



International Swaps and Derivatives Association, Inc.

2012 ISDA FATCA PROTOCOL

published on August 15, 2012
by the International Swaps and Derivatives Association, Inc.

The International Swaps and Derivatives Association, Inc. (**ISDA**) has published this 2012 ISDA FATCA Protocol (this **Protocol**) to enable parties to Covered Master Agreements (as defined in paragraph 4 below) to amend the terms of each such Covered Master Agreement to reflect certain amendments to the U.S. tax law contained in the Foreign Account Tax Compliance Act provisions of the Hiring Incentives to Restore Employment Act.

Accordingly, a party that has entered into a Covered Master Agreement may adhere to this Protocol and be bound by its terms by completing and delivering a letter substantially in the form of Exhibit 1 to this Protocol (an **Adherence Letter**) to ISDA, as agent, as described below.

1. Adherence to and Effectiveness of the Protocol

- (a) By adhering to this Protocol in the manner set forth in this paragraph 1, a party (an **Adhering Party**) that wishes to amend the terms of a Covered Master Agreement, in each case on the terms and subject to the conditions set forth in this Protocol and the relevant Adherence Letter, agrees that the terms of each Covered Master Agreement, if any, between it and each other Adhering Party will be amended with effect from the Implementation Date in accordance with the terms of the Attachment hereto.
- (b) Adherence to this Protocol will be evidenced by the execution and online delivery, in accordance with this paragraph, to ISDA, as agent, of an Adherence Letter (in accordance with subparagraphs 1(b)(i) through 1(b)(iii) below). ISDA shall have the right, in its sole and absolute discretion, upon thirty calendar days' notice on the "2012 FATCA Act Protocol" section of its website at www.isda.org (or by other suitable means) to designate a closing date of this Protocol (such closing date, the **Cut-off Date**). After the Cut-off Date, ISDA will not accept any further Adherence Letters to this Protocol.
 - (i) Each Adhering Party will access the Protocol Management section of the ISDA website at www.isda.org to enter information online that is required to generate its form of Adherence Letter. Either by directly downloading the populated Adherence Letter from the Protocol Management system or upon receipt via e-mail of the populated Adherence Letter, each Adhering Party will print, sign and upload the signed Adherence Letter as a PDF (portable document format) attachment into the Protocol Management system. Once the signed Adherence Letter has been approved and accepted by ISDA, the Adhering Party will receive an e-mail confirmation of the Adhering Party's adherence to the Protocol.
 - (ii) A conformed copy of each Adherence Letter containing, in place of each signature, the printed or typewritten name of each signatory will be published by ISDA so that it may be viewed by all Adhering Parties. Each Adhering Party agrees that, for evidentiary

purposes, a conformed copy of an Adherence Letter certified by the General Counsel (or other appropriate officer) of ISDA will be deemed to be an original.

