THE ASSOCIATION OF GLOBAL CUSTODIANS

THE BANK OF NEW YORK MELLON
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September 7, 2012

VIA ELECTRONIC MAIL

Mr. John Sweeney
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and

Mr. Michael H. Plowgian
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United States Treasury
1500 Pennsylvania Avenue, NW
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Re: **Follow-Up to July 19, 2012 Meeting on Proposed FATCA Regulations under Sections 1471-1474 of the Internal Revenue Code**

Dear John and Michael:

Allow me to express the sincere thanks of the Association of Global Custodians (the "Association" or "AGC")[1] to you and your colleagues for the time you took to meet with AGC members to discuss the AGC's April 30, 2012 comments on the proposed Foreign Account Tax Compliance Act ("FATCA") regulations under Sections 1471 through 1474 of the U.S. Internal

[1] The Association is an informal group of 11 member banks that provide securities safekeeping and asset-serving functions to cross-border institutional investors worldwide. Members provide custody-related services to most types of institutional investors, including investment funds, pension funds, and insurance companies. Association members are listed on the letterhead above.

Revenue Code of 1986, as amended. Your willingness to engage on the issues and your obvious thoughtfulness about how to address the concerns raised are greatly appreciated by the Association.

The members of the Association thought it would be helpful to provide some additional comments on a few topics discussed at the meeting. The attached brief memorandum sets forth those comments.

If you have questions concerning these comments or would like additional information, please do not hesitate to contact the undersigned. Once again, thank you very much for your consideration of the Association's submissions.

Sincerely yours on behalf of the Association,

Mary C. Bennett
Baker & McKenzie LLP
Secretariat and Counsel to the Association

Cc:
Ms. May Lew, Office of the Associate Chief Counsel (International)
Ms. Danielle Nishida, Office of the Associate Chief Counsel (International)
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**Follow-up Comments to July 19, 2012 Meeting on FATCA Proposed Regulations**

As a follow-up to the July 19, 2012 meeting between members of the Association of Global Custodians ("Association" or "AGC") and members of the IRS/Treasury FATCA team, the AGC felt it would be helpful to provide the following supplementary comments on certain topics discussed. The following comments are identified with specific sections of previously filed comment letters.

**Financial Services (Issue 9 in April 30, 2012 Letter)**

We have recommended that all services and not merely nonfinancial services be outside the scope of chapter 4. As a practical matter, it would be extremely difficult to define what constitutes a financial service, but more importantly we do not see any reason to treat financial and nonfinancial services differently for FATCA purposes. Services are not passive income-producing activities, which are the obvious subject of FATCA. For example, a service fee to a custody bank, which would be a payment for "financial services" under nearly any definition of this term, should not be subject to FATCA withholding for the same reason a service fee to a law firm will not be subject to FATCA withholding: both the custody bank and the law firm receive a payment for their active services and not for producing portfolio income.

We understand from our discussion at the meeting your desire to subject financial services to FATCA in order to bring into the FATCA system as many FFIs as possible. We believe that including financial services in FATCA would not add to the number of FFIs. This is because a foreign entity that provides a financial service may not necessarily be an FFI. For example, an entity that merely provides investment advice would presumably provide financial

services, but would not be an FFI, i.e., it would not accept deposits, hold financial assets of others, or itself invest or trade in securities. On the other hand, a financial advisor that does perform FFI activities would already be an FFI as a result of those activities. Accordingly, adding financial services to FATCA would not add to the number of FFIs.

We also discussed at the meeting that making financial services subject to FATCA withholding may not add incremental work to a withholding agent, which is already required to consider services for current chapter 3 purposes. Specifically, because only services performed inside the US would be subject to FATCA withholding (at least until the foreign passthru payment rules take effect) and because withholding agents are required to determine whether services are furnished inside the US for current chapter 3 purposes, a withholding agent may not have any material additional work in processing financial services for FATCA purposes.

It would indeed be helpful to a withholding agent if a service excluded from chapter 3 withholding (because it is not performed inside the US) also is not subject to FATCA withholding. Nevertheless, subjecting financial services to FATCA would add significant work for an accounts payable department, which would need to institute processes and procedures to address FATCA as opposed to merely chapter 3. We have assumed payments subject to chapter 4 withholding and reporting will need to be identified as chapter 4 payments for IRS filing purposes. The inclusion of financial services in FATCA could result in additional work by an accounts payable department, which may need to apply different withholding, reporting and refund rules under chapter 3 and FATCA. Further, any requirement to distinguish between chapter 3 and FATCA with respect to services would result in the added cost to withholding agents of determining whether a service is a “financial service”. For example, query whether a non-US accounting firm that provides services to a financial institution or a non-US vendor that provides access to an online database of financial market data furnishes a financial service (either of whom may have furnished certain services inside the US). Financial services versus nonfinancial services is not a determination that must be made for chapter 3 purposes and would be a subjective determination for certain payments should it be required for chapter 4 purposes. This assumes the absence of a precise definition of “financial services”, which we believe would be elusive.

