For the avoidance of doubt, this document is in a non-binding, recommended form. Its intention is to be used as a starting point for negotiation only. Individual parties are free to depart from its terms and should always satisfy themselves of the regulatory implications of its use.

2014 Summary Note on FATCA

This replaces the 2013 FATCA Riders released in May 2013

9 June 2014

Please refer to our guidance of February 2012 for background on how FATCA withholding can potentially arise. In summary, the unusual nature of FATCA means that it creates compliance and tax risk which is not allocated by historic LMA documentation; this may create exposure for all parties, particularly the Agent (although Agent exposure is likely to be significantly reduced where the Agent benefits from an intergovernmental agreement ("IGA") between the US and the jurisdiction in which the Agent is operating).

Whilst there remain a number of potential approaches to FATCA, the most commonly agreed approach for investment grade transactions (assuming the Agent operates in a Model I IGA jurisdiction and is not a Qualified Intermediary) is now contained in the suite of English law governed LMA investment grade facility agreements (which provisions are replicated at

1 Minor updates were made to this 2014 Summary Note on 5 November 2015 to reflect the deferral of gross proceeds withholding and passthru withholding from 2017 to 2019.
Annex I of this Summary Note). Alternative approaches are set out as separate Riders in this note.

Regardless of the approach used, there is, however, no simple drafting "solution" to FATCA; the possible approaches in both the LMA investment grade template facility agreements and this note should be considered on a deal-by-deal basis, in light of the factual background and the commercial deal.

It is important to note that FATCA is complex legislation and its precise effects on the loan market currently remain unclear. The approaches in the LMA investment grade template facility agreements and this note are therefore, necessarily, based on a view of how FATCA is likely to apply, but there is no guarantee that that is in fact how FATCA will apply. Accordingly, all Members should seek US tax advice and use and/or modify the language in light of that advice. Members may have differing views on the applicability of FATCA to them and their deals and accordingly these approaches are very much a guideline.

The LMA investment grade template facility agreements include provisions (which were formerly contained in Rider 3 of the May 2013 Riders) which provide that Obligors, Lenders and the Agent are all entitled to withhold tax when required by FATCA and do not need to gross-up payments. Any Lender which is not FATCA compliant by the applicable time limit therefore risks receiving interest (and even principal) net of FATCA withholding. This approach should generally be acceptable in most transactions in which Lenders are confident that both they and the Agent will be FATCA compliant within the applicable time limits.

The LMA investment grade template facility agreements also include FATCA information sharing provisions which facilitate FATCA compliance by Agents and others and provide for the replacement of the Agent in the event it will be non-compliant with FATCA (the "Common Provisions"). The Common Provisions should be included whenever any of the drafting approaches to FATCA set out in this Summary Note are used.

The FATCA language in the LMA investment grade template facility agreements is drafted on the basis that any Agent operates in a Model I IGA jurisdiction and is not a Qualified

---

2 Whilst this note refers specifically to investment grade transactions (and any clause references in this note refer expressly to the LMA Multicurrency Term and Revolving Facilities Agreement), it may also be used by those wishing to incorporate FATCA wording within other LMA facility agreements. However, any user wishing to incorporate wording from the Common Provisions, the Annex or the other Riders into other LMA facility agreements must ensure that the clause references are adapted appropriately. Users should also consider other changes that may be relevant to the document in question - for example providing Security Trustees with similar protection to that given to Agents in these approaches - seeking legal advice where necessary.

3 Riders 1 and 2 have been drafted for use in conjunction with the LMA Investment Grade Multicurrency Term and Revolving Facilities Agreement. If they are used in conjunction with other forms of the LMA’s Investment Grade documentation they may need to be adapted, including updating clause references and consideration of the extent to which other amendments are appropriate to the document in question (for example, to reflect the inclusion of any LMA Letter of Credit facility).
Intermediary that has elected to assume primary withholding responsibility (we understand that it is unusual for financial institutions to do so in relation to their agency businesses). Accordingly, the language deals with the requirement under the Model I IGA for Agents which are not Qualified Intermediaries to pass certain information regarding the Lenders' FATCA status to US Borrowers. The nature of this information is currently undefined but it is generally expected that this obligation will be satisfied by the Agent collecting appropriate US tax forms from Lenders which contain a certification from Lenders regarding their FATCA status. Therefore, where the Borrower's payments have a US source (e.g. where a Borrower is a US corporation or certain cases in which the Borrower has a US trade or business), Agents may wish to include these information sharing provisions so that they can request the required information from Lenders and pass it to the Borrower.

As there is a technical risk, however, that the parties may not realise on day one that there is a Borrower which is making US source payments, best practice may be for Lenders to also take a representation from Borrowers which are not likely to be US Borrowers that they are indeed non-US Borrowers. For example, Lenders may require each Borrower to represent that it is not a US Tax Obligor. Of course where, for example, a loan is made to an entirely UK group with no provision for the accession of additional borrowers, parties may be able to take a commercial view that such a representation is not necessary.

