

## ICMA – GMRA 2000 and GMRA 2011 FATCA Approaches<sup>1</sup>

### **1(a). GMRA 2000 Master Agreement:**

#### **Insert new definitions as follows:**

"Code", the United States of America Internal Revenue Code of 1986, as amended; and

"FATCA", Sections 1471 through 1474 of the Code, any current or future regulations or official interpretations thereof, any agreement entered into pursuant to Section 1471(b) of the Code, or any fiscal or regulatory legislation, rules or practices adopted pursuant to any intergovernmental agreement entered into in connection with the implementation of such Sections of the Code.

#### **Amend the definition of "Equivalent Securities" as follows:**

"Equivalent Securities", with respect to a Transaction, Securities equivalent to Purchased Securities under that Transaction. If and to the extent that such Purchased Securities have been redeemed, the expression shall mean a sum of money equivalent to the proceeds of the redemption, without taking into account any deduction or withholding imposed or collected in connection with FATCA that would not have been imposed but for Buyer's non-compliance with FATCA.

#### **Amend paragraph 5 as follows:**

5 Unless otherwise agreed

(a) where the Term of a particular Transaction extends over an Income Payment Date in respect of any Securities subject to that Transaction, Buyer shall on the date such Income is paid by the issuer transfer to or credit to the account of Seller an amount equal to (and in the same currency as) the amount paid by the issuer;

(b) where Margin Securities are transferred from one party ("the first party") to the other party ("the second party") and an Income Payment Date in respect of such Securities occurs before Equivalent Margin Securities are transferred by the second party to the first party, the second party shall on the date such Income is paid by the issuer transfer to or credit to the account of the first party an amount equal to (and in the same currency as) the amount paid by the issuer,

and for the avoidance of doubt references in this paragraph to the amount of Income paid by the issuer of any Securities shall be to an amount paid without any withholding or deduction for or on account of taxes or duties notwithstanding that a payment of such Income made in certain circumstances may be subject to a withholding or deduction, except, where a withholding or deduction for or on account of taxes or duties has been imposed under FATCA, to the extent an equivalent or greater amount of withholding or deduction for or on account of taxes or duties would have been imposed under FATCA in respect of Income paid by the issuer on such Securities (or Margin Securities, as applicable) had the Seller (or the first party, as applicable) retained the Securities (or the Margin Securities, as applicable).

#### **Amend paragraph 6(b) as follows:**

(b) (i) Unless otherwise agreed, all money payable by one party to the other in respect of any Transaction shall be paid free and clear of, and without withholding or deduction for,

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<sup>1</sup> These Riders are only intended for use with the specified versions of the GMRA and the specified versions of the Equities Annexes. Tax/legal advice should be sought if an alternative version of the GMRA is used or if other Annexes to the GMRA are used.

any taxes or duties of whatsoever nature imposed, levied, collected, withheld or assessed by any authority having power to tax unless the withholding or deduction of such taxes or duties is required by law. In that event, unless otherwise agreed, the paying party shall pay such additional amounts as will result in the net amounts receivable by the other party (after taking account of such withholding or deduction) being equal to such amounts as would have been received by it had no such taxes or duties been required to be withheld or deducted. For the avoidance of doubt, the reference to "law" in this paragraph includes FATCA. However, no additional amounts shall be payable by the paying party to the other party under this sub-paragraph (b)(i) to the extent that such tax is imposed or collected under FATCA.

(ii) If the paying party is required to make a withholding or deduction under FATCA but does not so withhold or deduct, and a liability resulting from such tax is assessed directly against the paying party, then, except to the extent the other party has satisfied or then satisfies the liability resulting from such tax, the other party will promptly pay to the paying party the amount of such liability (including any related liability for interest, but including any related liability for penalties only to the extent provided in sub-paragraph b(iii)). No payment under this sub-paragraph (b)(ii) is required to be made to the extent that the relevant liability arises from any gross negligence or willful misconduct of the paying party.

(iii) The amount of related liability for penalties shall only be payable to the paying party under sub-paragraph (b)(ii) where such penalties become due because the other party has failed to provide appropriate US tax forms.

