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May 16, 2014

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Re: FATCA — Follow-Up on Collateral Concerns

Dear Sirs and Madam:

I am writing on behalf of the North American Tax Committee of the International Swaps and Derivatives Association (ISDA). Since 1985, ISDA has worked to make the global OTC derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 64 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org.

ISDA is grateful for the attention you have given to the comments in our letter to Jesse Eggert dated June 11, 2013 (the "June Letter") and in our letter to John Sweeney, Quyen Huynh and Brett York dated November 11, 2013 (the "November Letter"), each relating to the treatment of posted collateral for purposes of FATCA. For your convenience, the June Letter is attached as Exhibit A and the November Letter is attached as Exhibit B.

Temporary Treasury regulations promulgated in February 2014 provide a transitional rule with respect to collateral intended to allow the industry time to develop the systems necessary to

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be able to determine whether a secured party is acting as an intermediary or a principal with respect to some or all of the payments made to the counterparty under a collateral arrangement. Specifically, the transitional rule provides that the following payments are not treated as "withholdable payments" for purposes of FATCA:

> A payment made prior to January 1, 2017, *by a secured party with respect to collateral* securing one or more transactions under a collateral arrangement, provided that only a commercially reasonable amount of collateral is held by the secured party as part of the collateral arrangement.

Temp. Treas. Reg. § 1.1473-1T(a)(4)(vii) (emphasis added). The temporary regulations list a number of transactions that are covered by this transitional rule.

We are concerned that the transitional rule may not provide the relief that was intended in all cases. By its terms, the transitional rule applies only to a payment "by a secured party with respect to collateral." The secured party, however, may not be the withholding agent with respect to a payment under a collateral arrangement (such as where the secured party holds such collateral as an intermediary). In general, when a foreign financial institution ("FFI") receives U.S. securities posted as collateral, the FFI holds such U.S. securities through a custodial account with a U.S. custodian. Upon receipt of a payment on the collateral, the U.S. custodian makes a corresponding payment to the FFI, which in turn makes a corresponding payment to its counterparty. Thus, two payments are made – one from the U.S. custodian to the FFI, and one from the FFI to the counterparty. As a result, U.S. securities posted as collateral to a U.S. withholding agent would be eligible for relief under the transitional rule, but some are concerned that U.S. securities posted as collateral to an FFI that is not the applicable U.S. withholding agent and that held such U.S. securities through an account with a U.S. custodian arguably would not be eligible for such relief. That is, although the payment by the FFI to the counterparty (*i.e.*, a payment "by a secured party with respect to collateral") would clearly be covered by the transitional rule, it is less certain that a payment by the U.S. custodian to the FFI would be covered by the transitional rule. This would be the case any time the FFI holds collateral through a U.S. custodian in the capacity of an intermediary (but where the FFI was not a U.S. withholding agent). There is substantial uncertainty in this regard as to when an FFI is acting in the capacity of an intermediary as opposed to a principal (particularly where there is pooled collateral and some but not all of such collateral may be rehypothecated). We understand that this result was not intended and request that a correction to the temporary regulations be made to clarify that the intended relief is available in both cases.

We also wanted to take this opportunity to reiterate the concerns relating to the application of FATCA to property posted as collateral raised in the June Letter and the November Letter. Specifically, where the transitional rule does not apply (*e.g.*, if more than a "commercially reasonable" amount of collateral is held), and in any event beginning in 2017, ISDA remains deeply concerned about the application of the grandfathering rules to property

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held as collateral due to the fungibility of pooled collateral. As a result, we encourage you to modify the regulations to adopt the following recommendations from the November Letter:

- Payments on U.S. securities that are posted as collateral are treated as either grandfathered or non-grandfathered by reference to the "grandfather" status of the posted security (*i.e.*, whether or not the security posted as collateral by the pledgor is an obligation issued before or after June 30, 2014); and

- For payments of withholdable amounts on non-grandfathered collateral (including cash after June 30, 2014) to be eligible for the grandfathering rule by reason of securing a grandfathered transaction, that collateral must be clearly identified in segregated accounts as securing solely grandfathered transactions.

ISDA reiterates its belief that additional guidance is needed to address these concerns and to provide much-needed certainty on the FATCA treatment of payments made on collateral.

We thank you for the opportunity to comment on the regulations and would be happy to discuss with you further either by phone or in person the issues presented in this letter.

Sincerely yours,

Thomas Prevost

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Exhibit A – ISDA Comment Letter Dated June 11, 2013

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Mr. Jesse Eggert
Associate International Tax Counsel
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

June 11, 2013

Dear Mr. Eggert:

The International Swaps and Derivatives Association, Inc. ("ISDA") appreciates the opportunity to comment on the practical implications of a particular provision of the Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA (the "Model 1 IGA") relating to implementation of the Foreign Accounting Tax Compliance Act ("FATCA").

Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 60 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

Background

Model 1 IGA Article 4(1)

Article 4, section 1 of the Model 1 IGA provides:

> Treatment of Reporting [FATCA Partner] Financial Institutions. Subject to the provisions of paragraph 2 of Article 5, each Reporting [FATCA Partner] Financial Institution will be treated as complying with, and not subject to withholding under, section 1471 of the U.S. Internal Revenue Code if [FATCA Partner] complies with its obligations under Articles 2 and 3 with respect to such Reporting [FATCA Partner] Financial Institution and the Reporting [FATCA Partner] Financial Institution:

. . .

d) to the extent that a Reporting [FATCA Partner] Financial Institution is . . . acting as a qualified intermediary (for purposes of section 1441 of the U.S. Internal Revenue Code) that has elected to assume primary withholding responsibility under chapter 3 of subtitle A of the U.S. Internal Revenue Code, . . . withholds 30 percent of any U.S. Source Withholdable Payment to any Nonparticipating Financial Institution; and

e) in the case of a Reporting [FATCA Partner] Financial Institution that is not described in subparagraph (1)(d) of this Article, and that makes a payment of, or acts as an intermediary with respect to, a U.S. Source Withholdable Payment to any Nonparticipating Financial Institution, the Reporting [FATCA Partner] Financial Institution provides to any immediate payor of such U.S. Source Withholdable Payment the information required for withholding and reporting to occur with respect to such payment.

This provision of the Model 1 IGA has been instituted in bilateral agreements with Norway, Spain, Ireland, Mexico, Denmark and the United Kingdom.

Although not entirely clear from the face of Article 4, we understand the intent is that a Reporting FATCA Partner Financial Institution has no FATCA withholding obligations with respect to U.S. Source Withholdable Payments that it makes in a principal capacity.

Typical Transaction

Many U.S. and non-U.S. financial institutions have dealer affiliates in the U.K. These dealer affiliates are foreign financial institutions ("FFIs"), and frequently are qualified intermediaries ("QIs"). As dealers, these FFIs continuously enter into swap and other transactions with unrelated parties. In a typical swap transaction, the dealer's counterparty (the "Counterparty") will be required to post collateral to the dealer. The collateral often consists of U.S. Treasury securities or other securities that generate U.S. source income. Under a standard ISDA Credit Support Annex, the dealer is permitted at its option to (i) hold the collateral and pay any income received from the collateral to the Counterparty or (ii) to sell or lend the posted collateral to a third party. In the latter case, the dealer is required to make substitute income payments to the Counterparty equal in amount to the income received on the collateral.