If historic facility agreements are amended on or after 1 July 2014, Agents in particular may wish to ensure that the FATCA language in the LMA investment grade template facility agreements is inserted as part of the amendment process.

However, there may be instances in which the FATCA language in the LMA template investment grade facility agreements is unsuitable. These circumstances might include where a Finance Party is located in an emerging markets jurisdiction in which it is unclear whether a Model I IGA will be signed, or where despite operating from a Model I IGA jurisdiction an Agent is a Qualified Intermediary for the purposes of FATCA. Rider 1 below provides alternative approaches which may be used in such instances. However, Agents and Lenders which have not yet obtained legal advice as to their own position and the obligations they will have under FATCA are strongly advised to do so.

Rider 1 contains drafting options which make FATCA a borrower risk, either by the Obligors representing that (in effect) they are outside the scope of FATCA and/or by an actual gross-up and indemnity. Lenders and/or Agents may wish to adopt these approaches if they are not at this point certain that they will be FATCA compliant (i.e. will be able to meet their own reporting and other obligations under FATCA within the applicable time limits), and/or if they believe that making FATCA a borrower risk is necessary to facilitate syndication/on-sale.

**Rider 1A** provides representations and other assurances from the Obligors that their status is such that FATCA withholding should not arise on payments made by Obligors or the Agent
on their behalf. If an Obligor breaches these provisions and a Finance Party suffers loss then there is no gross-up, but the Finance Party should be entitled to recover on the usual contractual principles. Lenders wanting to include a gross-up, or non-IGA Agents wanting explicit protection from potential Agent-level withholding, should add Rider 1B.

**Rider 1B** adds a provision requiring Obligors to gross-up if FATCA withholding arises. It also permits Finance Parties to make FATCA Deductions themselves, and requires the Company to compensate any Finance Party suffering a shortfall as a result. The Company has the option to repay or replace any Lender that potentially triggers a FATCA withholding. Rider 1B may be included in addition to Rider 1A in cases where no US Borrower or FFI Obligor is anticipated, or Rider 1B may be included on its own in other cases.

**Rider 2** was originally included in the 2013 FATCA Riders to facilitate reliance on the grandfathering that may be available for many loans. However, this Rider should be used with care and is only intended for use where Lenders are based in jurisdictions which have not entered into IGAs. Rider 2 should not be used to protect Lenders against withholding on US source payments from 1 July 2014. Therefore, the purpose of Rider 2 is to protect Lenders against the possibility of "pass-thru" withholding from 2017.79. Lenders should consider whether the contingent risk of "pass-thru" withholding being implemented and applying justifies the additional complications which Rider 2 entails (for example, Rider 2 has the potential to complicate loan restructurings even if "pass-thru" withholding is not in fact introduced).

Note that uncommitted facilities such as ancillary facilities and increases in commitments by way of accordion facilities are unlikely to be grandfathered if those facilities become committed after the grandfathering period ends (even if the main facility documentation was signed during the grandfathering period). Rider 2 would therefore not protect Lenders in the way anticipated by the Rider if the documentation contains such facilities.

Where a loan is not grandfathered, or grandfathering is lost, "pass-thru" withholding could apply from 2017 at the earliest (although at this point the form "pass-thru" withholding will take remains unclear, and it is possible it will not generally apply to loans at all). However, given the expectation that FFIs in countries which have signed a Model 1 IGA should not be required to apply "pass-thru" withholding on payments they make to other FFIs (whether FATCA compliant or not) the question of whether or not a loan is grandfathered may be of limited relevance to deals with agents in the UK or other Model 1 IGA jurisdictions (since, even in the absence of grandfathering, no "pass-thru" withholding should arise).

Assuming a loan is initially grandfathered, Rider 2 *prima facie* allocates FATCA risk to the Lenders, but Lenders then have the right to veto any amendment or change of Obligor that would result in the loan losing grandfathering. In certain circumstances the Borrower can override a Lender's veto at the price of designating that Lender a "FATCA Protected Lender". If, subsequently, FATCA withholding potentially arises on a payment to a FATCA Protected
Lender (e.g. because the Lender is not in the event FATCA compliant), then the Borrower is required to either replace or repay/cancel that Lender's participation. There is an optional provision limiting the Lenders' right to prepayment to some Lenders only – it is envisaged that the protected class of Lenders would be individually negotiated (but could, for example, include the initial syndicate, or financial institutions unable to be FATCA compliant due to illegality considerations in the jurisdictions in which they operate, or some other objective measure – however whilst Borrowers may wish to link the prepayment right to the reasons why a particular Lender is not FATCA compliant, this is anticipated to be impracticable given that it would involve a detailed analysis of that Lender's affairs).

**Common Provisions**

The Common Provisions (which have already been incorporated into the LMA investment grade template facility agreements) set out relevant definitions, insert FATCA information sharing provisions which facilitate FATCA compliance by Agents and others and provide for the replacement of the Agent in the event it will be non-compliant with FATCA.

