June 11, 2024

CC:PA:01:PR (REG-115710-22)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C., 20044

Re: RIN 1545–BQ60; Notice of Proposed Rulemaking; Excise Tax on Repurchase of Corporate Stock — Procedure and Administration

To Whom It May Concern:

SIFMA[1] submits these comments in response to the Notice of Proposed Rulemaking (the "Proposed Regulations") interpreting section 4501 of the Internal Revenue Code of 1986 (the "Code").[2] Section 4501 imposes a one percent excise tax on the fair market value of stock repurchased by a publicly traded corporation. This letter focuses on the Proposed Regulations under section 4501(d), and in particular, the revised Proposed Funding Rule (defined below).

I. Introduction

SIFMA's March 20, 2023 comment letter (attached hereto) on Notice 2023-2, 2023-2 I.R.B. 374 ("Prior SIFMA Comment") requested that Treasury and the IRS: (1) exempt from section 4501 (and correspondingly the netting rule in section 4501(c)(3)) the redemption or issuance of additional preferred stock that qualifies as tier 1 capital under applicable financial institution regulatory rules; and (2) exempt financial institutions or ordinary transactions from the Prior Funding Rule (defined below). SIFMA members thank Treasury and the IRS for (1) providing an exemption from section 4501 for redemptions and issuances of additional tier 1 capital preferred stock (including for purposes of the netting rule in section 4501(c)(3)), and (2)

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] REG 115710-22, 89 Fed Reg. 25,980 (April 12, 2024).

eliminating the Per Se Rule (defined below) and promulgating in its stead a narrowly tailored Downstream Rebuttable Presumption Rule (also defined below).

For the reasons described below, however, the new Proposed Funding Rule (defined below) is unreasonably overbroad, and presents substantial compliance and administrability challenges. Fundamentally, the Proposed Funding Rule provides insufficient guidance, such that no foreign parented taxpayer could properly compute the amount of section 4501(d) excise tax due or determine with high confidence when such excise tax is owed, particularly for foreign banking groups where funding transactions are integral to the core businesses of banking, lending, and finance. The IRS will similarly face difficulties in fairly and uniformly enforcing the Proposed Funding Rule for the same reasons. We urge Treasury and the IRS to eliminate the unbounded Proposed Funding Rule and retain solely the targeted and narrowly drawn Downstream Rebuttable Presumption Rule.

II. Background

A. Relevant Statutory Provisions

Section 4501(a) imposes an excise tax in an amount equal to one percent of the fair market value of any stock repurchased by a publicly traded corporation. Section 4501(c)(3) provides that the fair market value determined under section 4501(a) shall be reduced by the fair market value of any stock issued by the corporation during the taxable year (the "netting rule").

Section 4501(d)(1) provides: "In the case of an acquisition of stock of an applicable foreign corporation by a specified affiliate of such corporation (other than a foreign corporation or a foreign partnership (unless such partnership has a domestic entity as a direct or indirect partner)) from a person who is not the applicable foreign corporation or a specified affiliate of such applicable foreign corporation, for purposes of this section – (A) such specified affiliate shall be treated as a covered corporation with respect to such acquisition, (B) such acquisition shall be treated as a repurchase of stock of a covered corporation by such covered corporation, and (C) the adjustment under subsection (c)(3) shall be determined only with respect to stock issued or provided by such specified affiliate to employees of the specified affiliate."

Pursuant to section 4501(d)(3)(A), an "applicable foreign corporation" is a publicly traded foreign corporation, and pursuant to section 4501(c)(2)(B), a "specified affiliate" of a corporation is any corporation or partnership more than 50 percent of which is directly or indirectly owned by such corporation. Finally, pursuant to section 4501(b), a "covered corporation" is any publicly traded domestic corporation. The effect of these provisions is to provide that a U.S. subsidiary (including a controlled U.S. partnership) of a foreign publicly traded corporation will be subject to the section 4501(d)(1) excise tax if the U.S. subsidiary purchases stock of the foreign parent corporation from someone who is not the foreign parent or another subsidiary of the foreign parent.

