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RE: SIFMA Comments on Notice 2013-69

Ladies and Gentlemen,

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> is submitting these comments on Notice 2013-69 which provides guidance to foreign financial institutions (“FFIs”) entering into an FFI agreement with the Internal Revenue Service (“IRS”) to be treated as participating FFIs (“PFFIs”).

SIFMA appreciates the efforts that the Department of the Treasury and the IRS put into the development of the final regulations and related guidance, as well as the consideration that was given to SIFMA’s previous comments and suggestions. We are attaching a copy of the letter we submitted on October 4, 2013 and we would like to reiterate our request for a meeting or teleconference on the issues we raised in that letter to help our members prepare for FATCA implementation.

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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 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.

## **SUMMARY**

### **General Responsibilities and Related Updates to Regulations and Forms**

1. Further guidance is needed regarding the diligence procedures necessary to validate direct reporting non-financial foreign entities (“NFFEs”) or sponsored direct reporting NFFEs (section III.02(D)).
2. Guidance is needed regarding coordination with Chapter 61 (Form 1099 reporting) (section III.02(A)).
3. Further guidance is needed regarding the coordination rules under section 3406 (section III.02(B)).
4. Transitional reporting of foreign reportable amounts paid to non-participating foreign financial institutions (“NPFFIs”) (section III.02(C))
5. Qualified Intermediary (“QI”), Withholding Foreign Partnership (“WP”), and Withholding Foreign Trust (“WT”) agreements (section II.02)
6. Covered entities (section II.02)
7. General responsibilities (section III.01)

### **Draft FFI Agreement**

8. Scope of lead financial institutions (“FIs”) obligations (section 2.01.34)
9. Event of default (section 12.05)
10. Scope of the term “significant change in circumstances” is overly broad (section 12.04)
11. U.S. branch
12. Due diligence (section 3.04)
13. PFFI withholding certificate (section 9.01)
14. Modification of FFI agreement
15. Conflict of laws in Model 2 jurisdictions
16. Expiration of FFI agreement

## COMMENTS

### General Responsibilities and Related Updates to Regulations and Forms

**1. Further guidance is needed regarding the diligence procedures necessary to validate direct reporting non-financial foreign entities (“NFFEs”) or sponsored direct reporting NFFEs (section III.02(D)).**

The IRS should provide further guidance regarding the diligence procedures necessary to validate direct reporting NFFEs and sponsored direct reporting NFFEs. Substantial time and resources will be required for United States Financial Institutions (“USFIs”) and PFFIs to design due diligence, reporting and necessary withholding processes for both electing and non-electing passive NFFEs. Withholding agents will need to know the composition of the Global Intermediary Identification Number (“GIIN”) for the direct reporting NFFE and sponsoring and sponsored direct reporting NFFE, as well as how they are related for groups of direct reporting NFFEs, and how to validate this new GIIN against a direct reporting NFFE list on the IRS portal.

It is unclear if a lead FFI will be able to register its direct reporting NFFEs or if there will be new sponsoring direct reporting NFFEs, in which case it should be clarified which entities will qualify for the new classification. Clarification is needed regarding how a direct reporting NFFE or sponsored direct reporting NFFE would make or revoke this new election. The IRS should explain how an electing direct reporting NFFE would change its status on the FATCA Registration Website in the event it does not report all of its substantial U.S. owners. A withholding agent generally has 90 days to validate the status of a new account or obligation paid to a PFFI. However, a withholding agent must validate the status of an electing direct reporting NFFE or sponsored direct reporting NFFE immediately, or presumably withhold upon U.S. source payments to such entities.