Although the law is not entirely settled in this area, market participants generally view the Counterparty as the owner of the posted collateral for U.S. tax purposes where the dealer retains the collateral, with the result that the dealer is making payments as agent. Where the dealer lends or sells the collateral, market participants generally view the Counterparty as having made a securities loan to the dealer with the result that the dealer is making payments as

principal. In general, there is no U.S. tax significance to characterizing the arrangement between the dealer and the Counterparty in either manner. However, under Article 4 of the Model 1 IGA a dealer would be required to identify whether the dealer is making the payment to its counterparty in its capacity as principal (with no FATCA withholding required) or whether it is making the payment to its counterparty in an intermediary capacity (with FATCA withholding potentially required).[1]

A significant practical problem arises because it is common practice for dealers to place similar assets received as collateral (typically fixed income securities) from all Counterparties into a single pooled account. These accounts do not allow for specific assets to be linked to a particular Counterparty. Without a way to track the assets, the dealer will not know whether it is making payments to the Counterparty of income with respect to assets held on the Counterparty's behalf or of substitute payments with respect to securities that the dealer has borrowed from the Counterparty. Accordingly, if the Counterparty is a non-participating FFI, the dealer will not have any way of determining whether it is acting as an intermediary or whether it is acting as a principal, and in turn whether or not FATCA withholding is required.[2]

Proposal

We propose that the Treasury Department in administering an IGA, that like the IGA with the U.K., follows the Model 1 IGA create an exception under which no FATCA withholding would be required with respect to payments of withholdable amounts, where the payments relate to assets that were posted as collateral to the Reporting FATCA Partner Financial Institution in connection with a transaction in the ordinary course of the Reporting FATCA Partner Financial Institution's business as a dealer in securities.

We believe that the well intentioned provisions of Article 4(1) of the Model 1 IGA insofar as they relate to Reporting FATCA Partner Financial Institutions were set forth and implemented in bilateral agreements without complete awareness of the manner in which those Reporting FATCA Partner Financial Institutions' business and systems currently operate. It does not appear that the intention of those provisions was to require significant alteration of the manner of doing business in order to take advantage of the negotiated relief for certain Reporting FATCA Partner Financial Institutions. Moreover, we do not see any principled reason to base

[1] Note that this issue is present regardless of whether or not the dealer is a QI, and if it is a QI, whether or not it has assumed primary withholding responsibility. If the dealer is a QI that has assumed primary withholding responsibility, it would have to make this determination in order to know whether or not to withhold under FATCA on payments to a non-participating FFI. If the dealer is not a QI or is a QI that has not assumed primary withholding responsibility, it would have to make the determination in order to inform the party that is paying the relevant amount to the dealer, so that the party making the payment can withhold as required.

[2] A similar issue may arise in connection with assets held in margin accounts and other circumstances, which we do not address in this letter.

the requirement of FATCA withholding on whether or not the Reporting FATCA Partner Financial Institution has in fact borrowed U.S. securities posted as collateral. We believe that the suggested exception is consistent with the intention of the language of the Model 1 IGA and would not create any undue opportunity for abuse or avoidance of the purposes of FATCA.

On behalf of ISDA, I wish to thank you for your consideration of this issue.

With best regards.

Sincerely yours,

Thomas S. Prevost

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Exhibit B – ISDA Comment Letter Dated November 11, 2013

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November 11, 2013

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Brett York
Office of International Tax Counsel
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Re: FATCA Follow-up

Dear Sirs and Madam:

I am writing on behalf of the North American Tax Committee of the International Swaps and Derivatives Association (ISDA). Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 60 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org.

ISDA sincerely appreciates the time and attention you have given to the comments in a letter to Jesse Eggert and John Sweeney dated August 28, 2013 (the "SPV Letter"), relating to the provisions of the Final Regulations on so called "Limited Life Debt Investment Entities" or "LLDIEs," and in a letter to Jesse Eggert dated June 11, 2013 (the "Collateral Letter"), relating to the treatment of posted collateral under an IGA. For your convenience, the SPV Letter is attached as Exhibit A and the Collateral Letter is attached as Exhibit B. Capitalized terms used but not defined in this letter have the same meanings as assigned in the SPV Letter.

In general, the SPV Letter proposed a modification to the LLDIE provisions in the Final Regulations to effectively implement Treasury's and the IRS's understood goals in a manner that is not unduly burdensome to market participants, and simultaneously address significant related technical issues. The Collateral Letter raised concerns about implementation of required FATCA withholding under a typical Model 1 IGA, which appears to require FATCA withholding by a payor making withholdable payments in its capacity as an agent but not where the same payor makes withholdable payments in a principal capacity. In particular, the Collateral Letter noted the uncertainty that exists with respect to the potential imposition of FATCA withholding where a pledgee is entitled to rehypothecate or otherwise dispose of posted collateral, attributable largely to the fact that most posted collateral is held in a single commingled pool without any practical ability to trace collateral that has been rehypothecated to any particular transaction. You have requested that we elaborate on certain issues raised by the SPV Letter and the Collateral Letter.

Specifically, you have asked that we:

- Propose a rule for excepting appropriate entities from EAGs, and not have the rule (like the proposal in the SPV Letter) tied to an entity having Certified Deemed Complaint status for FATCA generally.
- Explore workable alternatives to the proposal made in the SPV Letter.
- Explain the importance of allowing more flexibility in the asset composition of SPVs that would be given Certified Deemed Compliant status.
- Propose one or more rules to address issues raised in the Collateral Letter and otherwise with regard to the potential imposition of FATCA withholding on payments with respect to collateral.

EAGs

As we stated in the SPV Letter, but for creation of a special rule, many securitization vehicles may not be FATCA Compliant because they are not practically able to identify whether they are members of an EAG and if so, whether all members of the EAG themselves are FATCA

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Compliant. Moreover, global financial institutions face enormous compliance challenges arising from the need to identify and ensure FATCA compliance for all of the members of their EAGs.[1]

Since this issue is of vital importance, we urge the IRS and Treasury Department to adopt the proposal in the SPV Letter as it relates to exclusion of entities meeting specified requirements from any EAG. In that way, the entity itself could become FATCA Compliant without regard to who owns its equity interests, and global financial institutions would not face the risk of failing to be FATCA Compliant by reason of failing to identify and register one or more securitization vehicles that may otherwise be found to be members of their EAG. More specifically, regardless of what criteria ultimately may be adopted for securitization vehicles to become FATCA Compliant, we urge the IRS and Treasury Department to provide in regulations that entities meeting the criteria set out in the SPV Letter would not be treated as members of an EAG for purposes of the FATCA rules.

As described in the SPV Letter, we would envision that slightly different criteria would be provided for determining whether "existing" as opposed to "new" vehicles would qualify.

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[1] The SPV Letter explained the specific issues that arise as follows:

> First, the EAG rule presents heightened problems for so-called "Repack SPVs" and certain other securitization vehicles. For example, a typical Repack SPV is an SPV that issues a single class of instruments and uses the cash raised to purchase at that time a single asset, or pool of assets, and enter into one or more derivative transactions that alter or enhance the return of those assets. Repack SPVs most typically issue a single class of "debt" instruments to one or a limited set of investors, and those securities might be treated as equity under U.S. tax principles. The Repack SPV interests are typically held through a clearing organization, and it would not be possible for the Repack SPV itself to determine at any point in time the identity of its actual beneficial owners. For this reason, if a Repack SPV or other similarly situated securitization vehicle is eligible to be FATCA Compliant only if it can identify any majority owner in order to determine whether such owner is FATCA Compliant, it is likely that many such vehicles would be unable to comply with FATCA and would become subject to FATCA withholding.
>
> Second, large multinational institutions are concerned about whether they can identify all instances where they may own more than 50 percent of the class or classes of SPV interests that are treated as equity for U.S. tax purposes, and the potential adverse consequences to the rest of the EAG in the event that any such SPVs are not identified. The difficulty faced by institutions is further compounded by the uncertainty in many cases regarding whether an interest in an SPV is properly treated as debt or equity. The potential inclusion of SPVs in an EAG unnecessarily increases the "footfault" risk for an FFI.