**Add a new paragraph 6(k) as follows:**

(k) If at any time a party (the "first party") is required to remit an amount of tax to the IRS with respect to a payment under a Transaction in connection with FATCA, then without duplication of any amount the first party has deducted on account of such tax from any amount previously paid to the other party (the "second party") pursuant to the Transaction, the second party shall be required to pay to the first party an amount equal to that amount of tax on the payment date on which a payment giving rise to remittance required under FATCA occurs. Upon the reasonable request of the second party with respect to any payment date, the first party will supply to the second party computations setting forth in reasonable detail the amount payable on such payment date pursuant to the preceding sentence.]<sup>2</sup>

**Add a new paragraph 6(l) as follows:**

(l) For the avoidance of doubt, the imposition of any withholding or deduction pursuant to or on account of FATCA on any amounts paid or received under a Transaction shall not be treated as an Event of Default under paragraph 10 or as a material adverse effect that could cause a Tax Event under paragraph 11, even if such imposition results in either party receiving amounts that differ materially from the amount that the party would have otherwise received if no such withholding or deduction were imposed.]<sup>3</sup>

**Add a new sub-paragraph 10(e)(iii) as follows:**

(iii) The Default Market Value determined pursuant to sub-paragraphs (i) or (ii) above shall not take into account any deduction or withholding imposed or collected (or that would be imposed or collected) in connection with FATCA that would not be imposed but for the non-Defaulting Party's non-compliance with FATCA.

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<sup>2</sup> This paragraph is intended to deal with the scenario in which FATCA withholding is imposed on a gross payment but the effect of netting is that no payment is actually made.

<sup>3</sup> This paragraph is intended to clarify that if FATCA withholding is imposed this should not result in an Event of Default or a Tax Event.

**1(b). GMRA 2000 Equities Annex**

This language is drafted on the assumption that the draft language above will be adopted in respect of the GMRA 2000 Master Agreement itself.

Section 3(b) (Income Payments) of the Equities Annex provides for paragraph 5 of the GMRA to be replaced with new language:

**Add the following to the end of paragraph 5(a) of that new language:**

*" , except where a withholding or deduction for or on account of taxes or duties has been imposed under FATCA, to the extent an equivalent or greater amount of withholding or deduction for or on account of taxes or duties would have been imposed under FATCA in respect of Income paid by the issuer on such Securities (or Margin Securities, as applicable) had the Seller (or the first party, as applicable) retained the Securities (or Margin Securities, as applicable)."*

**Add the following before "; and" at the end of paragraph 5(c)(i) of that new language:**

*"(assuming, in the event that a deduction or withholding for or on account of taxes or duties is (or would be) imposed under FATCA as a result of the Buyer's (or transferee's) non-compliance with FATCA, that no such deduction or withholding is (or would be) imposed)."*

**Add the following at the end of paragraph 5(c)(ii) of that new language (after the word "payment"):**

*"(disregarding, for the purposes of this sub-paragraph (ii) only, any deduction or withholding for or on account of taxes or duties imposed under FATCA)."*

## **2(a). GMRA 2011 Master Agreement**

### **Insert new definitions as follows:**

"Code", the United States of America Internal Revenue Code of 1986, as amended; and

"FATCA", Sections 1471 through 1474 of the Code, any current or future regulations or official interpretations thereof, any agreement entered into pursuant to Section 1471(b) of the Code, or any fiscal or regulatory legislation, rules or practices adopted pursuant to any intergovernmental agreement entered into in connection with the implementation of such Sections of the Code.

### **Amend the definition of "Equivalent Securities" as follows:**

"Equivalent Securities", with respect to a Transaction, Securities equivalent to Purchased Securities under that Transaction. If and to the extent that such Purchased Securities have been redeemed, the expression shall mean a sum of money equivalent to the proceeds of the redemption (other than Distributions), without taking into account any deduction or withholding imposed or collected in connection with FATCA that would not have been imposed but for Buyer's non-compliance with FATCA.

### **Amend paragraph 5 as follows:**

5 Unless otherwise agreed

(a) where: (i) the Term of a particular Transaction extends over an Income Payment Date in respect of any Securities subject to that Transaction; or (ii) an Income Payment Date in respect of any such Securities occurs after the Repurchase Date but before Equivalent Securities have been delivered to Seller, or, if earlier, the occurrence of an Early Termination Date or the termination of the Transaction under paragraph 10(i) then Buyer shall on the date such Income is paid by the issuer transfer to or credit to the account of Seller an amount equal to (and in the same currency as) the amount paid by the issuer;

(b) where Margin Securities are transferred from one party ("the first party") to the other party ("the second party") and an Income Payment Date in respect of such Securities occurs before Equivalent Margin Securities are transferred or a Cash Equivalent Amount is paid by the second party to the first party, the second party shall on the date such Income is paid by the issuer transfer to or credit to the account of the first party an amount equal to (and in the same currency as) the amount paid by the issuer,

and for the avoidance of doubt references in this paragraph to the amount of Income paid by the issuer of any Securities shall be to an amount paid without any withholding or deduction for or on account of taxes or duties notwithstanding that a payment of such Income made in certain circumstances may be subject to a withholding or deduction, except, where a withholding or deduction for or on account of taxes or duties has been imposed under FATCA, to the extent an equivalent or greater amount of withholding or deduction for or on account of taxes or duties would have been imposed under FATCA in respect of Income paid by the issuer on such Securities (or Margin Securities, as applicable) had the Seller (or the first party, as applicable) retained the Securities (or the Margin Securities, as applicable).