**2. Guidance is needed regarding coordination with Chapter 61 (Form 1099 reporting) (section III.02(A)).**

The IRS should provide further guidance on how the harmonization rules work for purposes of Chapter 61, Chapter 3 and Chapter 4. Among the outstanding issues are whether a U.S. payor or middleman, as currently defined, will have duplicate reporting on Form 8966 and

Form 1099, and how recipients can file tax returns requesting a refund if a Form 8966 is used assuming there will be no recipient copy. The IRS has previously stated that relief from double reporting does not extend to U.S. branches. Duplicative and inconsistent reporting requirements will have a particular impact on U.S. controlled entities acting as an agent for an FFI and would subject them to a competitive disadvantage, including additional costs and privacy concerns, which would not be resolved by Model 1 intergovernmental agreement (“IGA”) country laws, as such laws will not cover reporting by FFIs directly to the IRS.

**3. Further guidance is needed regarding the coordination rules under section 3406 (section III.02(B)).**

The IRS should provide further guidance regarding the coordination rules for backup withholding under section 3406 so that parties to the FFI agreement better understand their obligations under Chapter 4, and other U.S. tax information reporting and withholding provisions (Chapter 3, Chapter 61 and section 3406).

**4. Guidance is needed regarding transitional reporting of foreign reportable amounts paid to non-participating foreign financial institutions (“NPFFIs”) (section III.02(C)).**

The IRS should provide further guidance on how foreign reportable amounts will be reported on Form 8966, and whether a PFFI reporting “all payments made to the account,” in lieu of reporting “foreign reportable payments,” includes not only U.S. source income, but all payments regardless of whether the payments are income.

**5. Qualified Intermediary (“QI”), Withholding Foreign Partnership (“WP”), and Withholding Foreign Trust (“WT”) agreements (section II.02)**

It is unclear how the requirements under Chapter 4 will be incorporated into QI, WP and WT agreements that are in effect on or after June 30, 2014. More specifically, guidance is needed to understand how the updated QI, WP or WT agreements incorporate by reference the requirements of the FFI agreement, including the modifications to the terms of the FFI agreement that are applicable to a Model 2 FFI. It is therefore critical that the updated QI agreements are provided in a timely manner in order to know the interaction between the QI agreement and FFI agreement.

## **6. Covered Entities (section II.02)**

This section states that a branch of an FFI that cannot under the laws of the jurisdiction in which such branch is located satisfy all of the terms of the FFI agreement will be treated as a limited branch (and thus potentially tainting the expanded affiliated group (“EAG”)). A branch that is located in a jurisdiction that has laws that would not enable an FFI to meet all the requirements of an FFI agreement, but for which the FFI does not itself have any accounts or make any payments that would cause it to violate local law by complying with its FFI agreement, should not be treated as a limited FFI.

This section also states that the updated QI agreement shall apply to any foreign branch of the QI that is treated as a participating FFI or reporting Model 2 FFI. It is unclear if foreign branches that were not QIs previously will now have to become QIs.

## **7. General responsibilities of participating FFIs (Section III.01)**

According to the notice, in order for a participating FFI to maintain its status as a participating FFI, each member of the FFI group other than an exempt beneficial owner must maintain a status of participating FFI, limited FFI, registered deemed compliant FFI or nonreporting Model 1 or 2 FFI. The notice does not make clear the general requirements for certified deemed compliant status, including nonregistering local banks, FFIs with only low-value accounts, sponsored, closely-held investment vehicles, or limited life debt investment entities.

### **Draft FFI Agreement**

## **8. Scope of lead financial intuitions (“FIs”) obligations (section 2.01.34)**

The IRS should provide clarity regarding the scope of the lead FI obligations under the FFI agreement and under section 1471(e) and the final regulations. It is not clear if a lead FI’s obligations are limited to those specified in the FFI agreement or in addition to its obligations under the statute and regulations.

## **9. Event of default (Section 12.05)**

The IRS has included two new events of default, including where the PFFI fails to inform the IRS within 90 days of any “significant change in circumstances,” or if the lead FI fails, without reasonable cause, to inform the IRS within 90 days of an acquisition, sale, or change affecting the Chapter 4 status of an FFI in its FFI group, including that such FFI does not comply with the requirements to maintain its status as a PFFI or registered deemed-compliant FFI (“RDCFFI”). It is unclear if the PFFI who fails to inform the IRS within 90 days of any significant change in circumstances can also rely upon a reasonable cause defense to avoid an event of default.