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Given the overriding importance of this rule, we would highlight the importance of adopting the rule in its broadest form, as described in the SPV Letter. In particular, this would include adoption of the approach to cell companies described in the SPV Letter,[2] adopting the expanded definition of FFI contained in the SPV Letter for this purpose,[3] and also *not* adopting criteria for the types of assets a qualifying entity may hold that are more restrictive than those contained in the SPV Letter.

SPV Proposal

You requested our feedback regarding potentially workable variations to the proposal made in the SPV Letter for conferring Certified Deemed Compliant status. A useful stopgap measure would be to permit "existing SPVs" that meet the requirements described in the SPV Letter to be Certified Deemed Compliant until at least 2017. More specifically, we propose that either via notice or regulation that the IRS adopt the ISDA proposal for these entities and indicate that any change to the stated approach would only occur under regulations that in no event would be effective before 2017. This approach in the first instance avoids the need for thousands upon thousands of SPVs to register before the April 25, 2014 deadline (or a later date

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[2] In a letter from ISDA to Messrs. Eggert, Musher and Sweeney, dated April 18, 2013, we stated:

> The law relating to the treatment of cell companies is not entirely settled. In particular, depending on the facts and circumstances of a specific situation, it may be unclear whether generally for tax purposes a cell company should be treated as a single entity, or a collection of multiple entities. For example, in such a situation, it will be uncertain whether the entity as a whole or each individual cell would be treated as a separate FFI, with vastly different practical consequences regarding the procedure for becoming FATCA compliant. [Footnote omitted.]

As a consequence, the SPV Letter proposed generally treating each individual cell as a separate entity for purposes of applying the FATCA rules, without regard to whether the cell otherwise is treated as a separate entity for U.S. income tax purposes generally.

[3] The expanded definition, which would apply only for purposes of permitting Certified Deemed Compliant status for SPVs, is intended to address some uncertainty regarding whether typical repack SPVs would meet the definition of FFI due to lack of "management." The SPV letter proposed the following definition of FFI for purposes of the SPV rules:

> The entity's gross income is primarily attributable to investing, reinvesting, or trading in financial assets (as defined in paragraph (e)(4)(ii) of this section) and the entity is managed *or arranged* by another entity that is described in paragraph (e)(1)(i), (ii), (iv) or (e)(4)(i)(A) of this section*, or any member of the same expanded affiliated group of any such entity*.

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for SPVs in IGA jurisdictions). As we stated in the SPV Letter, the sheer number of outstanding SPVs is enormous, and the documentation (and hence the determination of whether or not the SPVs could register, and if so, how) is not uniform. Hence, any effort to try to register so many entities in this timeframe would involve enormous expense and devotion of resources, and we believe it may not be possible for all of the SPVs to be registered before the applicable deadline. Delayed implementation also would allow the IRS and the Treasury Department to observe for a relatively brief period the degree to which these vehicles present tax avoidance potential, and to verify that the points we made in the SPV Letter about the low likelihood of tax avoidance are indeed correct.

A less desirable approach would be as follows:

- Adopt the approach described in the SPV Letter for entities all of the interests in which are cleared through or custodied with FATCA Compliant entities.
- Permit an entity that has Certificated Interests but that otherwise meets the requirements of the SPV Letter to be Certified Deemed Compliant, provided that at least 80%[4] of its income is foreign source income (a "Foreign Deal," and vehicles not meeting the 80% foreign source income requirement, a "U.S. Deal"), or the entity uses a U.S. paying agent for its Certificated Interests.

We would see no downside in the first bullet point. The relevant clearing organization or custodians as the case may be are necessarily FATCA Compliant. Thus, there would be no FATCA withholding or reporting obligations on the securitization vehicle, even if it were forced to register in order to become FATCA Compliant itself. The FATCA Compliant custodian would have the full suite of FATCA withholding and reporting responsibilities, including U.S. account reporting and transitional reporting for payments to NPFFIs. In practice, all major clearing organizations essentially serve the purpose of custodian or recordkeeper for securities transactions among a limited number of major financial institutions, sometimes referred to as "participants" of the clearing organization. It is anticipated that the major clearing organizations outside the U.S. would be FFIs and would become FATCA Compliant as PFFIs and reporting Model 1 FFIs. As such, the clearing organizations would need to verify that their participants are FATCA Compliant FFIs or U.S. persons, and if not, undertake the relevant withholding and reporting. As the participants are overwhelmingly likely to be either U.S. persons or FATCA Complaint FFIs, it would be expected that the actual FATCA withholding and reporting would

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[4] We believe 80% is an appropriate threshold for distinguishing transactions that are primarily foreign, but that might have incidental U.S. source income, perhaps arising from temporary investment of cash balances with U.S. financial institutions. A higher threshold might be workable but would require resources to be devoted to more careful monitoring without any apparent material benefit.

be performed by the participants, and in some cases, the subparticipants who clear transactions through the clearing organization participants.

Relative to the proposal in the SPV Letter, the proposal in the second bullet would require numerous securitization vehicles to register in order to be FATCA Compliant. Nonetheless, the second bullet would preserve the ability of a certain subset of "existing" entities to be Certified Deemed Compliant. In particular, that subset is comprised of those securitization vehicles that pose the least potential for tax avoidance. Although we believe the potential for using securitization vehicles for tax avoidance generally is low for the reasons we discussed in the SPV Letter, the potential for tax avoidance in the specified subset of vehicles should be particularly low. In general, the Certificated Interests in Foreign Deals have historically not been sold to U.S. investors, who do not appear to have significant appetite for those Certificated Interests. And for U.S. Deals, it remains our belief that U.S. investors own only a small percentage of outstanding Certificated Interests and with a U.S. paying agent in place, the IRS would be receiving information reporting on Form 1099.

Asset Mix

The SPV Letter recommended liberalization relative to the Final Regulations of criteria relating to the assets an entity may hold and be eligible for Certified Deemed Compliant status. For any rule to be effective, it is critically important *not* to limit the availability of the rule to entities that only hold debt.[5] There are several reasons for this. First, many securitization vehicles, such as repack vehicles, will hold one or more instruments issued by other securitization vehicles that either would be treated as equity for U.S. income tax purposes, or whose characterization as debt or as equity for U.S. income tax purposes is unclear. Second, vehicles that are uniformly thought of as debt securitization vehicles frequently will hold non-debt assets. For example, (1) the vehicle may obtain desired exposure to debt by selling credit default swaps or hedge exposure to debt, interest rates or currencies by buying credit default swaps or entering into interest rate or currency swaps; (2) a securitization vehicle that owns debt

[5] The requirements proposed in the SPV Letter for eligibility contained the following language.

> It is an investment entity as defined in Treasury Regulation Sec. 1.1471-5(e)(4)(i)(B), *and the entity does not hold itself out as a mutual fund, private equity fund, hedge fund, venture capital fund, or leveraged buyout fund*. [Emphasis added; footnote omitted.]

Despite the absence of restrictions on the nature of an entity's assets, ISDA recognized that the IRS's intent was to limit the availability of Certified Deemed Compliant status to "real" securitization vehicles, and not to the types of entities described in the italicized language. ISDA believes that the approach proposed in the SPV Letter would be an effective means to achieve that objective without placing unnecessary compliance burdens on thousands of existing entities that would not meet even the modified restriction on assets mentioned below in text.

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could at some point become the owner of equity either as a result of restructuring debt that it holds, foreclosing on collateral or contributing foreclosed upon collateral in a U.S. "blocker" corporation, as is common practice; and (3) money market mutual funds, a common "eligible investment" for temporary cash balances, are treated as equity for U.S. income tax purposes.