Section 4501(f) states that the "Secretary shall prescribe such regulations and other guidance as are necessary or appropriate to carry out, and to prevent the avoidance of, the purposes of this section, including regulations and other guidance . . . (3) for the application of the rules under subsection (d)."

B. *Relevant Portions of Notice 2023-2*

Section 3.05(2)(a)(ii) of Notice 2023-2 provided that, for purposes of applying section 4501(d)(1), a repurchase was deemed to occur if (i) an "applicable specified affiliate" (i.e., a specified affiliate of an applicable foreign corporation other than a foreign corporation or foreign partnership without a domestic entity partner) funds "by any means (including through distributions, debt, or capital contributions) the repurchase or acquisition of stock of an applicable foreign corporation (or specified affiliate that is not also an applicable specified affiliate)" and (ii) such funding is undertaken for a principal purpose of avoiding section 4501 (collectively, the "Prior Funding Rule"). The Prior Funding Rule also provided that such a principal purpose was deemed to exist if the funding (other than through distributions) occurred within two years of the funded entity's repurchase or acquisition of stock of the applicable foreign corporation (the "Per Se Rule").

C. *Relevant Proposed Regulations*

As the Preamble to the Proposed Regulations acknowledges, several stakeholders criticized the Prior Funding Rule and especially the Per Se Rule as overbroad.[3] In response, Treasury and the IRS retained a broad principal purpose, anti-avoidance rule but eliminated the Per Se Rule and instead provided a more targeted rebuttable presumption for certain "downstream" funding transactions. With respect to the retained principal purpose test, the Proposed Regulations provide in relevant part that:

> An applicable specified affiliate of an applicable foreign corporation is treated as acquiring stock of the applicable foreign corporation to the extent the applicable specified affiliate funds by any means (including through distributions, debt, or capital contributions), directly or indirectly, a covered purchase with a principal purpose of avoiding the section 4501(d) excise tax (a covered funding). If a principal purpose of the covered funding is to fund, directly or indirectly, a covered purchase, then there is a principal purpose of avoiding the section 4501(d) excise tax. Whether a covered funding is described in this paragraph (e)(1) is determined based on all the facts and circumstances. A covered funding may be described in this paragraph (e)(1) regardless of whether the funding occurs before or after a covered purchase [the "Proposed Funding Rule"].[4]

An "applicable specified affiliate" is a specified affiliate of an applicable foreign corporation, other than a foreign corporation or a foreign partnership (unless the partnership has a domestic entity as a direct or indirect partner).[5] A "covered purchase" means an "AFC purchase" (i.e., a section 317 redemption with respect to the stock of an applicable foreign corporation or economically similar transaction) or an acquisition of stock of an applicable foreign corporation

[3] *See* 89 Fed. Reg., at 26,022

[4] Prop. Reg. § 58.4501-7(e)(1).

[5] Prop. Reg. § 58.4501-7(b)(2)(iv).

by a relevant entity.[6] Several examples apply this Proposed Funding Rule, including one in which the covered stock purchase occurs more than two years after the covered funding,[7] and one in which U.S. subsidiaries lend funds to their foreign parent which on-loans funds to a separate foreign subsidiary that buys stock in the foreign parent from an unrelated person.[8]

In place of the deleted Per Se Rule, the Proposed Regulations provide that a principal purpose of avoiding section 4501 is presumed to exist if an applicable specified affiliate funds by any means, directly or indirectly, a "downstream relevant entity," and the funding occurs within two years of a covered purchase by or on behalf of the downstream relevant entity. (the "Downstream Rebuttable Presumption Rule"). [9] A "downstream relevant entity" is defined as a relevant entity in which one or more applicable specified entities have a material (i.e., 25 percent or more, direct or indirect) ownership interest.[10] The presumption may be rebutted only if facts and circumstances clearly establish that there was not a principal purpose of avoiding section 4501.[11]