The Common Provisions must be included whenever any of the drafting approaches in relation to FATCA in this Summary Note are used; however the Common Provisions should not be used by themselves (as FATCA risk will remain unallocated and the agent is potentially left exposed). Although the Common Provisions are already incorporated into the LMA investment grade facility agreement templates, they have been set out separately in Annex II for use by those incorporating LMA FATCA wording into other LMA facility agreements.
**Rider 1A – Protections against FATCA withholding arising**

To include this Rider, first remove the FATCA language shown in Annex I to this Summary Note, which is already incorporated in the LMA investment grade template facility agreements.

a) **New definition**

Insert the following definition into Clause 1.1 (*Definitions*):

"FATCA FFI" means a foreign financial institution as defined in section 1471(d)(4) of the Code which, if any Finance Party is not a FATCA Exempt Party, could be required to make a FATCA Deduction.

b) **Provision requiring each Obligor to represent that it is not a FATCA FFI or a US Tax Obligor**

Insert the following as a new paragraph (c) into Clause 19.1 (*Status*):

(c) It is not a FATCA FFI or a US Tax Obligor.^[4]

c) **Provision requiring the Company to procure that no Obligor will become a FATCA FFI or US Tax Obligor**

Insert the following as a new Clause 22.7 (*Application of FATCA*):

22.7 **Application of FATCA**

The Company shall procure that [,unless otherwise agreed by all the Finance Parties,] no Obligor shall become a FATCA FFI or a US Tax Obligor.

d) **[Optional provision preventing breach of the above representation/procurement obligations being an event of default (i.e. so breach merely gives affected Finance Parties the right to recover for their loss)]**

Insert the following before the closing parenthesis in paragraph (a) of Clause 23.3 (*Other obligations*):

and Clause 22.7 (*Application of FATCA*)

Insert the following at the end of Clause 23.4 (*Misrepresentation*):

(save that this Clause 23.4 shall not apply to paragraph (c) of Clause 19.1 (*Status*))^[5]

---

^[4] Generally a US Guarantor will not be a US Tax Obligor unless there is also a US Borrower because payments by a US Guarantor in respect of the debts of a non-US Borrower will not generally be US source payments.
e) Provision ensuring that a Subsidiary that becomes an Additional Borrower would not be a FATCA FFI or US Tax Obligor

Delete paragraph (a)(i) of Clause 25.2 (Additional Borrowers) and replace it with the following:

(i) [all the Lenders]/[Majority Lenders] (or, in the case of a Subsidiary which would be a FATCA FFI or a US Tax Obligor if it became an Additional Borrower, all the Finance Parties) approve the addition of that Subsidiary;

f) Provision ensuring that a Subsidiary that becomes an Additional Guarantor is not a FATCA FFI or US Tax Obligor

Insert the following as a new paragraph (a)(i) into Clause 25.4 (Additional Guarantors) and renumber the subsequent paragraphs accordingly:

(i) in the case of a Subsidiary which would be a FATCA FFI or a US Tax Obligor if it became an Additional Guarantor, all the Finance Parties approve the addition of that Subsidiary;

g) Provision requiring the compulsory resignation of FATCA FFIs and US Tax Obligors

Insert the following as a new Clause 25.7 (Compulsory resignation of FATCA FFIs and US Tax Obligors):

25.7 Compulsory resignation of FATCA FFIs and US Tax Obligors

If so directed by the Agent (acting on the instructions of [all Lenders]/[Majority Lenders], the Company shall procure that any Obligor which is a FATCA FFI or a US Tax Obligor shall resign as a Borrower or a Guarantor (as the case may be) prior to the earliest FATCA Application Date relating to any payment by that Obligor (or any payment by the Agent which relates to a payment by that Obligor). For the purposes of paragraph (b)(ii) of Clause 25.6 (Resignation of a Guarantor) each Lender consents to the resignation of a Guarantor required pursuant to this Clause 25.7.

5 Parties may wish to amend this provision so that breach is an Event of Default, but the Lenders are not entitled to accelerate.
Rider 1B – Obligor gross-up and right to replace relevant Lenders

To include this Rider, first remove the FATCA language shown in Annex I to this Summary Note, which is already incorporated in the LMA investment grade template facility agreements.

a) New Definitions

Insert the following definition into Clause 13.1 (Definitions):

"FATCA Payment" means either:

(i) the increase in a payment made by an Obligor to a Finance Party under Clause 13.9 (FATCA Deduction and gross-up by Obligor) or paragraph (b) of Clause 13.10 (FATCA Deduction by Finance Party); or

(ii) a payment under paragraph (d) of Clause 13.10 (FATCA Deduction by Finance Party).

b) Amended Definitions

Amend the definition of "Tax Deduction" at Clause 13.1 (Definitions) by inserting:

", other than a FATCA Deduction"

after "Finance Document" in the last line of that paragraph.

c) Provision carving out from the tax indemnity losses that are compensated for under new Clauses 13.9 and 13.10

Amend paragraph (b)(ii)(A) of Clause 13.3 (Tax indemnity) by inserting:

", Clause 13.9 (FATCA Deduction and gross-up by Obligor) or paragraph (b) of Clause 13.10 (FATCA Deduction by Finance Party);"

in place of "; or" at the end of the second line.