Where all of a securitization vehicle's interests are cleared through or custodied with FATCA Compliant entities, the FATCA Compliant entities will be obligated to perform all of the FATCA compliance measures that the securitization vehicle itself otherwise would be required to perform. Therefore no purpose is served by denying Certified Deemed Compliant status to such a vehicle on the basis of what type of assets it holds. Moreover, failure to permit the holding of equity securities would have the effect of excluding from Certified Deemed Compliant status numerous repack SPVs and other transactions and would be particularly unnecessary for the reasons discussed in the SPV Letter and under "SPV Proposal" above. In effect, registration of thousands of vehicles would be required, without furthering the purposes of FATCA in any way.

Accordingly, if restrictions on the composition of assets are contemplated, at most those restrictions should apply to entities that have Certificated Interests. Even so, for entities with Certificated Interests, added restrictions on asset composition would be especially problematic in Foreign Deals, where typically non-U.S. arrangers and professionals are involved and generally speaking do not have the same level of familiarity with FATCA (or U.S. tax law rules distinguishing debt from equity) as the U.S. arrangers and professionals who more typically are involved in U.S. Deals. In light of what we believe to be very compelling evidence of the absence of U.S. ownership of Certificated Interests in Foreign Deals (and significant barriers for U.S. persons who might now want to seek to acquire such interests), we do not believe restrictions on the composition of assets are appropriate for these vehicles. Moreover, we should stress that under the ISDA proposal, Certified Deemed Compliant status would be made available only to "existing" entities with Certificated Interests and a stated limited life. Thus, the absence of restrictions on asset composition has a finite impact on the universe of entities with Certificated Interests that could so qualify.

Thus, at most, restrictions on asset composition should be applied to U.S. Deals with Certificated Interests. In response to the difficulties presented by the restrictive provisions contained in the Final Regulations even for typical debt securitization vehicles, we note that a proposal made by the Loan Syndications and Trading Association (LSTA) and the Securities Industry and Financial Markets Association (SIFMA) in a letter to Jesse Eggert, John Sweeney and Steven Musher dated April 17, 2013, would represent a vast improvement over the more restrictive provision contained in the Final Regulations. ISDA members would agree that the formulation presented by LSTA and SIFMA would be more suitable for use in limiting asset composition in the limited cases where doing so may be considered.

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Collateral

In addition to the specific issue we discussed in the Collateral Letter,[6] several other issues have come to light regarding the potential for FATCA withholding with respect to payments on collateral posted under derivative contracts.[7] Many, if not most, of the issues appear to have the same root cause as the issue discussed in the Collateral Letter. Specifically, it is the prevailing market practice among global institutions to commingle posted collateral, which is essential to the proper functioning and liquidity of the marketplace. This practice does not permit identification of posted collateral to specific transactions. Moreover, increasing recent focus on implementation has revealed further areas of complexity. Because of the sheer magnitude of global collateral arrangements and the complex systems that need to be in place to support these arrangements, resolving issues relating to payments on collateral may be as important as any others under the FATCA rules.[8]

One highly relevant situation arises for USFIs as well as FFIs where a grandfathered U.S. Treasury security is pledged as collateral and after June 30, 2014, the pledgee exercises its right to rehypothecate that security. Since the pledgee may no longer own the security from a U.S. tax perspective, payments by the pledgee with respect to that security may then be payments under a securities loan that is not a grandfathered obligation. If the derivative transaction with respect to

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[6] In the Collateral Letter, we addressed the circumstance where an NPFFI posted collateral to a PFFI in a Model I IGA jurisdiction. We stated:

> A significant practical problem arises because it is common practice for dealers to place similar assets received as collateral (typically fixed income securities) from all Counterparties into a single pooled account. These accounts do not allow for specific assets to be linked to a particular Counterparty. Without a way to track the assets, the dealer will not know whether it is making payments to the Counterparty of income with respect to assets held on the Counterparty's behalf or of substitute payments with respect to securities that the dealer has borrowed from the Counterparty. Accordingly, if the Counterparty is a non-participating FFI, the dealer will not have any way of determining whether it is acting as an intermediary or whether it is acting as a principal, and in turn whether or not FATCA withholding is required. [Footnote omitted.]

[7] We also would point out that the same issues arise for payments made on the equivalent of collateral in repurchase transactions and margin accounts, and we believe the same approach recommended in this letter should be applied to those situations.

[8] The degree of significant and widespread concern in the marketplace about this issue is reported in a recent article in *Risk Magazine*. *See* http://www.risk.net/risk-magazine/news/2302637/fatca-fears-reach-swaps-market

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which the security was pledged is not a grandfathered transaction, FATCA withholding could apply.

This situation gives rise to an identification problem similar to the one that arises in the circumstances addressed in the Collateral Letter, where the pledgee, as is typical, has commingled all the like pledged U.S. Treasury securities in a single account. Accordingly, the pledgee cannot specifically trace the Treasury security that was rehypothecated to any particular transaction. Thus, where identical Treasury securities are posted as collateral for both grandfathered and non-grandfathered transactions and the pledgee disposed of some of those securities, the pledgee would not be able to determine whether FATCA withholding in fact is required.

A related issue arises when counterparties have both grandfathered transactions and non-grandfathered transactions outstanding with each other. Collateral posted between the counterparties as a practical matter will not be segregated between collateral for grandfathered transactions and collateral for non-grandfathered transactions. Recognizing this, the Final Regulations provide for "pro-rata" allocation of the collateral to determine the portion that would be grandfathered by reason of having been posted with respect to a grandfathered transaction.[9] This method, however, is impractical to administer. The absence of segregation of collateral between grandfathered and non-grandfathered transactions means that the collateral is effectively netted between those transactions. The pro-rata allocation will change literally every day as positions are marked to market daily. Furthermore, there would need to be a separate allocation of grandfathered and non-grandfathered collateral, which would further compound the complexity in determining whether withholding is required with respect to a particular payment. And finally, even if it were feasible to make daily changes to the percentage of collateral payments that must be withheld upon, it is not feasible to compute the required percentage in real time. Payments with respect to collateral are made during the business day, but the pro rata calculation could not be made, at best, until sometime after the close of business for the day when the daily mark-to-market calculation is made. Thus, at the time a payment actually is made, it is not even possible for the pledgee to know (or for the IRS to determine on examination) what portion of that payment should be subject to FATCA withholding.

Certainty is vital with respect to these rules. Uncertainty regarding the need to withhold on payments would tend to cause the pledgee/withholding agent to withhold. At the same time, a pledgor who could colorably assert that no withholding is required would be able to make claims against the pledgee for improperly withholding. The resulting commercial disputes could lead to significant market disruptions, and ultimately to courts determining substantive tax law rules in civil litigation between private parties, an obviously undesirable outcome. Accordingly, ISDA

[9] See Treas. Reg. § 1.1471-2(b)(2)(i)(A)(*3*).

recommends in the strongest possible terms adoption of an approach that would create the greatest certainty for the market. Moreover, in order to avoid undue complexity in making a grandfathering or other collateral withholding determination, we urge adoption of relatively simple rules that allows for application of FATCA withholding in a manner consistent with market practices. Finally, in light of the myriad complexities that are becoming apparent to market participants, we recommend some delay in implementation of any withholding on collateral by FFIs in order to permit more thoughtful consideration of the optimal approach to the difficult issues identified as well as others that are likely to come to light.

Specifically, we recommend that regulations provide that for a financial institution making payments with respect to collateral it holds:

- Payments on U.S. securities that are posted as collateral are treated as either grandfathered or non-grandfathered by reference to the "grandfather" status of the posted security (i.e., whether or not the security posted as collateral by the pledgor is an obligation issued before after June, 30, 2014).

- For payments of withholdable amounts on non-grandfathered collateral (including cash after June 30, 2014) to be eligible for the grandfathering rule by reason of securing a grandfathered transaction, that collateral must be clearly identified in segregated accounts as securing solely grandfathered transactions.

