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Part III – Global Trading of Financial Instruments (the discussion draft on the Attribution of Profits to Permanent Establishments)

Dear Sir/Madam

The International Swaps and Derivatives Association (ISDA) appreciates the opportunity to comment on Part III – Global Trading of Financial Instruments (the discussion draft on the Attribution of Profits to Permanent Establishments) which was published by the OECD in March of this year.

Our members represent leading participants in the privately negotiated derivatives industry and include most of the world's major financial institutions, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the financial market risks inherent in their core economic activities.

We have seen the responses to this discussion draft of the LIBA, BBA and AFB working group and ISDA would like to add to the general concerns that have been expressed, an example of a practical issue which we see arising as a result of the current approach to global trading through dependant agents (256 – 261 of the Report).

By producing standard documentation for the derivative market ISDA's main purpose is to provide a legal framework within which the global market in derivatives can operate. This includes providing for certainty as to the tax treatment of payments made under derivative contracts, particularly their withholding tax treatment.

The ISDA contract is drafted to allow parties to establish, at the time when they enter into a contract, the expected withholding tax treatment of payments to and from any relevant jurisdiction out of which either party is dealing. Large financial institutions with a variety of branches will sign "multi branch" agreements to cover each jurisdiction from which they expect to be dealing and both parties will have carried out the relevant due diligence to establish the withholding tax treatment of payments made to and from those jurisdictions.

This model depends on each party being able to identify, at the outset, the jurisdictions from which payments under the derivative contract will be treated as having been made or received. Uncertainty as to whether payments under a derivative contract could be attributable to a potential "Permanent Establishment" (PE) in a different jurisdiction could leave parties exposed to withholding tax risk. Uncertainty in this area will act as a disincentive to the efficient working of the global derivative market. The increased uncertainty will also complicate the documentation requirements and greatly increase the level of due diligence required.

ISDA recognise that this is a difficult issue, but suggest that it requires further thought and consideration of the practical ramifications of changes approach.

We have made every effort to be complete and clear in our response, we would be pleased to discuss our comments with the OECD. To arrange this please contact either Rachel Short on (020) 7986 6213 or Ed Duncan on 020 7330 3574 or at the above address.

Yours sincerely,

Rachel Short
Chair of the ISDA Committee

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