



October 8, 2012

**Delivered Electronically**

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**RE: Additional SIFMA Comments on the Proposed FATCA Regulations**

Ladies and Gentlemen,

The Securities Industry and Financial Markets Association

("SIFMA")<sup>1</sup> wishes to submit additional comments on the proposed regulations

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<sup>1</sup> SIFMA brings together the shared interests of securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and



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being developed to implement the provisions of the Foreign Account Tax Compliance Act (“FATCA”) that were included in section 501 of the Hiring Incentives to Restore Employment Act. These comments are intended to supplement our comments with respect to DVP/COD transactions in our letter dated April 30, 2012. We make two important and time-sensitive recommendations discussed further below.

SIFMA appreciates that Treasury and IRS are in the last stages of finalizing the FATCA regulations. However, in order to avoid unnecessary market disruption, we believe the final FATCA regulations should reflect the suggestions below.

*I. The potential for FATCA withholding from a payment made to **purchase** securities is not clearly stated in the proposed FATCA regulations; the final regulations should not include such a withholding requirement.*

- Brokers have developed systems to backup withhold, when required, on gross proceeds from the **sale** of securities by customers. For example, the sale of stock by a customer may be subject to backup withholding if a Form W-9 is not on file. The key point here is that **the broker**

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globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

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**effecting the sale** by its customer has the backup withholding obligation.<sup>2</sup>

- Based on recent discussions with SIFMA members, it appears that Treasury and IRS interpret FATCA as applying to *purchases* of securities. For example, a broker purchasing securities on behalf of its customers or for its own account in the market would need to ensure that its counterparty is not subject to FATCA withholding. Treasury and IRS appear to view the transaction as a payment of gross proceeds potentially subject to FATCA withholding.
- The details of such a requirement are not stated in the proposed regulations, not widely or well understood, is unprecedented, and has the potential for significant market disruption. A broker's market purchase of securities has never before triggered tax documentation, reporting, or withholding requirements. Interpreting FATCA to impose such requirements -- even assuming those requirements are clearly defined -- would represent a major change for brokers. In addition, brokers will require time to analyze the impact of this new proposed requirement to

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<sup>2</sup> See Treasury regulation sections 1.6045-1(a)(1) and -1(c)(2).

properly conclude on its impact from a system, operations and market perspective.

- We also note that the recent Intergovernmental Agreements (IGAs) generally do not require FATCA withholding on gross proceeds. This issue is specifically reserved for resolution by January 1, 2017. Unless and until the issue of withholding on gross proceeds is resolved in a uniform manner and at the same time for U.S. and foreign brokers globally, we believe there is the potential for a significant adverse affect on the US securities industry. If transactions executed by brokers located in an IGA country are not subject to FATCA withholding but transactions executed in the United States are subject to FATCA withholding, the potential is for the business to migrate to those safe harbor countries.
- **Recommendation #1:** In order to avoid potential market disruption, we urge Treasury and IRS to not adopt final regulations at this time that would require the application of FATCA to purchase transactions. Any future requirements relating to purchases, including any related onboarding documentation requirements, withholding, and reporting

requirements, should be expressly proposed and vetted with the affected industry participants before being finalized. Alternatively, we request that Treasury should clarify in its final regulations that purchasers of securities are not required by FATCA to withhold a portion of the purchase price as gross proceeds of the seller.

II. *To the extent SIFMA's prior recommendations on DVP/COD transactions are not included in the final regulations, those regulations should also not be finalized at this time.*

- SIFMA has provided extensive comments on the potential market disruption from the application of FATCA to delivery-versus-payment/cash-on-delivery transactions.<sup>3</sup>
- Given the market risk due to these rules (similar to the purchase issue discussed above), Treasury and IRS should re-propose these rules to obtain additional feedback from industry.
- As mentioned earlier, we also note that the recent Intergovernmental Agreements (IGAs) generally do not require FATCA withholding on

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<sup>3</sup> See SIFMA letter dated April 30, 2012.

sales proceeds transactions. Rather the IGAs reserve on this issue and would commit the countries to resolve the issue by January 1, 2017.

Similarly, final regulations on this issue should not apply to any payments of gross proceeds made before January 1, 2017.

- **Recommendation #2:** Similar to our Recommendation #1 above, we urge Treasury and IRS to reserve on the application of FATCA to DVP/RVP transactions (unless the final regulations adopt SIFMA’s prior recommendations). In this manner, the Industry will have the opportunity work through this issue with the IRS to assure a practical and workable rule is implemented. Any future requirements relating to DVP/RVP transactions, including any related onboarding documentation requirements, withholding, and reporting requirements, should apply prospectively only and not before the matter is resolved for countries that enter into IGAs.



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SIFMA appreciates your consideration of its collective views and concerns on the regulations that are being developed to implement the provisions of FATCA, and we would welcome the opportunity to discuss this issue further before the issuance of final regulations. Please do not hesitate to contact me at (202) 962-7333 or [ppeabody@sifma.org](mailto:ppeabody@sifma.org) if you have any questions or if we can be of further assistance.

Sincerely,

A handwritten signature in blue ink that reads "Payson Peabody". The signature is written in a cursive, flowing style.

Payson Peabody  
Managing Director & Tax Counsel  
Securities Industry and Financial Markets Association

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