- Payments by an FFI with respect to collateral, whether or not the FFI is in an IGA jurisdiction, are not subject to FATCA withholding until 2017. After 2016, all payments by an FFI (also whether or not the FFI is in an IGA jurisdiction) are treated solely for purposes of the FATCA rules as made in a principal capacity. The rules in the previous two bullet points apply to payments by the FFI, so that payments made with respect to grandfathered collateral by a PFFI in a non-IGA jurisdiction after 2016 would not be subject to FATCA withholding, even if the payment is deemed to be made in a principal capacity. Payments made with respect to non-grandfathered collateral by a PFFI in an non-IGA jurisdiction after 2016 would be subject to FATCA withholding.[10]

A matrix illustrating the results of these rules is attached as Exhibit C.

The overall effect of the proposal is to provide clear and administrable rules that are necessary for the continued smooth functioning of the markets that call for posting of collateral. Insofar as the treatment of FFIs is concerned, the delay implementing FATCA withholding for

[10] This proposal supersedes the proposal contained in the Collateral Letter.

all payments with respect to collateral in the first instance conforms the effective date for payments made as agent to the effective date already provided by the Final Regulations for payments made in a principal capacity.[11] FFIs as a group, especially when transacting under non-U.S. law, are particularly ill situated to make the often nuanced and uncertain determination of the U.S. tax law characterization of a collateral arrangement as one in which it is acting as agent or principal. Accordingly, the delay is necessary to allow FFIs to avoid having to make this determination as of July 1, 2014, and ultimately to adapt systems to provide for FATCA withholding on a uniform basis for all collateral arrangements. The end result after 2016 is that FFIs in IGA jurisdictions would have certainty regarding the characterization of their collateral arrangements and would not be responsible for FATCA withholding on payments with respect to collateral, while (subject to the grandfathering rule, as a applied under the proposal) FATCA withholding would be required for payments on collateral by FFIs in non-IGA jurisdictions.

Additional significant issues may arise in connection with the application of FATCA to collateral arrangements. In particular, ISDA members have raised concerns about the treatment of U.S. securities collateral held as part of multi-branch arrangements, and about the potential impact of the application of foreign law to collateral arrangements. As a result, because of the importance and overall complexity of how FATCA rules might apply to payments on collateral, we plan to undertake expedited efforts to develop more comprehensive proposals. We would be pleased to meet with you to discuss those proposals in the near future.

* * * *

We would be pleased to discuss any aspect of this letter with you further.

Sincerely yours,

Thomas Prevost

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[11] Reg. § 1.1473-1(a)(4)(vi).

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EXHIBIT A

August 28, 2013

Mr. Jesse Eggert
Associate International Tax Counsel
United Stated Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mr. John Sweeney
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue
Washington, DC 20224

Re: ISDA Proposal For FATCA Regulations

Dear Mr. Eggert and Mr. Sweeney:

I am writing on behalf of the North American Tax Committee of the International Swaps and Derivatives Association (ISDA). Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 60 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org.

We thank you and your colleagues for meeting with ISDA on July 24, 2013, to discuss ISDA's proposal for modifying the Limited Life Debt Investment Entity (LLDIE) provision in the final FATCA regulations. As a takeaway from that meeting, ISDA agreed to provide an updated proposal for special purpose vehicles or "SPVs" that uses as a starting point the Collective Investment Vehicle provision in Part IV, Item E of the July 12, 2013 version of the model Annex II to the Model 1 IGA ("Annex II Model Provision").[1] The updated proposal

[1] The July 12, 2013 version of the model Annex II has been replaced by a new version dated August 19, 2013. The new version did not make any change to the Annex II Model Provision, however.

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responsive to that request is attached as Appendix 2, and is also endorsed by the Securities Industry and Financial Markets Association (SIFMA) and the Loan Syndications and Trading Association (LSTA).

You will notice in Appendix 2 a number of modifications to the Annex II Model Provision. We believe the modifications are necessary to achieve the following objectives, which we believe are in the interest of the government as well as ISDA's members: (1) giving the government FATCA reporting for interests issued by "New SPVs" while maintaining flexibility for the vehicles as to how they achieve this objective; and (2) striking an appropriate balance between the benefits of FATCA reporting for "Existing SPVs," given the tremendous costs and resource difficulties associated with achieving this objective, and the relatively low risk of noncompliance that may exist for a relatively small segment of the market.

With respect to New SPVs, the ISDA proposal does the following in comparison to the Annex II Model Provision:

1. Uses the Final Regulation definition of an Investment Entity with certain limitations (intended to exclude hedge funds, mutual funds, and other types of investment vehicles, as opposed to securitization vehicles), rather than referring to a regulated collective investment vehicle, to reflect the fact that most SPVs are not regulated entities. We question whether regulation is necessary given that FATCA compliance will be done by entities that are required or have agreed to comply with FATCA. (We refer to such entities as "FATCA Compliant" entities.) A form of "limited life" requirement also is imposed to limit the scope of the proposal. We wish to point out that for this purpose the proposal adopts the FATCA compliance requirements consistent with those imposed under the final FATCA regulations for several Registered Deemed Compliant FFI classifications, which does not include the transitional reporting requirements for certain payments made by PFFIs to NPFFIs.

2. Allows the SPV more flexibility in the manner that it complies with FATCA. In particular, the SPV would be permitted to achieve Certified Deemed Compliant status by hiring a FATCA Compliant paying agent, provided that the paying agent agrees to comply with certain FATCA requirements with respect to any interests in the SPV that are not held or cleared through a FATCA Compliant entity. We refer to interests that are not so held or cleared as "Certificated Interests." The ISDA proposal also allows the SPV to achieve Registered Deemed Compliant status if the SPV itself performs or hires another vendor to perform such FATCA compliance for any interests the payments of which are not made by a FATCA Compliant paying agent. While we built in this flexibility, we don't expect this fact pattern to be very common.

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3. Provides that an SPV that achieves Certified Deemed Compliant or Registered Deemed Compliant status under the proposal would be excluded from any EAG. This is a critical aspect of the proposal, for two reasons. First, the EAG rule presents heightened problems for so-called "Repack SPVs" and certain other securitization vehicles. For example, a typical Repack SPV is an SPV that issues a single class of instruments and uses the cash raised to purchase at that time a single asset, or pool of assets, and enter into one or more derivative transactions that alter or enhance the return of those assets. Repack SPVs most typically issue a single class of "debt" instruments to one or a limited set of investors, and those securities might be treated as equity under U.S. tax principles. The Repack SPV interests are typically held through a clearing organization, and it would not be possible for the Repack SPV itself to determine at any point in time the identity of its actual beneficial owners. For this reason, if a Repack SPV or other similarly situated securitization vehicle is eligible to be FATCA Compliant only if it can identify any majority owner in order to determine whether such owner is FATCA Compliant, it is likely that many such vehicles would be unable to comply with FATCA and would become subject to FATCA withholding.

   Second, large multinational institutions are concerned about whether they can identify all instances where they may own more than 50 percent of the class or classes of SPV interests that are treated as equity for U.S. tax purposes, and the potential adverse consequences to the rest of the EAG in the event that any such SPVs are not identified. The difficulty faced by institutions is further compounded by the uncertainty in many cases regarding whether an interest in an SPV is properly treated as debt or equity. The potential inclusion of SPVs in an EAG unnecessarily increases the "footfault" risk for an FFI.

4. Clarifies how to apply the SPV rules to cell companies, without otherwise suggesting the appropriate treatment of cells and cell companies for any substantive tax purpose.