The Proposed Regulations also provide certain timing and allocation rules with respect to fundings subject to section 4501(d). First, the Proposed Regulations provide that stock of an applicable foreign corporation is treated as acquired on the later date of the covered funding or the covered purchase to which the covered funding is allocated.[12] Second, in a series of allocation rules, the Proposed Regulations stack covered acquisitions against any covered funding before fundings received from other sources.[13]

Finally, in response to comments, Treasury exempted from the Proposed Regulations any redemptions or issuances of preferred stock that qualifies as additional tier 1 capital for purposes of regulatory requirements for regulated financial institutions.[14] Thus, additional tier 1 preferred stock would not be subject to the stock repurchase excise tax under section 4501(a) and the issuance of additional tier 1 preferred stock would not be taken into account for purposes of the netting rules of section 4501(c)(3).[15]

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[6] Prop. Reg. § 58.4501-7(b)(2)(i), (vii), (xiv).

[7] *See id*. at -7(p)(3), Example 3

[8] *See id*. at -7(p)(7), Example 7.

[9] *See* Prop. Reg. § 58.4501-7(e)(2).

[10] *See* Prop. Reg. § 58.4501-7(b)(2)(xiv).

[11] Prop. Reg. § 58.4501-7(e)(2).

[12] Prop. Reg. § 58.4501-7(e)(3).

[13] Prop. Reg. § 58.4501-7(e)(5)-(7).

[14] *See* Prop. Reg. § 58.4501-1(b)(29)(ii).

[15] *See* Preamble, 89 Fed. Reg., at 25,984.

III. Discussion

The expanded Proposed Funding Rule is functionally similar to (and shares many of the same issues with) the Prior Funding Rule, and the seemingly limitless Proposed Funding Rule creates uncertainty and ambiguity for taxpayers and IRS examination agents alike. As described below, the Proposed Funding Rule exceeds the scope of section 4501(d)'s statutory mandate and lacks sufficient guidance to be properly applied by taxpayers and administered by IRS examination agents. We recommend its deletion and retention solely of the targeted Downstream Rebuttable Presumption Rule.

A. The Proposed Funding Rule Exceeds the Statutory Authority Granted in Section 4501

Several comments on the Notice questioned the Prior Funding Rule as overbroad and contrary to the text of section 4501(d)(1) and congressional intent. The Preamble responded by justifying the retention of a Funding Rule as necessary to prevent avoidance of section 4501(d), and as authorized by the "broad grant of authority in section 4501(f)" to carry out or prevent avoidance of section 4501 generally and provide guidance for the application of section 4501(d) in particular.[16] The Preamble further supports its Proposed Funding Rule by pointing to regulations under sections 304 and 956 as representing "longstanding rules" that treat a taxpayer as acquiring property if it funds a related party's acquisition of such property and the funding satisfies a principal purpose test.[17] Finally, the Preamble notes that the replacement of the Per Se Rule with the more targeted Downstream Rebuttable Presumption Rule "would materially narrow the scope of the proposed funding rule relative to the Notice funding rule" and more broadly addresses the concerns raised by taxpayers regarding the Prior Funding Rule.[18]

1. The new Proposed Funding Rule creates more, not less, ambiguity and uncertainty for taxpayers and IRS examination agents.

We address the practical administrability concerns in more detail below in the context of cross-border flows in a foreign parented group, but the Proposed Funding Rule generates more substantive exposure for foreign-parented groups to section 4501(d) taxation than the Prior Funding Rule in multiple ways, including:

- Pursuant to the Proposed Funding Rule, any purpose to fund a stock repurchase by the foreign parent automatically equates to a purpose to avoid section 4501(d) even if the domestic affiliate is barred from holding foreign parent shares under applicable corporate law, the domestic affiliate funding represents merely a portion of the multiple sources of funding from around the globe for a foreign parent stock repurchase, or any such funding is in part or in whole funding foreign

[16] 89 Fed. Reg., at 26,023-24.

[17] *Id.*, at 26,024

[18] *Id.*

parent activities independent of the repurchase but is undertaken some time before or after the foreign parent stock repurchase.