- (iii) Each Adhering Party agrees that the determination of the date and time of acceptance of any Adherence Letter will be determined by ISDA in its absolute discretion.
- (c) As between any two Adhering Parties, the agreement to make the amendments contemplated by this Protocol, on the terms and conditions set forth in this Protocol, will be effective on the date of online delivery to ISDA, as agent, of an Adherence Letter (in accordance with paragraph 1(b) above) from the later of such two Adhering Parties to adhere (such date with respect to such Adhering Parties, the **Implementation Date**).
- (d) This Protocol is intended for use without negotiation, but without prejudice to any amendment, modification or waiver in respect of a Covered Master Agreement that the parties may otherwise effect in accordance with the terms of that Covered Master Agreement.
 - (i) In adhering to this Protocol, an Adhering Party may not specify additional provisions, conditions or limitations in its Adherence Letter.
 - (ii) Any purported adherence that ISDA, as agent, determines in good faith is not in compliance with this Protocol will be void and ISDA will inform the relevant party of such fact as soon as reasonably possible after making such determination.
- (e) Each Adhering Party acknowledges and agrees that adherence to this Protocol is irrevocable, except that an Adhering Party may deliver to ISDA, as agent, a notice substantially in the form of Exhibit 2 to this Protocol that is effective (determined pursuant to paragraph 3(e) below) on any Business Day during the Annual Revocation Period (a Revocation Notice) to designate the next Annual Revocation Date as the last date on which any counterparty may adhere to this Protocol in respect of any ISDA Master Agreement between the counterparty and such Adhering Party.
 - (i) Upon the effective designation of the next Annual Revocation Date by an Adhering Party, this Protocol will not amend any ISDA Master Agreement between that Adhering Party and a party which adheres to this Protocol after that Annual Revocation Date occurs and such ISDA Master Agreement will not be a Covered Master Agreement. The foregoing is without prejudice to any amendment effected pursuant to this Protocol to any Covered Master Agreement between two Adhering Parties that each adhered to this Protocol on or before the day on which that Annual Revocation Date occurs or is deemed to occur, regardless of the date on which such Covered Master Agreement is entered into, and any such amendment shall be effective notwithstanding the occurrence or deemed occurrence of such Annual Revocation Date.
 - (ii) Each Revocation Notice must be delivered by the means specified in paragraph 3(e) of this Protocol below.
 - (iii) Each Adhering Party agrees that, for evidentiary purposes, a conformed copy of a Revocation Notice certified by the General Counsel or an appropriate officer of ISDA will be deemed to be an original.
 - (iv) Any purported revocation that ISDA, as agent, determines in good faith is not in compliance with this paragraph 1(e) will be void.

2. Representations

As of the date on which an Adhering Party adheres to this Protocol in accordance with paragraph 1 above, such Adhering Party represents to each other Adhering Party with which it has entered into a Covered Master Agreement each of the following matters:

- (a) **Status.** It is, if relevant, duly organized and validly existing under the laws of the jurisdiction of its organization or incorporation and, if relevant under such laws, in good standing or, if it otherwise represents its status in or pursuant to the Covered Master Agreement, has such status.
- (b) **Powers.** It has the power to execute and deliver the Adherence Letter and to perform its obligations under the Adherence Letter and the Covered Master Agreement as amended by the Adherence Letter and this Protocol (including the Attachment hereto), and has taken all necessary action to authorize such execution, delivery and performance.
- (c) **No Violation or Conflict.** Such execution, delivery and performance do not violate or conflict with any law applicable to it, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets.
- (d) **Consents.** All governmental and other consents that are required to have been obtained by it with respect to the Adherence Letter and the Covered Master Agreement, as amended by the Adherence Letter and this Protocol (including the Attachment hereto), have been obtained and are in full force and effect and all conditions of any such consents have been complied with.
- (e) **Obligations Binding.** Its obligations under the Adherence Letter and the Covered Master Agreement, as amended by the Adherence Letter and this Protocol (including the Attachment hereto), constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms (subject to applicable bankruptcy, reorganization, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law)).
- (f) **Credit Support.** Its adherence to this Protocol and any amendment contemplated by this Protocol will not, in and of itself, adversely affect the enforceability, effectiveness or validity of any obligations owed, whether by it or by any third party, under any Credit Support Document or Third Party Credit Support Document in respect of its obligations relating to the Covered Master Agreement as amended by the Adherence Letter and this Protocol (including the Attachment Letter hereto).

Each Adhering Party agrees with each other Adhering Party with which it has entered into a Covered Master Agreement that each of the foregoing representations will be deemed to be a representation for purposes of Section 5(a)(iv) of each such Covered Master Agreement that is made by each Adhering Party as of the later of (A) the date on which such Adhering Party adheres to this Protocol in accordance with paragraph 1 above and (B) the date of such Covered Master Agreement.