5. Expands the definition of Investment Entities solely for purposes of applying the SPV rules in order to ensure that Repack SPVs and other securitization vehicles would be treated as FFIs. Although we believe the regulation drafters intended to include these vehicles within the definition of Investment Entity, the limited undertakings of the financial institutions that arrange the Repack SPVs and certain other securitization vehicles leaves it unclear whether those entities are "managed" by anyone, possibly resulting in those entities being treated as NFFEs. Rather than suggesting a change to the definition of Investment Entity that would apply for all purposes of FATCA, our proposal would expand the definition of Investment Entity in a manner that would include an SPV solely for the purpose of allowing the SPV to qualify for Certified or Registered Deemed Compliant status (and for purposes of determining whether the SPV is – in the first instance - a financial institution eligible for such status).

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6. Although the ISDA proposal follows the Annex II Model Provision in this regard, it should be noted that the ISDA proposal permits the SPV to hold financial assets other than debt securities, which is important for reasons we discussed in our April 4, 2013 letter. Accordingly, in this letter, we refer to the "SPV rules" rather than "LLDIE rules," and new regulation provisions also should adopt a different name than LLDIE.

The ISDA proposal for Existing SPVs is different from the ISDA Proposal for New SPVs in the following respects. An Existing SPV with Certificated Interests can be Certified Deemed Compliant as long as the SPV uses a FATCA Compliant paying agent, with no requirement that the paying agent perform any FATCA compliance for the particular SPV. We realize that this represents a departure from the general regime for FATCA compliance. However, we believe the SPV Market Analysis discussion in Appendix 1 below supports the conclusion that the risk of Existing SPVs being used as vehicles for tax evasion is low, while the effort that would be required for the enormous volume of Existing SPVs to attempt to perform normal FATCA compliance would at best be extremely difficult and costly to implement. The number of Existing SPVs with Certificated Interests is by most estimates several thousand at a minimum, but maybe significantly over ten thousand. The documentation of SPVs is hardly uniform. Each SPV would need legal review in order to determine whether the SPV is authorized to undertake registration and other activities necessary to comply with FATCA. There is also strong evidence that the government will likely get the requisite Form 1099 reporting on the overwhelming majority of U.S. individuals holding any Certificated Interests, even though this would not be a requirement for the SPV to be Certified Deemed Compliant. Therefore, we respectfully request that you accept the proposed departure from the FATCA reporting requirements.

Finally, we would add that we believe that the provisions of the proposal should be adopted into the language of the typical Article 4 in newly negotiated IGAs, and thus imported into existing IGAs through the "most favored nation" provision in the typical Article 7.

We would be pleased to discuss any aspect of this proposal with you further.

Sincerely yours,

Thomas S. Prevost

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Appendix 1

SPV Market Analysis

As mentioned earlier in the letter, the main difference between the ISDA proposal for Existing SPVs and New SPVs is the treatment of Certificated Interests in Existing SPVs. Below is an explanation of our understanding of the marketplace for SPVs with Certificated Interests. However, please note that although we spoke extensively with a number of knowledgeable parties, it is very difficult to get a complete view of the market, and especially any kind of concrete statistics, given the large number of players in the market and lack of published information. We know that there are tens of thousands, if not more, SPVs currently in existence. Several members of the ISDA North American Tax Committee inquired internally within their own institutions, including CLO arrangers at two major institutions, a conduit specialist at a major institution, private bankers who have sold Certificated Interests to individuals in the U.S., and also with various U.S. counsel, Irish counsel, U.K. counsel, Dutch counsel, Luxembourg counsel, Cayman counsel, and Asia counsel. Based on these inquiries, we prepared the summary below to depict as best as we can the real marketplace as it relates to Certificated Interests in SPVs.

Overall, our inquiries support the conclusion that the substantial burden of imposing full FATCA compliance obligations on existing SPVs is not justified by the potential benefits that such reporting might achieve. First and foremost, we believe the risk of noncompliance by holders of interests in SPVs is small given:

1. The proposal provides for full compliance with FATCA when a FATCA Compliant financial institution clears or custodies the interests issued.

2. Certificated Interests generally represent an extremely small fraction of all of the interests issued by SPVs. In addition, the overwhelming majority of Certificated Interests were not sold to U.S. individuals.

3. Certificated Interests sold to U.S. individuals were primarily from U.S. managed CLO and CDO deals, which generally have a U.S. paying agent, so that any U.S. individual holder would receive a Form 1099.

4. Certificated Interests held by individuals may also be held through a FATCA Compliant financial institution (usually a U.S. financial institution), which would be required to perform FATCA reporting; however, it is difficult for the SPV Board of Directors to determine whether this is the case, since they only see the first sale of the Certificated Interests, which are often sold to the arranger of the deal that will then sell the interests

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on to its clients. It should be noted that, while we have heard that some individuals hold the Certificated Interests through trusts, the feedback we received is that these were U.S. trusts, not offshore vehicles.

5. Except to a limited extent, Certificated Interests are not the type of assets that U.S. individuals could or would typically buy either because of size restrictions, legal restrictions or because the asset class is difficult to evaluate or is too risky for most individuals. As a result, we don't believe that many individuals would look to buy these assets in order to avoid FATCA. And,

6. In order for individuals to buy these Certificated Interests in the secondary market, they would have to go to a Financial Institution that can source these assets, as these assets are not actively traded on any exchange. Moreover, we believe that Financial Institutions will not sell these assets to anyone they believe is using the investment to evade tax by avoiding FATCA, particularly in light of the certification requirement in Treasury Regulation Sec. 1.1471-4(c)(7).[1]

In the face of this low risk of noncompliance, we believe that imposing compliance obligations on Existing SPVs similar to the ones for New SPVs would be extremely onerous, for the following reasons:

A. The operative documents of many thousands of vehicles across numerous jurisdictions in the market (which vehicles generally have a very small percentage of Certificated Interests) would have to be analyzed to determine whether the particular SPV is authorized to hire someone to perform the FATCA compliance work. Moreover, in cases where amendment of the operative documentation would be required for the SPV to do so, effecting such an amendment might be difficult or impossible.

B. Individual contractual arrangements would have to be established for each of those vehicles that are legally authorized to hire someone to perform FATCA compliance work.

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[1]In particular, this regulation provides: "The responsible officer must also certify to the best of the responsible officer's knowledge after conducting a reasonable inquiry, that the participating FFI did not have any formal or informal practices or procedures in place from August 6, 2011, through the date of such certification to assist account holders in the avoidance of chapter 4."

C. Paying Agents are already spending massive resources to prepare to comply with FATCA, so dealing with all of these Existing SPVs would add significantly to their burden at a time when resources in the market with FATCA expertise are scarce. And,

D. Merely figuring out which SPVs have Certificated Interests will be a very significant undertaking for those involved. Since certain SPVs permit holders of interests to request to exchange their custodied or cleared interests for Certificated Interests in specific circumstances, there is no simple procedure to determine which deals have Certificated Interests outstanding, and those who administer the SPVs would have to undertake manual diligence of every deal.

Complying with the ISDA proposal is fairly easy for SPV Boards of Directors as they can easily determine where the interests are cleared or custodied and whether those institutions are FATCA Compliant entities, and they can easily determine who the paying agent is and whether the institution is a FATCA Compliant entity. Our research indicates that there are at most 10 institutions globally that handle payments for the overwhelming majority of SPVs. All of these major institutions are expected to be FATCA Compliant.