Insert "; or" in place of ";." at the end of paragraph (b)(ii)(B).

Insert the following as a new paragraph (b)(ii)(C) after paragraph (b)(ii)(B) of Clause 13.3 (Tax indemnity):

(C) is compensated for by a payment under paragraph (d) of Clause 13.10 (FATCA Deduction by Finance Party).
d) Provision requiring an Obligor to gross-up in the event of a FATCA Deduction

Insert the following as a new Clause 13.9 (FATCA Deduction and gross-up by Obligor):

13.9  **FATCA Deduction and gross-up by Obligor**

(a)  If an Obligor is required to make a FATCA Deduction, that Obligor shall make that FATCA Deduction and any payment required in connection with that FATCA Deduction within the time allowed and in the minimum amount required by FATCA.

(b)  If a FATCA Deduction is required to be made by an Obligor, the amount of the payment due from that Obligor shall be increased to an amount which (after making any FATCA Deduction) leaves an amount equal to the payment which would have been due if no FATCA Deduction had been required.

(c)  The Company shall promptly upon becoming aware that an Obligor must make a FATCA Deduction (or that there is any change in the rate or the basis of a FATCA Deduction) notify the Agent accordingly. Similarly, a Finance Party shall notify the Agent on becoming so aware in respect of a payment payable to that Finance Party. If the Agent receives such notification from a Finance Party it shall notify the Company and that Obligor.

(d)  Within [thirty days] of making either a FATCA Deduction or any payment required in connection with that FATCA Deduction, the Obligor making that FATCA Deduction or payment shall deliver to the Agent for the Finance Party entitled to the payment evidence reasonably satisfactory to that Finance Party that the FATCA Deduction has been made or (as applicable) any appropriate payment has been paid to the relevant governmental or taxation authority.

e) Provision permitting Finance Parties to make payments net of FATCA Deductions, requiring an Obligor to gross-up in the event that the Agent is required to make a FATCA Deduction and providing an indemnity from the Company to the Finance Parties in respect of FATCA Deductions by another Finance Party

Insert the following as a new Clause 13.10 (FATCA Deduction by a Finance Party):

13.10  **FATCA Deduction by a Finance Party**

(a)  Each Finance Party may make any FATCA Deduction it is required by FATCA to make, and any payment required in connection with that FATCA Deduction, and no Finance Party shall be required to increase any payment in respect of which it makes such a FATCA Deduction or otherwise compensate
the recipient of the payment for that FATCA Deduction. A Finance Party which becomes aware that it must make a FATCA Deduction in respect of a payment to another Party (or that there is any change in the rate or the basis of such FATCA Deduction) shall notify that Party and the Agent.

(b) If the Agent is required to make a FATCA Deduction in respect of a payment to a Finance Party under Clause 29.2 (Distributions by the Agent) which relates to a payment by an Obligor, the amount of the payment due from that Obligor shall be increased to an amount which (after the Agent has made such FATCA Deduction), leaves the Agent with an amount equal to the payment which would have been made by the Agent if no FATCA Deduction had been required.

(c) The Agent shall promptly upon becoming aware that it must make a FATCA Deduction in respect of a payment to a Finance Party under Clause 29.2 (Distributions by the Agent) which relates to a payment by an Obligor (or that there is any change in the rate or the basis of such a FATCA Deduction) notify the Company, the relevant Obligor and the relevant Finance Party.

(d) The Company shall (within three Business Days of demand by the Agent) pay to a Finance Party an amount equal to the loss, liability or cost which that Finance Party determines will be or has been (directly or indirectly) suffered by that Finance Party as a result of another Finance Party making a FATCA Deduction in respect of a payment due to it under a Finance Document. This paragraph shall not apply to the extent a loss, liability or cost is compensated for by an increased payment under paragraph (b) above.

(e) A Finance Party making, or intending to make, a claim under paragraph (d) above shall promptly notify the Agent of the FATCA Deduction which will give, or has given, rise to the claim, following which the Agent shall notify the Company.

(f) A Finance Party must, on receiving a payment from an Obligor under this Clause, notify the Agent.

f) Provision excluding certain Increased Costs relating to FATCA from increased costs provision

Insert the following as new paragraphs (a)(ii) and (a)(iii) of Clause 14.3 (Exceptions) and renumber subsequent paragraphs accordingly:

(ii) attributable to a FATCA Deduction required to be made by an Obligor or a Finance Party;
(iii) compensated for by paragraph (d) of Clause 13.10 (FATCA Deduction by a Finance Party);

g) Provision permitting a Lender to transfer to a non-FATCA compliant Lender and providing for a New Lender to receive the same FATCA protections as a day one Lender

Insert the following as a new paragraph (f)(v) of Clause 24.2 (Conditions of assignment or transfer):

(v) to the extent that the payment under Clause 13 (Tax gross-up and indemnities) relates to a FATCA Deduction.

h) Provision allowing Company right of replacement or repayment and cancellation in respect of a Lender if that Lender is not a FATCA Exempt Party

Insert a new paragraph (a)(iii) after paragraph (a)(ii) of Clause 8.6 (Right of replacement or repayment and cancellation in relation to a single Lender):

(iii) at any time on or after the date which is [three] months before the earliest FATCA Application Date for any payment by a Party to a Lender (or to the Agent for the account of that Lender), that Lender is not, or has ceased to be, a FATCA Exempt Party and, as a consequence, a Party will be required to make a FATCA Deduction from a payment to that Lender (or to the Agent for the account of that Lender) on or after that FATCA Application Date.

