders involved in a Financial Transaction should ensure that, assuming the consent of the relevant Public Sector Entity counterparty, the Relevant Information in connection with a Financial Transaction is disclosed to the Reporting Host within a reasonable time frame.⁷

This disclosure should be provided by (i) the private sector lender where the arrangement is bilateral or (ii) an applicable agent/trustee/transaction intermediary where the arrangement is syndicated or involves multiple providers of financing/underwriters. Where there is no such party, the lead arranger or equivalent party should make the disclosure⁸.

⁶ A matrix with various ranges will be included in a disclosure template document to be provided as part of an implementation memorandum; i.e., the disclosure template will specify possible financing cost ranges. The disclosure template would require the submitting party to specify the range applicable to the Financial Transaction being disclosed.

⁷ A reasonable time frame could be no earlier than 60 days and no later than 120 days after the date on which funds first move in connection with such Financial Transaction. The formulation of this cooling off period is driven by legal considerations and will be assessed in the implementation phase.

⁸ The structure contemplated assumes there will be disclosure of information after execution of the transaction but, in the absence of any amendment or variation, this information will not be updated periodically to reflect,

The implementation of these new voluntary Principles for Debt Transparency by the private sector will require a sense of shared responsibility between the private sector, public sector lenders and Public Sector Entities; the expectation is that public sector lenders and Public Sector Entities will facilitate and encourage the disclosure contemplated herein by private sector lenders whether adherents to these Principles or otherwise. Accordingly, the legal documentation relating to each relevant Financial Transaction should contain the necessary legal carve outs, consents and acknowledgements (including in respect of confidentiality provisions) from each of the contracting parties including the relevant Public Sector Entity counterparty to enable the Relevant Information to be publicly disclosed to the Reporting Host in the manner contemplated herein.

Encouraging the broadest possible disclosure among creditors should, together with any disclosures made by borrowers, have the added advantage of facilitating cross-checks for consistency.

It is contemplated that these new voluntary Principles for Debt Transparency will become operational no later than a year from such time as the Reporting Host is able to receive the disclosures from private sector lenders contemplated under these Principles. Following consultation on the disclosure template, an implementation memorandum related to these Principles will be published to support their uptake (covering, *inter alia*, margin ranges and timings of disclosure).

Separately, the IIF under the auspices of the Group of Trustees of the *Principles* shall at least annually thereafter report on an aggregate basis on the take up of these voluntary Principles for Debt Transparency, the scope of applicability and any observable impact arising from their implementation and at the appropriate time shall assess whether it would be beneficial to update them following a review process.

7. DISSEMINATION AND DISCLAIMER

As noted above, these Principles are supported by the IIF, and every effort will be made to promote awareness of them and adherence more broadly. Private sector lenders will adopt and implement these Principles voluntarily and independently without reliance or recourse to the IIF. As implementation proceeds, it is hoped that the efforts of those "leading by example" will promote adherence in the broader global financial community. Inevitably, some members of that community may apply these Principles earlier than others, while some may need more time to consider the Principles in the context of their specific business models.

These voluntary Principles for Debt Transparency do not create any rights in, or liability to, any person, public or private. No private sector lender is legally bound by any of the provisions of these Principles, whether as a matter of contract, comity, or otherwise. Nothing in these Principles shall be deemed to constitute a waiver of any private sector lender's legal rights. Disclosures will be made voluntarily and subject to local laws and regulations applicable to the contracting parties and in each case the consent of the relevant Public Sector Entity counterparty. In a situation where there would be a clear conflict between applicable laws and regulations and requirements set out in these Principles, the local laws and regulations prevail.

for example, principal repayments. It is therefore important that the information specified in paragraph 5 is sufficient for the debt profile of the Financial Transaction to be accurately projected.