- The Proposed Funding Rule has no temporal limit and Example 3 applies an excise tax to a foreign parent stock repurchase that occurs more than two years after the apparent funding.

- Distributions were excluded from the Per Se Rule but no comparable exception is provided in the Proposed Regulations.

- Despite repeated requests for applicable guidance, no exception for ordinary course transactions between domestic affiliates and their foreign parent was provided, with Treasury and the IRS reasoning instead that the elimination of the Per Se Rule and the targeted nature of the Downstream Rebuttable Presumption Rule sufficiently addressed these comments.

- Despite requests to permit taxpayers to demonstrate the absence of a connection between a domestic funding and a foreign parent stock repurchase, Treasury and IRS rejected any tracing approach and instead adopted a stacking rule that directly allocates a repurchase to any funding that might exist despite the existence of multiple sources of funding.

- Despite requests to provide guidance regarding whether and to what extent a cross-border transaction provides net versus gross funding and which party is actually providing net funding, Treasury and the IRS provided no such guidance.

Treasury and the IRS appear to believe that the elimination of the Per Se Rule and adoption of the narrowly tailored Downstream Rebuttable Presumption Rule have solved for the overbreadth and uncertainty created by Prior Funding Rule. While we once again applaud Treasury and the IRS for reconsidering these points, the retention and apparent expansion of the baseline Proposed Funding Rule while providing no guardrails or guidance on its scope creates a similar set of difficulties. As discussed below in Section 2, SIFMA questions what has fundamentally changed between eliminating the Prior Funding Rule and adopting the Proposed Funding Rule that addresses the points in the Prior SIFMA Comment regarding tax administration and fact documentation once a funding is potentially within scope of the rules.

2. We question the statutory authority for the Proposed Funding Rule.

Section 4501(d)(1) speaks solely to acquisitions of foreign parent stock from unrelated parties; section 4501(d)(1) by its terms does not reference a funding in any form, let alone via distributions, debt repayment, or arm's length transactions between the domestic-connected affiliate and the foreign parent or foreign affiliates. Nor does any legislative history or apparent purpose support this deviation from the transactions targeted by the text of section 4501(d)(1).

- The Preamble invokes section 4501(f)(3) as the source of its authority to promulgate the Proposed Funding Rule as necessary to carry out the purposes and prevent avoidance of section 4501(d). But the text and purposes of section

4501(d) constrain the regulatory authority provided in section 4501(f)(3).[19] Section 4501(d)(1) is textually limited to "an acquisition of stock of an applicable foreign corporation" by domestic-connected affiliates from unrelated parties, and there is no reference to "indirect" acquisitions and, again, no reference to a "funding." Treasury and IRS have not explained nor cited authority supporting the premise that a "funding by any means" equates under U.S. tax law to a direct "acquisition" of stock by a domestic-connected affiliate from an unrelated party.

- In fact, the Proposed Funding Rule captures transactions expressly permitted by the plain text of section 4501(d). For example, to ensure that it has sufficient foreign parent stock to compensate U.S. employees, a domestic-connected affiliate could purchase surplus foreign parent stock from a foreign affiliate. Such related party purchase is outside the scope of the plain terms of section 4501(d), which solely applies to purchases of foreign parent stock from *unrelated* parties. Such related party transaction, however, could constitute a covered purchase subjecting the domestic-connected affiliate to section 4501(a) excise tax liability pursuant to the Proposed Funding Rule. Excise tax liability would in such case apply to a transaction otherwise plainly outside the statutory scope.