Insert "or FATCA Deduction" in the seventh line of paragraph (a) of Clause 8.6 (Right of replacement or repayment and cancellation in relation to a single Lender) after the word "indemnification".
i) Provision requiring a Finance Party that has obtained a Tax Credit in respect of a FATCA Payment to make a refund to the Obligor

Insert the following as a new Clause 13.11 (Tax Credit and FATCA):

13.11 Tax Credit and FATCA

If an Obligor makes a FATCA Payment and the relevant Finance Party determines that:

(a) a Tax Credit is attributable to an increased payment of which that FATCA Payment forms part, to that FATCA Payment or to a FATCA Deduction in consequence of which that FATCA Payment was required; and

(b) that Finance Party has obtained, utilised and retained that Tax Credit,

the Finance Party shall pay an amount to the Obligor which that Finance Party determines will leave it (after that payment) in the same after-Tax position as it would have been in had the FATCA Payment not been required to be made by the Obligor.
Rider 2 – Lender risk with protection against loss of grandfathering

This Rider should be used with care and is only intended for use where Lenders are based in jurisdictions which have not entered into IGAs.

This Rider should not be used to protect Lenders against withholding on US source payments from 1 July 2014. Therefore, the purpose of this Rider is to protect Lenders against the possibility of "pass-thru" withholding from 2014 onwards. Lenders should consider whether the contingent risk of "pass-thru" withholding being implemented and applying justifies the additional complications which Rider 2 entails (for example, Rider 2 has the potential to complicate loan restructurings even if "pass-thru" withholding is not in fact introduced).

To include this Rider, first remove the FATCA language shown in Annex I to this Summary Note, which is already incorporated in the LMA investment grade template facility agreements.

a) **Provision requiring the consent of all Lenders in respect of amendments that could result in a FATCA Deduction**

Insert the following as a new paragraph (c) of Clause 35.1 (Required consents):

(c) No amendment or waiver may be made before the date falling ten Business Days after the terms of that amendment or waiver have been notified by the Agent to the Lenders, unless each Lender is a "FATCA Protected Lender". The Agent shall notify the Lenders reasonably promptly of any amendments or waivers proposed by the Company.6

Insert the following as a new paragraph (b) of Clause 35.3 (Other exceptions) and renumber the existing text as paragraph (a):

(b)

(i) If the Agent7 or a Lender reasonably believes that an amendment or waiver may constitute a "material modification" for the purposes of FATCA that may result (directly or indirectly) in a Party being required to make a FATCA Deduction and the Agent or that Lender (as the case may be) notifies the Company and the Agent accordingly, that amendment or waiver may, subject to paragraph (ii) below, not be effected without the consent of the Agent or that Lender (as the case may be).

---

6 The purpose of this clause is to ensure Lenders receive notice of proposed amendments or waivers and can then exercise their rights under paragraph (b) of Clause 35.3 (Other exceptions) before an amendment or waiver takes effect (unless the Company has opted to give all the Lenders prepayment protection by designating them all as FATCA Protected Lenders).

7 This Clause does not establish a mechanism for overriding an Agent’s veto. However, it is anticipated that if the Agent vetoes an amendment that the Company and Majority Lenders wish to pursue, then the Company and Majority Lenders may wish to require the Agent to resign pursuant to paragraph (h) of Clause 26.12 (Resignation of the Agent)
(ii) The consent of a Lender shall not be required pursuant to paragraph (i) above if that Lender is a FATCA Protected Lender.

b) Provision requiring the consent of all Lenders in respect of a Borrower/Guarantor accession or resignation that could result in a FATCA Deduction

Insert the following as a new Clause 25.7 after Clause 25.6 (Resignation of a Guarantor):

25.7 Changes to the Obligors – FATCA

(a) No Subsidiary may become an Additional Borrower or an Additional Guarantor, or cease to be a Borrower or Guarantor, before the date falling ten Business Days after the Company's request in relation thereto has been notified by the Agent to the Lenders, unless each Lender is a "FATCA Protected Lender". The Agent shall notify the Lenders reasonably promptly of any such requests from the Company.