## **10. Scope of the term “significant change in circumstances” is overly broad. (section 12.04)**

The scope of the term “significant change in circumstances” seems to be overly broad. Any change of “applicable foreign law or policy that affects the validity of any provision of the agreement” or material affects the provisions contained in the agreement, or materially affects the PFFI’s ability to perform obligations under the agreement is viewed as a significant change in circumstances. Thus, lead FIs and PFFIs will have to monitor all changes in foreign laws, regulations policy or rulings of any court that materially affects the validity of any provision of the FFI agreement.

## **11. U.S. branch requirements**

We understand that U.S. branches are not required to separately enter into an FFI agreement and that it will be deemed compliant with its head office PFFI agreement, pursuant to the regulations. We ask the IRS to confirm that our understanding of these requirements are correct.

## **12. Due diligence (Section 3.04)**

Section 3.04 of the draft FFI agreement states that an FFI may rely on otherwise valid documentation for 30 days after a change in circumstance while Section 3.03(B)(1) states that if a PFFI is unable to obtain required documentation within 90 days of the expiration date of the

documentation or a change in circumstances, the FFI must apply the presumption rules of section 3.04 of the FFI agreement. We would like the IRS to clarify that an FFI has 90 days from the date that documentation expires before it needs to begin withholding, rather than the 30 days identified in section 3.04. We would also like the IRS to clarify how the 30 day rule applies to a change in circumstances given that the regulations apply at 90 day rule in this situation.

### **13. PFFI withholding certificate (Section 9.01)**

This section allows an FFI, with respect to a payment made prior to January 1, 2017, or made with respect to an offshore obligation, to provide its GIIN or other documentation in lieu of a withholding certificate. Under Treasury Regulation section 1.1471-3(d)(4), the withholding agent is given the discretion to rely on the GIIN and other documentation in lieu of the FATCA withholding certification. We believe the determination as to whether an FFI can simply provide its GIIN in lieu of a FATCA withholding certificate should be at the discretion of the withholding agent, and not the FFI.

### **14. Modification of FFI agreement**

In the event the IRS modifies the FFI agreement under Section 12.02, it is not clear if a PFFI will be required to renew the agreement to be subject to the new terms, or if a PFFI is automatically subject to new regulatory obligations promulgated by Treasury, subject to the PFFI's right to terminate the FFI agreement under Section 12.07. Under the agreement, as drafted, there does not seem to be a requirement to notify PFFIs of changes to the FFI agreement. Will all modifications be published in the Federal Register and the Internal Revenue Bulletin, or will Treasury publish some modifications solely on its website, e.g., in the form of an FAQ document? Will signatories be required to monitor all guidance published by the IRS? In addition, how will signatories be notified of changes to the IGAs that may impact the agreement?

### **15. Conflict of laws in Model 2 jurisdictions**

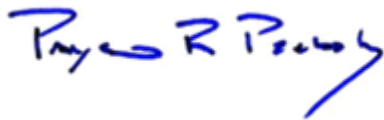
It is unclear from the FFI agreement for a Model 2 FFI whether the Model 2 IGA or the FFI agreement will govern in the event of a conflict between the provisions of the FFI agreement and Model 2 IGA. The agreement presently specifies that it is governed by the laws of the U.S. and not local laws.

## **16. Expiration of FFI agreement**

The December 31, 2016 expiration date of the FFI agreement seems to be a short lifespan for such an agreement, insofar as the first FFI agreements will be effective no earlier than June 30, 2014, and especially in comparison to the six-year term of a QI agreement. We believe the terms of the two agreements should be more consistent which would allow PFFIs adequate time to acclimate to their responsibilities before needing to renew the agreement.

SIFMA appreciates your consideration of its collective views and concerns on the guidance that are being developed to implement the provisions of FATCA. Please do not hesitate to contact me at (202) 962-7300 or [ppeabody@sifma.org](mailto:ppeabody@sifma.org) if you have any questions or if we can be of further assistance.

Sincerely,



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