3. Miscellaneous

(a) ***Entire Agreement; Restatement; Survival.***

- (i) This Protocol constitutes the entire agreement and understanding of the Adhering Parties with respect to its subject matter and supersedes all oral communication and prior writings (except as otherwise provided herein) with respect thereto. Each Adhering Party acknowledges that in adhering to this Protocol it has not relied on any oral or written representation, warranty or other assurance (except as provided for or referred to elsewhere in this Protocol or in the Attachment) and waives all rights and remedies which might otherwise be available to it in respect thereof, except that nothing in this Protocol will limit or exclude any liability of an Adhering Party for fraud.
- (ii) Except for any amendment deemed to be made pursuant to this Protocol in respect of any Covered Master Agreement, all terms and conditions of each Covered Master Agreement will continue in full force and effect in accordance with its provisions as in effect immediately prior to the Implementation Date. Except as explicitly stated in this Protocol, nothing herein shall constitute a waiver or release of any rights of any Adhering Party under any Covered Master Agreement to which such Adhering Party is a party. This Protocol will, with respect to its subject matter, survive, and any amendments deemed to be made pursuant to this Protocol will form a part of each Covered Master Agreement between the Adhering Parties, notwithstanding Section 9(a) of the Covered Master Agreement (or in the case of a Covered Master Agreement that is a 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction), Section 8(a) of the Covered Master Agreement).

- (b) ***Amendments.*** An amendment, modification or waiver in respect of the matters contemplated by this Protocol will only be effective in respect of a Covered Master Agreement if made in accordance with the terms of the Covered Master Agreement and then only with effect between the parties to that Covered Master Agreement (and will only be effective to amend or override the provisions set forth in this Protocol and the Attachment to this Protocol if it expressly refers in writing to this paragraph 3(b) of this Protocol and would otherwise be effective in accordance with Section 9(b) (or in the case of an ISDA Master Agreement that is a 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction), Section 8(b)) of the Covered Master Agreement in effect between the parties).

- (c) ***Headings.*** The headings used in this Protocol and any Adherence Letter are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Protocol or any Adherence Letter.

- (d) ***Governing Law.*** This Protocol and each Adherence Letter will, as between two Adhering Parties and in respect of each Covered Master Agreement between them, be governed by and construed in accordance with the laws of the State of New York, without reference to choice of law doctrine, provided that the amendments to each Covered Master Agreement shall be governed by and construed in accordance with the law specified to govern that Covered Master Agreement and otherwise in accordance with the applicable choice of law doctrine.

- (e) ***Notices.*** Any Revocation Notice must be in writing and delivered as a locked PDF (portable document format) attachment to an email to ISDA at FATCAProtocol@isda.org and will be deemed effectively delivered on the date it is delivered unless on the date of that delivery ISDA's New York office is closed or that communication is delivered after 5:00 p.m., New York time, in

which case that communication will be deemed effectively delivered on the next day ISDA's New York office is open.

(f) ***Ability of an Agent to Adhere to the Protocol on Behalf of a Client.***

(i) An Agent may adhere to this Protocol:

- (A) on behalf of all Clients represented by such Agent (in which case such Agent need not identify each Client in its Adherence Letter);
- (B) on behalf of Clients represented by such Agent that are specifically named or identified in the Adherence Letter or an attachment thereto; or
- (C) on behalf of all Clients represented by such Agent, except any Client that the Agent and an Adhering Party that has entered into a Covered Master Agreement with such Client agree will not be covered by this Protocol;

provided, in each case, that such adherence shall only be effective with respect to Covered Master Agreements entered into by such Agent on behalf of such Clients.

(ii) Where an Agent adheres to this Protocol on behalf of a Client by executing and delivering an Adherence Letter on behalf of such Client in accordance with paragraph 1 and this paragraph 3(f), references to the Adhering Party for purposes of this Protocol (including the Attachment hereto) and the Adherence Letter shall be interpreted to refer to such Client.

(g) ***Clients added to an Agent Covered Master Agreement after the Implementation Date.*** In respect of any Client added to an Agent Covered Master Agreement between an Agent and an Adhering Party after the Implementation Date (a "New Client"), the Agent and such Adhering Party agree that the terms of such Agent Covered Master Agreement as between such Adhering Party and any New Client will be subject to the amendments effected by this Protocol, unless otherwise agreed between such Agent and such Adhering Party.

4. Definitions

As used in this Protocol, **Credit Support Document** and **Transaction** each has the meaning given to such term in the related Covered Master Agreement.