(b) If the Agent or a Lender reasonably believes that a Subsidiary becoming an Additional Borrower or an Additional Guarantor, or ceasing to be a Borrower or Guarantor, may constitute a "material modification" for the purposes of FATCA that may result (directly or indirectly) in a Party being required to make a FATCA Deduction and the Agent or such Lender (as the case may be) notifies the Company and the Agent accordingly, that Subsidiary may, subject to paragraph (c) below, not become an Additional Borrower or an Additional Guarantor, or cease to be a Borrower or Guarantor (as the case may be) without the consent of the Agent or that Lender (as the case may be).

(c) The consent of a Lender shall not be required pursuant to paragraph (b) above if that Lender is a FATCA Protected Lender.

c) Provision requiring the Company to replace or repay and cancel any FATCA Protected Lender if it is not a FATCA Exempt Party as the effective date approaches

Insert the following definition into Clause 1.1 (Definitions):

"FATCA Protected Lender" means any Lender irrevocably designated as a "FATCA Protected Lender" by the Company by notice to that Lender and the Agent at least [six months] prior to the earliest FATCA Application Date for a payment by a Party to that Lender (or to the Agent for the account of that Lender).8

8 A Borrower therefore has the ability to override a Lender's veto of an amendment (etc) – but it can only do so by designating that Lender a "FATCA Protected Lender" and therefore giving it a prepayment right if in fact a FATCA withholding later arises. A Lender's veto can only be overridden up until [six months] prior to the date that FATCA withholding would arise – after that point a commercial agreement of some kind would need to be reached with a Lender that vetoes any amendment due to a concern regarding loss of FATCA grandfathering. This could create a problem as after this date any Lender would be able to block amendments. As an alternative, the timing in these clauses could be amended to allow the provisions to
Insert a new paragraph (iii) to paragraph (a) of Clause 8.6 (Right of replacement or repayment and cancellation in relation to a single Lender):

"(iii) any FATCA Protected Lender notifies the Agent of a FATCA Event pursuant to Clause 8.7 (Mandatory repayment and cancellation of FATCA Protected Lenders),"

Insert "or FATCA Event" in the seventh line of paragraph (a) of Clause 8.6 (Right of replacement or repayment and cancellation in relation to a single Lender) after "indemnification".

Insert a new Clause 8.7 (Mandatory repayment and cancellation of FATCA Protected Lenders) after Clause 8.6 (Right of replacement or repayment and cancellation in relation to a single Lender):

8.7 Mandatory repayment and cancellation of FATCA Protected Lenders

(a) [Subject to paragraph (b) below, if][If] on the date falling [six months] before the earliest FATCA Application Date for any payment by a Party to a FATCA Protected Lender (or to the Agent for the account of that Lender), that Lender is not a FATCA Exempt Party and, in the opinion of that Lender (acting reasonably), that Party will, as a consequence, be required to make a FATCA Deduction from a payment to that Lender (or to the Agent for the account of that Lender) on or after that FATCA Application Date (a "FATCA Event"):  

(i) that Lender shall, reasonably promptly after that date, notify the Agent of that FATCA Event and the relevant FATCA Application Date;

(ii) if, on the date falling [one] month before such FATCA Application Date, that FATCA Event is continuing and that Lender has not been repaid or replaced pursuant to Clause 8.6 (Right of replacement or repayment and cancellation in relation to a single Lender) (other than by reason of that Lender's failure to comply with its obligations pursuant to paragraph (d) of Clause 8.6 (Right of replacement or repayment and cancellation in relation to a single Lender)):

(A) that Lender may, at any time between [one] month and [two weeks] before such FATCA Application Date, notify the Agent;

(B) upon the Agent notifying the Company, the Commitment(s) of that Lender will be immediately cancelled; and

(C) each Borrower shall repay that Lender's participation in the Loans made to that Borrower on the last day of the Interest Period for each Loan occurring after the Agent has notified the Company or, if earlier, the last Business Day before the relevant FATCA Application Date.

operate at any time. However, there is a possibility that any prepayment may itself be subject to FATCA withholding (potentially on both principal and interest).
[(b) Paragraph (a) above shall not apply if [ ]⁹]

d) **Amended Definitions**

Amend the definition of "Tax Deduction" at Clause 13.1 (*Definitions*) by inserting:

"..., other than a FATCA Deduction"

after "Finance Document" in the last line of that paragraph.

e) **Provision excluding FATCA from the tax indemnity**

Insert the following as a new paragraph (b)(ii)(C) after paragraph (b)(ii)(B) of Clause 13.3 (*Tax indemnity*):

(C) relates to a FATCA Deduction required to be made by a Party.

f) **Provision enabling Obligors, Agent and Lenders to make FATCA Deductions when required and not gross-up**

Insert the following as a new Clause 13.9 (*FATCA Deduction Spears Intentionally Blank*):

13.9 **FATCA Deduction**

(a) Each Party may make any FATCA Deduction it is required to make by FATCA, and any payment required in connection with that FATCA Deduction, and no Party shall be required to increase any payment in respect of which it makes such a FATCA Deduction or otherwise compensate the recipient of the payment for that FATCA Deduction.