Accordingly, we continue to believe that accounts payable departments should not be burdened by FATCA because services, including financial services, performed in the ordinary course of business are not the types of activities that give rise to the type of tax evasion that chapter 4 seeks to curtail.

**CFCs Using USFI Affiliate as Withholding Agent (Issue 5 in September 23, 2011 Letter)**

We have recommended that a US affiliate or parent of a controlled foreign corporation be able to meet the FATCA requirements with respect to custodial accounts maintained by the CFC using the US affiliate's EIN. This is the manner in which the current chapters 3 and 61 requirements are met by several AGC members that have CFCs that are NQIs, which results in operational efficiencies for CFCs while still fully satisfying the chapters 3 and 61 requirements.

Under this current NQI CFC model, the CFC's customers are fully disclosed to the US affiliate, the customers' accounts are maintained on the US affiliate's systems, and the US affiliate performs NRA and backup withholding and reports directly to the CFC's customers under its own EIN (not the CFC's). This results in significant efficiencies for the US global bank, which can consolidate all the chapters 3 and 61 processing in one location and on one Form 1042 and one Form 945. Please note that QI CFCs are not the subject of this recommendation.

Most payments to the CFC customers are first received by the US affiliate and not the CFC because the US affiliate rather than the CFC is generally the party that interacts with third party payors, such as the Depository Trust Company and Clearstream. However, certain CFCs do receive payments directly from third party payors, in which case those payments are tracked on the systems of the US affiliate.

The FATCA guidance as currently drafted prevents this type of simplified processing. Under current FATCA guidance, because the US affiliate is technically paying the CFC who in turn is paying its customer, the CFC must apply FATCA to its customers' accounts. Accordingly, the CFC would need to enter into a PFFI agreement with the IRS, or be deemed compliant, and report under FATCA regarding its customers, and the US affiliate would have to report on Form 1042-S to the CFC. This would result in back-to-back reporting, and a Form

1042 filing from every CFC, as opposed to just one Form 1042 from the US affiliate under current chapter 3. All of this would come at a much greater cost to the US global bank as compared to the cost of complying with chapter 3.

If our recommendation is adopted, the US affiliate would document the customer, looking though the customer when needed, and withhold on all FATCA withholdable payments and report on Forms 1099 or 1042-S, as appropriate. This would result in all the FATCA objectives being met, but at a much lower cost to the withholding agent because it would fit the current operational model of the withholding agent.

We discussed at the meeting how the CFC would document itself to external withholding agents. We recommend that the reporting entity (the US affiliate or parent) provide its Form W-9 to withholding agents on which the name of the CFC would be entered on the "Business name/disregarded entity name" line.

You expressed concern at the meeting that a filer of Form 8938, Statement of Specified Foreign Financial Assets, may not know that he or she has an account with a foreign financial institution if he or she receives Forms 1099 or 1042-S with respect to the account from a US company. To alleviate this concern, a box could be added to Forms 1099 and 1042-S that states "Payments by foreign financial institution to an individual," which a payor would check, as appropriate. Only certain individuals (not entities) are currently required to file Form 8938. If this filing requirement is expanded to include entities, the word "individual" could be removed from the box description. Until a Form 8938 filing requirement of entities exists, it would be important for the box to be limited to individuals so that a payor need not incur the cost of completing the box for payees that are entities.

**Transfer Agent (Issue 10 in April 30, 2012 letter)**

We have recommended that the final regulations clarify that an investor in an investment fund has an account with the fund and not the fund's transfer agent (TA), and that a non-US TA of an investment fund does not become an FFI as a result of its TA activities. Clarity on a TA's regulatory obligations under FATCA is necessary, or else redundant obligations and confusion

will arise as to who – the fund and/or the TA – has which obligations. The proposed regulations leave room for interpretation in this regard. For example, does a non-US TA "hold financial assets for the account of others"? We believe the answer to this question is no because a TA merely maintains, on behalf of a fund, the registry of owners of interests in the fund, and is not in privity with the owners, and accordingly, does not "hold assets" of others. Contrast this with a custodial bank, which in the ordinary course of its business does hold financial assets of its clients. We believe that an example in the final regulations that describes a fund's and its TA's US tax withholding and reporting obligations vis-à-vis investor accounts would be the best approach to eliminate this uncertainty.