References in this Protocol and the Attachment to the following terms shall have the following meanings:

Agent means an entity that enters into a Covered Master Agreement and executes and delivers an Adherence Letter with respect to this Protocol on behalf of, and as agent for, one or more clients, investors, funds, accounts and/or other principals.

Agent Covered Master Agreement means any ISDA Master Agreement that is signed as an umbrella agreement by an Agent and an Adhering Party prior to the date of receipt by ISDA of an Adherence Letter from the later of such Adhering Party or such Agent.

Annual Revocation Date means, with respect to each calendar year, December 31 of such calendar year. If December 31 in any calendar year is not a day on which the ISDA's New York office is open, the

Annual Revocation Date with respect to such calendar year will be deemed to occur on the next day that the ISDA's New York office is open.

Annual Revocation Period means the period between October 1 and October 31 of any calendar year.

Business Day means a day on which commercial banks and foreign exchange markets are generally open to settle payments in both London and New York.

Client means a client, investor, fund, account and/or other principal on whose behalf an Agent acts.

Covered Master Agreement means, subject to an Adhering Party's right to deliver a Revocation Notice pursuant to paragraph 1(e) above:

(a) any of the following agreements:

(i) ISDA Master Agreement entered into by execution by Adhering Parties of a confirmation pursuant to which an Adhering Party is deemed to have entered into an ISDA Master Agreement with another Adhering Party until such time as an ISDA Master Agreement has been executed by such Adhering Parties and that is still outstanding as of the Implementation Date,

(ii) ISDA Master Agreement executed by two Adhering Parties, and

(iii) Agent Covered Master Agreement,

in each case, entered into by the Adhering Parties on or prior to the Implementation Date or, in the case of an Agent Covered Master Agreement signed by the Agent and the counterparty prior to adherence by both the counterparty and the Agent, on behalf of the relevant Client (and including all outstanding Transactions thereunder and outstanding Credit Support Documents entered into by such Adhering Parties in connection therewith); or

(b) any ISDA Master Agreement entered at any time after the Implementation Date and/or prior to the Cut-off Date entered into by execution by Adhering Parties of a confirmation pursuant to which an Adhering Party is deemed to have entered into an ISDA Master Agreement with another Adhering Party until such time as an ISDA Master Agreement has been executed by such Adhering Parties;

provided that if

(1) any consent, approval, agreement, authorization or other action of any party to a Third Party Credit Support Document other than either of such Adhering Parties (a **Third Party**) is expressly required, under the terms of such Third Party Credit Support Document or such ISDA Master Agreement, to amend or otherwise modify such ISDA Master Agreement, or

(2) such Third Party Credit Support Document or such ISDA Master Agreement includes express terms to the effect that any amendment or modification of such ISDA Master Agreement without the consent, approval, agreement, authorization or other action of any such Third Party would void, impair or otherwise adversely affect existing or future obligations owed under such Third Party Credit Support Document,

then such ISDA Master Agreement shall not be a Covered Master Agreement.

Implementation Date means, subject to an Adhering Party's right to delivery a Revocation Notice pursuant to paragraph 1(e) above, with respect to any two Adhering Parties, the date determined pursuant to paragraph 1(c) of this Protocol.

ISDA Master Agreement means a 2002 ISDA Master Agreement, 1992 ISDA Master Agreement (Multicurrency – Cross Border), 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction), or 1987 ISDA Interest Rate and Currency Exchange Agreement, in each case as published by ISDA.

Third Party Credit Support Document means, with respect to an Adhering Party to an ISDA Master Agreement, any document in effect on the Implementation Date and executed by one or more Third Parties (whether or not an Adhering Party is a party thereto), which by its terms secures, guarantees or otherwise supports such Adhering Party's obligations under such ISDA Master Agreement from time to time, whether or not such document is specified as such, or as a Credit Support Document, therein or in the ISDA Master Agreement.

Form of Adherence Letter

[Letterhead of Adhering Party]

[Date]

International Swaps and Derivatives Association, Inc.

