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[1] The July 12, 2013 version of the model Annex II has been replaced by a new version dated August 19, 2013.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).

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 Prevost

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.

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

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[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.

(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).

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[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.

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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.)