### **Amend paragraph 6(b) as follows:**

(b) (i) Unless otherwise agreed, all money payable by one party to the other in respect of any Transaction shall be paid free and clear of, and without withholding or deduction for, any taxes or duties of whatsoever nature imposed, levied, collected, withheld or assessed by any authority having power to tax unless the withholding or deduction of such taxes or duties is required by law. In that event, unless otherwise agreed, the paying party shall pay such additional amounts as will result in the net amounts receivable by the other party (after taking account of such withholding or deduction) being equal to such amounts as would have been received by it had no such taxes or duties been required to be withheld or

deducted. For the avoidance of doubt, the reference to "law" in this paragraph includes FATCA. However, no additional amounts shall be payable by the paying party to the other party under this sub-paragraph (b)(i) to the extent that such tax is imposed or collected under FATCA.

(ii) If the paying party is required to make a withholding or deduction under FATCA but does not so withhold or deduct, and a liability resulting from such tax is assessed directly against the paying party, then, except to the extent the other party has satisfied or then satisfies the liability resulting from such tax, the other party will promptly pay to the paying party the amount of such liability (including any related liability for interest, but including any related liability for penalties only to the extent provided in sub-paragraph b(iii)). No payment under this sub-paragraph (b)(ii) is required to be made to the extent that the relevant liability arises from any gross negligence or willful misconduct of the paying party.

(iii) The amount of related liability for penalties shall only be payable to the paying party under sub-paragraph (b)(ii) where such penalties become due because the other party has failed to provide appropriate US tax forms.

**[Add a new paragraph 6(k) as follows:**

(k) If at any time a party (the "first party") is required to remit an amount of tax to the IRS with respect to a payment under a Transaction in connection with FATCA, then without duplication of any amount the first party has deducted on account of such tax from any amount previously paid to the other party (the "second party") pursuant to the Transaction, the second party shall be required to pay to the first party an amount equal to that amount of tax on the payment date on which a payment giving rise to remittance required under FATCA occurs. Upon the reasonable request of the second party with respect to any payment date, the first party will supply to the second party computations setting forth in reasonable detail the amount payable on such payment date pursuant to the preceding sentence.]<sup>4</sup>

**[Add a new paragraph 6(l) as follows:**

(l) For the avoidance of doubt, the imposition of any withholding or deduction pursuant to or on account of FATCA on any amounts paid or received under a Transaction shall not be treated as an Event of Default under paragraph 10 or as a material adverse effect that could cause a Tax Event under paragraph 11, even if such imposition results in either party receiving amounts that differ materially from the amount that the party would have otherwise received if no such withholding or deduction were imposed.]<sup>5</sup>

**[Add a new sub-paragraph 10(f)(iv) as follows:**

(iii) The Default Market Value determined pursuant to sub-paragraphs (i), (ii) or (iii) above shall not take into account any deduction or withholding imposed or collected (or that would be imposed or collected) in connection with FATCA that would not be imposed but for the non-Defaulting Party's non-compliance with FATCA.

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<sup>4</sup> This paragraph is intended to deal with the scenario in which FATCA withholding is imposed on a gross payment but the effect of netting is that no payment is actually made.

<sup>5</sup> This paragraph is intended to clarify that if FATCA withholding is imposed this should not result in an Event of Default or a Tax Event.

## **2(b). GMRA 2011 Equities Annex**

This language is drafted on the assumption that the draft language above will be adopted in respect of the GMRA 2011 Master Agreement itself.

Section 3(b) (Income Payments) of the Equities Annex provides for paragraph 5 of the GMRA to be replaced with new language:

### **Add the following to the end of paragraph 5(a) of that new language:**

*" , except where a withholding or deduction for or on account of taxes or duties has been imposed under FATCA, to the extent an equivalent or greater amount of withholding or deduction for or on account of taxes or duties would have been imposed under FATCA in respect of Income paid by the issuer on such Securities (or Margin Securities, as applicable) had the Seller (or the first party, as applicable) retained the Securities (or Margin Securities, as applicable)."*

### **Add the following before "; and" at the end of paragraph 5(c)(i) of that new language:**

*"(assuming, in the event that a deduction or withholding for or on account of taxes or duties is (or would be) imposed under FATCA as a result of the Buyer's (or transferee's) non-compliance with FATCA, that no such deduction or withholding is (or would be) imposed)."*

### **Add the following at the end of paragraph 5(c)(ii) of that new language (after the word "payment"):**

*"(disregarding, for the purposes of this sub-paragraph (ii) only, any deduction or withholding for or on account of taxes or duties imposed under FATCA)."*