Send to: FATCAProtocol@isda.org

Dear Sirs,

2012 ISDA FATCA Protocol - Adherence

The purpose of this letter is to confirm our adherence to the 2012 ISDA FATCA Protocol as published by the International Swaps and Derivatives Association, Inc. on August 15, 2012 (the **Protocol**). This letter constitutes, as between each other Adhering Party and us, an Adherence Letter as referred to in the Protocol. The definitions and provisions contained in the Protocol are incorporated into this Adherence Letter, which will supplement and form part of each Covered Master Agreement between us and each other Adhering Party.

1. Specified Terms

As between each other Adhering Party and us, the amendments in the Attachment to the Protocol shall apply to each Covered Master Agreement to which we are a party in accordance with the terms of the Protocol and this Adherence Letter.

2. Appointment as Agent and Release

We hereby appoint ISDA as our agent for the limited purposes of the Protocol and accordingly we waive any rights and hereby release ISDA from any claims, actions or causes of action whatsoever (whether in contract, tort or otherwise) arising out of or in any way relating to this Adherence Letter or our adherence to the Protocol or any actions contemplated as being required by ISDA.

3. Payment

Each Adhering Party must submit a one-time fee of U.S. \$500 to ISDA at or before the submission of this Adherence Letter.

4. Contact Details

Our contact details for purposes of this Adherence Letter are:

Name:
Address:
Telephone: Fax:
E-mail:

We consent to the publication of a conformed copy of this letter by ISDA and to the disclosure by ISDA of the contents of this letter.

Yours faithfully,

[ADHERING PARTY]¹

By:

Name:
Title:
Signature:

¹ Specify legal name of Adhering Party.

If you are an Agent and act on behalf of multiple Clients, you may sign the Adherence Letter using one of three options.

First, if you have the authority to adhere to this Protocol as Agent on behalf of all Clients, you may indicate the following in the signature block: “[Investment/Asset Manager], acting on behalf of the clients, investors, funds, accounts and/or other principals listed in the relevant Covered Master Agreement (or other agreement which deems a Covered Master Agreement to have been created) entered into between it (as Agent) and another Adhering Party” or such other language that indicates the Clients to which this letter is applicable. If such a signature block is used, a separate Adherence Letter for each Client does *not* need to be submitted to ISDA and no specific names of Clients will be publicly disclosed on the ISDA website in connection with this Protocol.

Second, if you have the authority to adhere to this Protocol as Agent on behalf of certain Clients only, you may include with the Adherence Letter an attachment that names each Client. If you cannot or do not wish to name such Clients, then provided that you can identify the adhering Clients by way of specific identifiers which will be known and recognized by all other Adhering Parties with which the relevant Clients have entered into Covered Master Agreements, you may identify such Clients using specific identifiers and without including any names. In such case, the specific identifiers will be listed on the ISDA website with the Adherence Letter.

Third, if you do not have the authority to adhere to this Protocol as Agent on behalf of certain Clients but wish to adhere to this Protocol on behalf of all other Clients, you may indicate the following in the signature block: “[Investment/Asset Manager], acting on behalf of the clients, investors, funds, accounts and/or other principals listed in the relevant Covered Master Agreement (or other agreement which deems a Covered Master Agreement to have been created) entered into between it (as Agent) and another Adhering Party, unless the relevant Adhering Parties agree prior to the Implementation Date in respect of such parties that a particular client, investor, fund, account or other principal is not an Adhering Party for purposes of this Protocol”. It is the Agent’s responsibility to record properly any bilateral agreement to exclude a Client from the scope of this Protocol.

**EXHIBIT 2
to 2012 ISDA FATCA Protocol**

Form of Revocation Notice

[Letterhead of Adhering Party]

[Date]

International Swaps and Derivatives Association, Inc.

Send to: FATCAProtocol@isda.org

Dear Sirs,

2012 ISDA FATCA Protocol - Designation of Annual Revocation Date

The purpose of this letter is to notify you that we wish to designate this year's Annual Revocation Date as the last date on which any counterparty may adhere to the 2012 ISDA FATCA Protocol as published by the International Swaps and Derivatives Association, Inc. on August 15, 2012 (the Protocol) in respect of any Covered Master Agreement between us.

This letter constitutes a Revocation Notice as referred to in the Protocol.