Examples of SPVs that Issue Certificated Interests

1. CLO/CDO economic equity: If the economic equity tranche of a CLO or CDO (generally, the bottom 10% or less of the deal) is marketed for sale in the U.S., the interests are required to be issued in certificated form if the original purchaser is a U.S. pension fund or a U.S. individual that is not a "qualified institutional buyer." Due to the complexity and risk profile of this asset class, individuals who invest in CLOs or CDOs are generally employees of the investment managers or other highly sophisticated investors. We have strong indications that Certificated Interests represent less than 5% of the U.S. CLO/CDO market. Certificated Interests are primarily purchased by U.S. pension plans and other institutional investors. As U.S. paying agents are generally used for U.S. managed CLO/CDO deals, any U.S. individuals holding Certificated Interests would receive Forms 1099. European CLOs/CDOs were generally not sold into the U.S., unless they were U.S. dollar denominated deals, so Certificated Interests would be a very small piece of the overall European market. Our understanding is that it is rare that a U.S. individual owns Certificated Interests in European deals.

2. Repack SPVs sometimes issue Certificated Interests to their investors. These deals are not typically sold to individual investors.

3. Non-quoted Eurobond deals: Irish SPVs were required in certain instances to issue bearer bonds for holders to obtain treaty benefits. These deals generally were not sold to

U.S. investors, unless they were held at a depositary that issued registered depository receipts to investors.

4. SPV Interests issued to German insurance companies were for some time required to be Certificated Interests for regulatory reasons.

5. Securitization vehicles issued Certificated Interests to commercial paper conduit vehicles formed by major financial institutions and sometimes directly to such financial institutions. Our understanding is that these are very large bespoke transactions, with a single buyer, and no individuals involved. Because of the size and tailored nature of these transactions, interests are generally redeemed, not transferred.

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Appendix 2

ISDA Proposal

Part I: Certified Deemed Compliant Classification for Securitization and other Sponsored Special Purpose Vehicles – Replaces LLDIE concept in Treasury Regulation Sec. 1.1471-5(f)(2)(iv)

"New Entity Requirements" (Applicable to entities formed after the later of December 31, 2013 or [30] days following the publication of final regulations implementing the proposals contained herein (the "New Entity Date")):

An entity will be certified deemed compliant and will not be treated as a member of an EAG[1] if all of the following requirements are met:

(a) It is an investment entity as defined in Treasury Regulation Sec. 1.1471-5(e)(4)(i)(B), and the entity does not hold itself out as a mutual fund, private equity fund, hedge fund, venture capital fund, or leveraged buyout fund.[2]

(b) All payments with respect to interests in the entity (except for debt or equity interests of $50,000 or less) are made either:

(i) with respect to interests held by or through one or more exempt beneficial owners, active NFFEs (described in Treasury Regulation Sec. 1.1472-1(c)(1)(iv)), U.S. Persons that are not "specified U.S. Persons," as described in Treasury Regulation Sec. 1.1473-1(c) ("Specified U.S. Persons"), or Financial Institutions that are not Nonparticipating Financial Institutions; or

[1] Exclusion from any EAG is a critical aspect of this proposal because the potential inclusion of an SPV in an EAG raises highly problematic administrative issues. It is understood that an entity meeting the stated requirements would be excluded from any EAG even if it has not provided the applicable forms or certification to be certified deemed compliant.

[2] Note that this definition is not intended to include family trusts or private investment companies. Preamble or other language can clarify this.

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(ii) by one or more (x) U.S. Financial Institutions that are not Specified U.S. Persons, (y) Participating FFIs, or (z) reporting Model 1 FFIs, that each agree: (I) in the case of an entity that is not subject to an IGA, (A) to document the relevant account holders in accordance with the procedures set forth in Treasury Regulation Sec. 1.1471-4(c) applicable to accounts, and (B) to withhold and report on such accounts as would be required under Treasury Regulation Secs. 1.1471-4(b) and (d), in the case of both clause (A) and clause (B) as if the entity were a Participating FFI,[3] and (II) in the case of an entity that is subject to the terms of an IGA, to comply with the requirements set forth in the applicable IGA for the entity to be treated as complying with, and not subject to withholding under, Section 1471.

(c) The entity's operative documents require the entity to pay investors representing substantially all[4] of the interests in such entity, all amounts that such investors are entitled to receive, on or before a specified date, and there is no right for the entity to unilaterally extend such date.[5] An entity that would meet the requirements of the foregoing provision, but for the fact that the requirements described in clauses (b)(ii)(A) and (b)(ii)(B) with respect to some or all of the interests in the entity are performed by a person not described in paragraph (b)(ii), may qualify as registered deemed compliant if it meets the procedural requirements described in Treasury Regulation Sec. 1.1471-5(f)(1)(ii).

"Existing Entity Requirements" (Applicable to entities formed on or before the New Entity Date):

An entity will be certified deemed compliant and will not be treated as a member of an EAG if all of the following requirements are met:

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[3] In general, this provision would impose compliance procedures similar to those applicable to Participating FFIs. We note that these reporting requirements mirror those of several registered deemed compliant FFI classifications under Treasury Regulation Sec. 1.1471-5(f), which would not result in payment reporting under Treasury Regulation Sec. 1.1474-1(d)(4)(iii), including the transitional reporting requirements for payments of certain reportable amounts made by PFFIs to NPFFIs.

[4] ISDA members would be open to clarification of the meaning of "substantially all" for this purpose. The principal purpose of imposing the requirement on less than all of the interests in the SPV is to exclude the generally de minimis common interests in the SPV that are held by charities or other accommodation parties.

[5] Acceptance of the proposal regarding cell companies is a critical component of this requirement. Inclusion of this requirement without adoption of the cell company proposal would render the use of cell companies very impractical.

(a) It is an investment entity as defined in Treasury Regulation Sec. 1.1471-5(e)(4)(i)(B), and the entity does not hold itself out as a mutual fund, private equity fund, hedge fund, venture capital fund, or leveraged buyout fund.

(b) All payments with respect to interests in the entity (except for debt or equity interests of $50,000 or less):

(i) are made with respect to interests held by or through one or more exempt beneficial owners, active NFFEs (described in Treasury Regulation Sec. 1.1472-1(c)(1)(iv)), U.S. Persons that are not Specified U.S. Persons, or Financial Institutions that are not Nonparticipating Financial Institutions; or

(ii) are made by one or more (x) U.S. Financial Institutions that are not Specified U.S. Persons, (y) Participating FFIs, or (z) reporting Model 1 FFIs.[6]

(c) The entity's operative documents require the entity to pay investors, representing substantially all of the interests in such entity, all amounts that such investors are entitled to receive, on or before a specified date, and there is no right for the entity to unilaterally extend such date. If investors approve the extension of such date for any interests, or any new interests are issued, the entity will be required to comply with the New Entity Requirements solely with respect to such interests.

An entity that would meet the requirements of the foregoing provision, but for the fact that it does not comply with paragraph (b) with respect to some or all interests in the entity, may qualify as registered deemed compliant if:

(1) the entity agrees to (A) document the relevant account holders in accordance with the procedures set forth in Treasury Regulation Sec. 1.1471-4(c) applicable to accounts, and (B) withhold and report on such accounts as would be required under Treasury Regulation Sec. 1.1471-4(b) and (d), in the case of both clause (A) and clause (B) as if the entity were a Participating FFI; and

(2) it meets the procedural requirements described in Section 1.1471-5(f)(1)(ii).

---

[6] The reporting and other compliance obligations under Treasury Regulation Sec. 1.1471-4 are not included here because of the highly challenging practical issues involved in reviewing individually the documents of many thousands of existing entities to determine whether the activities could be implemented, and if so how, even where it is established that the SPVs had the legal ability to undertake those activities.

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Part II: For cell entities:

In the case of an entity that comprises one or more separate cells, regardless of whether each such cell is treated as a separate entity for other US tax purposes, each cell that meets the New Entity Requirements or Existing Entity Requirements will be eligible to be registered or certified deemed compliant under those rules, provided that any cell formed after the New Entity Date, shall be treated as an entity formed after the New Entity Date, and the cell must satisfy the New Entity Requirements. The Existing Entity Requirements will apply to each cell formed on or before the New Entity Date.