(b) Each Party shall promptly, upon becoming aware that it must make a FATCA Deduction (or that there is any change in the rate or the basis of such FATCA Deduction) notify the Party to whom it is making the payment and, in addition, shall notify the Company, the Agent and the other Finance Parties.

g) **Provision excluding FATCA from increased costs provision**

Insert the following as new paragraph (a)(ii) of Clause 14.3 (*Exceptions*) and renumber subsequent paragraphs accordingly:

(ii) attributable to a FATCA Deduction required to be made by a Party;

---

⁹ Some Members wish to see a limitation on Lenders' right to prepayment, for example giving the protection to a particular class of Lenders only (e.g. the initial syndicate and/or financial institutions unable to be FATCA compliant due to illegality considerations in the jurisdictions in which they operate). It is expected such provisions will be individually negotiated. It is likely to be impracticable for the condition to prepayment to be linked to the reasons why a particular Lender is not FATCA compliant, as this would involve a detailed investigation into that Lender's affairs. Accordingly the condition, if included, should be objective and general in nature.
ANNEX I\textsuperscript{10}

FATCA Language Included in LMA Investment Grade Facility Agreements\textsuperscript{11}

a) Amended Definitions

The definition of "Tax Deduction" at Clause 13.1 (Definitions) has been amended by inserting ", other than a FATCA Deduction" after "Finance Document" in the last line of that paragraph.

b) Provision excluding FATCA from the tax indemnity

Paragraph (b)(ii)(C) has been inserted after paragraph (b)(ii)(B) of Clause 13.3 (Tax indemnity):

(C) relates to a FATCA Deduction required to be made by a Party.

c) Provision enabling Obligors, Agent and Lenders to make FATCA Deductions when required and not gross-up

The following has been inserted as a new Clause 13.9 (FATCA Deduction):

13.9 FATCA Deduction

(a) Each Party may make any FATCA Deduction it is required to make by FATCA, and any payment required in connection with that FATCA Deduction, and no Party shall be required to increase any payment in respect of which it makes such a FATCA Deduction or otherwise compensate the recipient of the payment for that FATCA Deduction.

(b) Each Party shall promptly, upon becoming aware that it must make a FATCA Deduction (or that there is any change in the rate or the basis of such FATCA Deduction), notify the Party to whom it is making the payment and, in addition, shall notify the Company and the Agent and the Agent shall notify the other Finance Parties.

d) Provision excluding FATCA from increased costs provision

The following has been inserted as new paragraph (a)(ii) of Clause 14.3 (Exceptions):

(ii) attributable to a FATCA Deduction required to be made by a Party;

\textsuperscript{10} Formerly Rider 3 of the May 2013 Riders.

\textsuperscript{11} Please note that although this wording has been incorporated into all LMA investment grade facility agreements, clause references relate specifically to the LMA Multicurrency Term and Revolving Facilities Agreement.
ANNEX II

Common Provisions

a) New definitions

Insert the following definitions into Clause 1.1 (Definitions):


"FATCA" means:

(a) sections 1471 to 1474 of the Code or any associated regulations;

(b) any treaty, law or regulation of any other jurisdiction, or relating to an intergovernmental agreement between the US and any other jurisdiction, which (in either case) facilitates the implementation of any law or regulation referred to in paragraph (a) above; or

(c) any agreement pursuant to the implementation of any treaty, law or regulation referred to in paragraphs (a) or (b) above with the US Internal Revenue Service, the US government or any governmental or taxation authority in any other jurisdiction.

"FATCA Application Date" means:

(a) in relation to a "withholdable payment" described in section 1473(1)(A)(i) of the Code (which relates to payments of interest and certain other payments from sources within the US), 1 July 2014;

(b) in relation to a "withholdable payment" described in section 1473(1)(A)(ii) of the Code (which relates to "gross proceeds" from the disposition of property of a type that can produce interest from sources within the US), 1 January 2017;

(c) in relation to a "passthru payment" described in section 1471(d)(7) of the Code not falling within paragraphs (a) or (b) above, 1 January 2017, or, in each case, such other date from which such payment may become subject to a deduction or withholding required by FATCA as a result of any change in FATCA after the date of this Agreement.

Please note that these provisions have already been incorporated into the LMA investment grade template facility agreements and therefore do not need to be included where these documents are already being used. However, they have been replicated in this note for insertion into other LMA facility agreements which currently do not contain any FATCA wording at all. Users must ensure that the clause references are adapted appropriately and should also consider other changes that may be relevant to the document in question - for example providing Security Trustees with similar protection to that given to Agents in these approaches - seeking legal advice where necessary.
"FATCA Deduction" means a deduction or withholding from a payment under a Finance Document required by FATCA.

"FATCA Exempt Party" means a Party that is entitled to receive payments free from any FATCA Deduction.

"US" means the United States of America.