We consent to the publication of the conformed copy of this notice by ISDA on and after the Annual Revocation Date and to the disclosure by ISDA of the contents of this letter.

Yours faithfully,

[ADHERING PARTY]²

² Specify legal name of Adhering Party.

If you are an Agent and act on behalf of multiple Clients, you may sign a Revocation Notice using one of three options.

First, if you have the authority to deliver a Revocation Notice for this Protocol as Agent on behalf of all Clients, you may indicate the following in the signature block: “[Investment/Asset Manager], acting on behalf of the clients, investors, funds, accounts and/or other principals listed in the relevant Covered Master Agreement (or other agreement which deems a Covered Master Agreement to have been created) entered into between it (as Agent) and another Adhering Party” or such other language that indicates the Clients to which this letter is applicable. If such a signature block is used, a separate Revocation Notice for each Client does *not* need to be submitted to ISDA and no specific names of Clients will be publicly disclosed on the ISDA website in connection with this Protocol.

Second, if you have the authority to deliver a Revocation Notice for this Protocol as Agent on behalf of certain Clients only, you may include with the Revocation Notice an attachment that names each Client. If you cannot or do not wish to name such Clients, then provided that you can identify the revoking Clients by way of specific identifiers which will be known and recognized by all other Adhering Parties with which the relevant Clients have entered into Covered Master Agreements, you may identify such Clients using specific identifiers and without including any names. In such case, the specific identifiers will be listed on the ISDA website with the Revocation Notice.

Third, if you do not have the authority to deliver a Revocation Notice for this Protocol as Agent on behalf of certain Clients but wish to deliver a Revocation Notice for this Protocol on behalf of all other Clients, you may indicate the following in the

By:

Name:
Title:
Signature:

signature block: “[Investment/Asset Manager], acting on behalf of the clients, investors, funds, accounts and/or other principals listed in the relevant Covered Master Agreement (or other agreement which deems a Covered Master Agreement to have been created) entered into between it (as Agent) and another Adhering Party, unless the relevant Adhering Parties agree prior to the Annual Revocation Date immediately following the date of this Revocation Notice in respect of such parties that a particular client, investor, fund, account or other principal is not delivering this Revocation Notice for purposes of this Protocol”. It is the Agent’s responsibility to record properly any bilateral agreement to exclude a Client from the scope of a Revocation Notice for this Protocol.

ATTACHMENT

1. Subject to paragraph 2 below, with effect from the Implementation Date, each Covered Master Agreement shall be modified as follows.

The following text shall be added to the Schedule to the Covered Master Agreement:

“Withholding Tax imposed on payments to non-US counterparties under the United States Foreign Account Tax Compliance Act. “Tax” as used in Part 2(a) of this Schedule (Payer Tax Representation) and “Indemnifiable Tax” as defined in Section 14 of this Agreement shall not include any U.S. federal withholding tax imposed or collected pursuant to Sections 1471 through 1474 of the U.S. Internal Revenue Code of 1986, as amended (the “Code”), any current or future regulations or official interpretations thereof, any agreement entered into pursuant to Section 1471(b) of the Code, or any fiscal or regulatory legislation, rules or practices adopted pursuant to any intergovernmental agreement entered into in connection with the implementation of such Sections of the Code (a “**FATCA Withholding Tax**”). For the avoidance of doubt, a FATCA Withholding Tax is a Tax the deduction or withholding of which is required by applicable law for the purposes of Section 2(d) of this Agreement.”

2. This Protocol and the amendments set forth in this Attachment shall replace any Express Provisions, where “**Express Provisions**” means:

(a) any provisions expressly set out in any confirmation of a Transaction that supplements, forms a part of, and is subject to, a Covered Master Agreement; or

(b) any provisions expressly set out in any Schedule to a Covered Master Agreement;

in either case, that provide for amendments to (i) any Payer Tax Representation contained in such Covered Master Agreement, (ii) Section 2(d) of such Covered Master Agreement, or (iii) the definition of “Indemnifiable Tax” in such Covered Master Agreement, in each case, only in relation to FATCA Withholding Tax.