Part III: Clarification of Status of "Repack" and other Securitization Vehicles

There may be some uncertainty regarding the status of non-US vehicles used in so-called "repack" transactions and other types of securitization transactions, due to the absence of "management." For that reason we propose that solely for the purpose of determining whether an entity would be treated as an FFI in order to qualify for certified or registered deemed compliant status under the proposals above, the following modification to the definition of investment entity contained in Treasury Regulation Sec. 1.1471-5(e)(4)(i)(B), so that the first sentence of the section would read:

(B) The entity's gross income is primarily attributable to investing, reinvesting, or trading in financial assets (as defined in paragraph (e)(4)(ii) of this section) and the entity is managed *or arranged* by another entity that is described in paragraph (e)(1)(i), (ii), (iv) or (e)(4)(i)(A) of this section*, or any member of the same expanded affiliated group of any such entity*.

(Added language italicized.)

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EXHIBIT B

ISDA® Safe, Efficient Markets

Mr. Jesse Eggert
Associate International Tax Counsel
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

June 11, 2013

Dear Mr. Eggert:

The International Swaps and Derivatives Association, Inc. ("ISDA") appreciates the opportunity to comment on the practical implications of a particular provision of the Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA (the "Model 1 IGA") relating to implementation of the Foreign Accounting Tax Compliance Act ("FATCA").

Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 60 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

Background

Model 1 IGA Article 4(1)

Article 4, section 1 of the Model 1 IGA provides:

> Treatment of Reporting [FATCA Partner] Financial Institutions. Subject to the provisions of paragraph 2 of Article 5, each Reporting [FATCA Partner] Financial Institution will be treated as complying with, and not subject to withholding under, section 1471 of the U.S. Internal Revenue Code if [FATCA Partner] complies with its obligations under Articles 2 and 3 with respect to such Reporting [FATCA Partner] Financial Institution and the Reporting [FATCA Partner] Financial Institution:

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. . .

d) to the extent that a Reporting [FATCA Partner] Financial Institution is . . . acting as a qualified intermediary (for purposes of section 1441 of the U.S. Internal Revenue Code) that has elected to assume primary withholding responsibility under chapter 3 of subtitle A of the U.S. Internal Revenue Code, . . . withholds 30 percent of any U.S. Source Withholdable Payment to any Nonparticipating Financial Institution; and

e) in the case of a Reporting [FATCA Partner] Financial Institution that is not described in subparagraph (1)(d) of this Article, and that makes a payment of, or acts as an intermediary with respect to, a U.S. Source Withholdable Payment to any Nonparticipating Financial Institution, the Reporting [FATCA Partner] Financial Institution provides to any immediate payor of such U.S. Source Withholdable Payment the information required for withholding and reporting to occur with respect to such payment.

This provision of the Model 1 IGA has been instituted in bilateral agreements with Norway, Spain, Ireland, Mexico, Denmark and the United Kingdom.

Although not entirely clear from the face of Article 4, we understand the intent is that a Reporting FATCA Partner Financial Institution has no FATCA withholding obligations with respect to U.S. Source Withholdable Payments that it makes in a principal capacity.

Typical Transaction

Many U.S. and non-U.S. financial institutions have dealer affiliates in the U.K. These dealer affiliates are foreign financial institutions ("FFIs"), and frequently are qualified intermediaries ("QIs"). As dealers, these FFIs continuously enter into swap and other transactions with unrelated parties. In a typical swap transaction, the dealer's counterparty (the "Counterparty") will be required to post collateral to the dealer. The collateral often consists of U.S. Treasury securities or other securities that generate U.S. source income. Under a standard ISDA Credit Support Annex, the dealer is permitted at its option to (i) hold the collateral and pay any income received from the collateral to the Counterparty or (ii) to sell or lend the posted collateral to a third party. In the latter case, the dealer is required to make substitute income payments to the Counterparty equal in amount to the income received on the collateral.

Although the law is not entirely settled in this area, market participants generally view the Counterparty as the owner of the posted collateral for U.S. tax purposes where the dealer retains the collateral, with the result that the dealer is making payments as agent. Where the dealer lends or sells the collateral, market participants generally view the Counterparty as having made a securities loan to the dealer with the result that the dealer is making payments as

principal. In general, there is no U.S. tax significance to characterizing the arrangement between the dealer and the Counterparty in either manner. However, under Article 4 of the Model 1 IGA a dealer would be required to identify whether the dealer is making the payment to its counterparty in its capacity as principal (with no FATCA withholding required) or whether it is making the payment to its counterparty in an intermediary capacity (with FATCA withholding potentially required).[1]

A significant practical problem arises because it is common practice for dealers to place similar assets received as collateral (typically fixed income securities) from all Counterparties into a single pooled account. These accounts do not allow for specific assets to be linked to a particular Counterparty. Without a way to track the assets, the dealer will not know whether it is making payments to the Counterparty of income with respect to assets held on the Counterparty's behalf or of substitute payments with respect to securities that the dealer has borrowed from the Counterparty. Accordingly, if the Counterparty is a non-participating FFI, the dealer will not have any way of determining whether it is acting as an intermediary or whether it is acting as a principal, and in turn whether or not FATCA withholding is required.[2]

Proposal

We propose that the Treasury Department in administering an IGA, that like the IGA with the U.K., follows the Model 1 IGA create an exception under which no FATCA withholding would be required with respect to payments of withholdable amounts, where the payments relate to assets that were posted as collateral to the Reporting FATCA Partner Financial Institution in connection with a transaction in the ordinary course of the Reporting FATCA Partner Financial Institution's business as a dealer in securities.

We believe that the well intentioned provisions of Article 4(1) of the Model 1 IGA insofar as they relate to Reporting FATCA Partner Financial Institutions were set forth and implemented in bilateral agreements without complete awareness of the manner in which those Reporting FATCA Partner Financial Institutions' business and systems currently operate. It does not appear that the intention of those provisions was to require significant alteration of the manner of doing business in order to take advantage of the negotiated relief for certain Reporting FATCA Partner Financial Institutions. Moreover, we do not see any principled reason to base

[1] Note that this issue is present regardless of whether or not the dealer is a QI, and if it is a QI, whether or not it has assumed primary withholding responsibility. If the dealer is a QI that has assumed primary withholding responsibility, it would have to make this determination in order to know whether or not to withhold under FATCA on payments to a non-participating FFI. If the dealer is not a QI or is a QI that has not assumed primary withholding responsibility, it would have to make the determination in order to inform the party that is paying the relevant amount to the dealer, so that the party making the payment can withhold as required.

[2] A similar issue may arise in connection with assets held in margin accounts and other circumstances, which we do not address in this letter.

the requirement of FATCA withholding on whether or not the Reporting FATCA Partner Financial Institution has in fact borrowed U.S. securities posted as collateral. We believe that the suggested exception is consistent with the intention of the language of the Model 1 IGA and would not create any undue opportunity for abuse or avoidance of the purposes of FATCA.

On behalf of ISDA, I wish to thank you for your consideration of this issue.

With best regards.

Sincerely yours,

Thomas S. Prevost

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Exhibit C

	Impact of Proposal	
	Collateral Solely Secures Grandfathered Obligations	*Collateral Secures both Grandfathered and non-Grandfathered Obligations*
Grandfathered US securities posted to an IGA FFI	No	No
Grandfathered US securities posted to a non-IGA PFFI	No	No
Grandfathered US securities posted to a USFI	No	No
Non-Grandfathered US securities posted to an IGA FFI	No	No
Non-Grandfathered US securities posted to a non-IGA PFFI	No	No until 2017/ Yes thereafter
Non-Grandfathered US securities posted to a USFI	No	Yes
Cash posted to a USFI	No	Yes