"US Tax Obligor" means:

(a) a Borrower which is resident for tax purposes in the US; or

(b) an Obligor some or all of whose payments under the Finance Documents are from sources within the US for US federal income tax purposes.

b) Provision requiring the Parties to provide information to the other Parties relating to its FATCA status

Insert the following as a new Clause 13.8 (FATCA Information):

13.8 FATCA Information

(a) Subject to paragraph (c) below, each Party shall, within [ten] Business Days of a reasonable request by another Party:

(i) confirm to that other Party whether it is:

(A) a FATCA Exempt Party; or

(B) not a FATCA Exempt Party;

(ii) supply to that other Party such forms, documentation and other information relating to its status under FATCA as that other Party reasonably requests for the purposes of that other Party's compliance with FATCA;

(iii) supply to that other Party such forms, documentation and other information relating to its status as that other Party reasonably requests for the purposes of that other Party's compliance with any other law, regulation, or exchange of information regime.

(b) If a Party confirms to another Party pursuant to paragraph (a)(i) above that it is a FATCA Exempt Party and it subsequently becomes aware that it is not or has ceased to be a FATCA Exempt Party, that Party shall notify that other Party reasonably promptly.

(c) Paragraph (a) above shall not oblige any Finance Party to do anything, and paragraph (a)(iii) above shall not oblige any other Party to do anything, which would or might in its reasonable opinion constitute a breach of:

(i) any law or regulation;
(ii) any fiduciary duty; or

(iii) any duty of confidentiality.

(d) If a Party fails to confirm whether or not it is a FATCA Exempt Party or to supply forms, documentation or other information requested in accordance with paragraph (a)(i) or (ii) above (including, for the avoidance of doubt, where paragraph (c) above applies), then such Party shall be treated for the purposes of the Finance Documents (and payments under them) as if it is not a FATCA Exempt Party until such time as the Party in question provides the requested confirmation, forms, documentation or other information.

(e) [If a Borrower is a US Tax Obligor or the Agent reasonably believes that its obligations under FATCA or any other applicable law or regulation require it, each Lender shall, within [ten] Business Days of:

(i) where an Original Borrower is a US Tax Obligor and the relevant Lender is an Original Lender, the date of this Agreement;

(ii) where a Borrower is a US Tax Obligor on a Transfer Date and the relevant Lender is a New Lender, the relevant Transfer Date;

(iii) the date a new US Tax Obligor accedes as a Borrower; or

(iv) where a Borrower is not a US Tax Obligor, the date of a request from the Agent,

supply to the Agent:

(A) a withholding certificate on Form W-8, Form W-9 or any other relevant form; or

(B) any withholding statement or other document, authorisation or waiver as the Agent may require to certify or establish the status of such Lender under FATCA or that other law or regulation.

(f) The Agent shall provide any withholding certificate, withholding statement, document, authorisation or waiver it receives from a Lender pursuant to paragraph (e) above to the relevant Borrower.

(g) If any withholding certificate, withholding statement, document, authorisation or waiver provided to the Agent by a Lender pursuant to paragraph (e) above is or becomes materially inaccurate or incomplete, that Lender shall promptly update it and provide such updated withholding certificate, withholding statement, document, authorisation or waiver to the Agent unless it is unlawful for the Lender to do so (in which case the Lender shall promptly notify the Agent). The Agent shall provide any such updated withholding certificate, withholding statement, document, authorisation or waiver to the relevant Borrower.
(h) The Agent may rely on any withholding certificate, withholding statement, document, authorisation or waiver it receives from a Lender pursuant to paragraph (e) or (g) above without further verification. The Agent shall not be liable for any action taken by it under or in connection with paragraph (e), (f) or (g) above.\(^{13}\)

c) **Provision requiring the Agent to resign if its FATCA status will result in a FATCA withholding**

Insert the following as a new paragraph (i) to Clause 26.12 (*Resignation of the Agent*):

(i) The Agent shall resign in accordance with paragraph (b) above (and, to the extent applicable, shall use reasonable endeavours to appoint a successor Agent pursuant to paragraph (c) above) if on or after the date which is [three] months before the earliest FATCA Application Date relating to any payment to the Agent under the Finance Documents, either:

(i) the Agent fails to respond to a request under Clause 13.8 (*FATCA Information*) and [the Company or] a Lender reasonably believes that the Agent will not be (or will have ceased to be) a FATCA Exempt Party on or after that FATCA Application Date;

(ii) the information supplied by the Agent pursuant to Clause 13.8 (*FATCA Information*) indicates that the Agent will not be (or will have ceased to be) a FATCA Exempt Party on or after that FATCA Application Date; or

(iii) the Agent notifies the Company and the Lenders that the Agent will not be (or will have ceased to be) a FATCA Exempt Party on or after that FATCA Application Date;

and (in each case) [the Company or] a Lender reasonably believes that a Party will be required to make a FATCA Deduction that would not be required if the Agent were a FATCA Exempt Party, and [the Company or] that Lender, by notice to the Agent, requires it to resign.

---

\(^{13}\) Paragraphs (e), (f), (g) and (h) of Clause 13.8 (*FATCA Information*) may be used for loans entered into with US borrowers (or loans where a US borrower may become an additional borrower).