We have also recommended that a TA that makes payments to investors should not itself be a withholding agent, or a "U.S. payor" under chapter 61, with respect to a non-US fund provided that the fund is a PFFI or deemed-compliant FI. FATCA is the updated standard with respect to the identification and reporting of financial accounts. Accordingly, when a fund meets its FATCA obligations, the TA should not separately be required to document, withhold or report on the accounts under the TA's own independent and perhaps different obligations. Having two withholding agents with respect to a single payment and payee, overlaid with the US payor rules, would result in duplicative reporting, extra cost to the financial services industry, confusion as to whose requirements govern, and a competitive disadvantage for US-owned TAs subject to more stringent requirements, with no benefit to the IRS or payees.

Consider a TA that is a controlled foreign corporation servicing a non-US fund that is both a corporation for US tax purposes and a PFFI or a type of deemed-compliant FI that can maintain accounts of US reportable persons. Assume the non-US fund is not a US payor under chapter 61. However, the CFC is, and accordingly, the CFC must issue 1099s regarding payments by the foreign fund to its US account holders. This does currently put CFCs at a competitive disadvantage as compared to a non-US payor TA. Under current chapter 61, the CFC applies one set of rules in documenting the investors and reporting – rules based on its own status. FATCA changes the paradigm. Under FATCA, the foreign fund itself will have to document and report with respect to its US account holders. Accordingly, there is no longer a need for the TA to have an independent obligation to do so, which would be duplicative. In addition, the current Form 1099 reporting by the CFC is misleading to both the IRS and

taxpayers. This is because investment funds that are foreign corporations for US tax purposes normally are passive foreign investment companies, and the Forms 1099 provide misleading information. For example, the cost basis reported on Form 1099-B by a TA, which is generally the subscription amount, is generally not the adjusted basis to the taxpayer because of the qualified electing fund election. This election, which is commonly made, provides that a shareholder's basis is increased by the earnings of the fund and decreased by distributions from the fund (a similar adjustment to basis is made in the case of a mark-to-market election). As another example, TAs generally report pro-rata distributions as dividends on Forms 1099-DIV, whereas taxpayers with the QEF election must generally recognize ordinary income each year, regardless of any distributions. The more basic requirement in Prop. Reg. section 1.1471-4(d)(4)(iv)(C) of PFFIs to report the aggregate amount of "payments made" is more appropriate with respect to these non-US funds. Unlike Forms 1099, this reporting does not specify or suggest the income tax characterization of a payment.

Take the example above a step further to assume the fund makes foreign passthru payments. The fund then will have an obligation to FATCA withhold in some cases. It may hire its TA to do so (we expect it often will), in which case the TA would have the same withholding and reporting obligations as the fund due to Prop. Reg. section 1.1474-1(a)(3)(ii) (regarding agents of withholding agents). The TA having the same chapter 4 obligations as the fund is an appropriate result where the TA is contractually obligated to perform the FATCA withholding of the fund, but absent this obligation, the fund should be the only party subject to FATCA. The TA should not have an independent obligation to withhold and report. (Note that neither the fund nor the TA is a withholding agent under current chapter 3 because the fund's distributions are not US source income.)

Consider an investment fund that is a foreign partnership for US tax purposes and that, like the corporation in the example above, is a PFFI or a type of deemed-compliant FI that can maintain accounts of US reportable persons. Assume as in the above example that the fund's TA is a CFC. Also assume that the fund is not required to issue Schedules K-1 under section 6031 and, accordingly, the TA is required to issue Forms 1099 under section 6041. As in the corporation example above, the foreign fund itself will have to document and report under FATCA with respect to its US investors. Accordingly, there is no longer a need for the TA to

have an independent obligation to do so, which would be duplicative. The current Form 1099 reporting by the CFC is also misleading to both the IRS and taxpayers. This is because partnership distributions are not items of income, i.e., income is recognizable each year, regardless of any distribution. (Many foreign partnerships that are not required to issue Schedules K-1 report items of income on a pro-forma Schedule K-1 to their US partners, which is not filed with the IRS.) As in the corporation example above, the more basic requirement in the proposed regulations to report "payments made" is more appropriate with respect to funds that are foreign partnerships. (Note that the TA is generally not a withholding agent under current chapter 3 because Treas. Reg. section 1.1441-5 places the withholding obligation squarely with the partnership itself or persons making payments to the partnership.)

Our request that a TA of a non-US investment fund not be a withholding agent or a US payor does not apply to a fund that is an NPFFI. For such a fund, the TA should be expected to withhold and report, as applicable, as FATCA will not compel the NPFFI to report. Our request also does not apply to an agent of a payee, such as a custodial bank that makes payments to its customers, because such an agent is in privity with the payee and would generally be regarded as the only person paying the payee. Finally, our request does not apply to an agent of a fund with respect to accounts maintained by the agent rather than the fund. For example, a fund distributor who is also a nominee holder of record of interests in the fund should be required to withhold and report, as applicable, with respect to accounts it maintains in connection with the nominee. Accordingly, our request is limited to agents that service accounts that are maintained by funds that are PFFIs or deemed compliant FIs.