- Furthermore, while the purposes of section 4501(d)(1) are somewhat opaque, it would appear that Congress targeted domestic corporate subsidiary purchases of foreign parent stock from shareholders because, in such transactions, cash or other equivalent value leaves U.S. corporate solution as a capital gains transaction for the shareholder, not as a pro rata dividend paid by the domestic corporate subsidiary that could be subject to U.S. withholding tax or fully taxed as a dividend without basis recovery.[20] Those concerns are simply not present when (1) a domestic subsidiary distributes to its foreign parent its earnings that have already been subject to U.S. corporate income tax and are likely also subject to U.S. withholding tax; (2) a domestic subsidiary lends cash to its foreign parent that generates taxable interest in the United States and must otherwise be repaid; (3) a domestic subsidiary uses cash in arm's length, value-for-value transactions with its foreign parent or foreign affiliates (e.g., licenses, leases, purchases of goods and services, or even transfer pricing adjustments) that permit continued U.S. taxation of the corresponding income or asset; or (4) a domestic subsidiary acquires foreign parent stock from its foreign parent or foreign affiliate, with such acquired stock subject to full U.S. taxation. In each transaction, cash or equivalent value remains in the affiliated group (and other than distributions, within the United States) and U.S. taxation of the transaction or resulting income or asset is preserved. Accordingly, such transactions do not offend the policy concerns animating section 4501(d).

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[19] We note that, unlike the grant of authority in section 4501(f)(1) with respect to exceptions from section 4501(a) found in section 4501(e), section 4501(f)(3) makes no mention of anti-abuse concerns. *Compare* section 4501(f)(1) (granting authority to write regulations to "prevent the abuse of the exceptions provided by subsection (e)").

[20] *See* Prior SIFMA Comment, at 3

3. Treasury and IRS miss the mark when referencing in the Preamble similar principal purpose, conduit funding rules promulgated under sections 956 and 304 as supporting its authority to craft similar rules under section 4501(d).

- The section 956 and 304 conduit rules are far more targeted, focusing on discrete, controlled transactions among identifiable members of a related party group (either loans by a CFC to its U.S. shareholders under section 956 or specific sales of controlled stock by one related party to another related party under section 304). These rules apply on a narrow transaction-by-transaction basis and ferret out whether the true lender or acquiror should in substance be brought within the scope of the relevant rules. And, unlike the Proposed Funding Rule, the conduit rules under sections 304 and 956 include several targeted examples that evidence the limited scope of these rules.[21]

- Further, there are questions regarding the statutory authority for these section 304 and 956 conduit rules, and Congress had demonstrated in other recent tax legislation that it knows how to expressly direct Treasury to write a conduit rule but did not do so here. *Compare* section 59A(i)(1)(A) (specifically granting regulatory authority "providing for such adjustments to the application of this section as are necessary to prevent the avoidance of the purposes of this section, including through . . . the use of unrelated persons, conduit transactions, or other intermediaries.").

The ring-fenced nature of the conduit rules under sections 956 and 304 stand in stark contrast to the unbounded nature of the Proposed Funding Rule, which looks at all cross-border transactions among a foreign parent, foreign affiliates, and domestic-connected affiliates to unearth an indirect funding of a covered purchase. The Proposed Funding Rule thus imposes the heavy burden on the taxpayer to de-link these varied and potentially massive transactions among a foreign parent, foreign affiliates, and domestic-connected affiliates from any foreign affiliate stock repurchase from a third party. In the context of SIFMA members, evidencing the purpose of either an isolated related party stock purchase and sale under section 304 or identifiable inbound loans from controlled foreign corporations under section 956 is not commensurate with unpacking the enormous volume and variety of cross-border fundings made daily by financial institutions in the ordinary course of business and driven by client, operational, and regulatory demands and constraints (as explained below). Put simply, the Proposed Funding Rule is not comparable in scope or application to the conduit funding rules under sections 956 or 304 (which again, have their own authority questions).

4. Finally, SIFMA can understand extending section 4501(d) when the domestic-connected affiliate uses another foreign affiliate as an agent, nominee, or conduit to

[21] *See* Treas. Reg. § 1.956-1(b)(4); § 1.304-4(c).

purchase foreign parent stock from a third party and thus in substance is treated as "acquiring" such foreign parent stock under applicable case law.[22]

Such narrow circumstances appear to be essentially what the Downstream Rebuttable Presumption Rule targets.[23] Indeed, the Downstream Rebuttable Presumption Rule is narrowly drawn and more consistent with applicable conduit and agency case law to determine which party in substance "acquires" foreign parent stock for purposes of section 4501(d). Extending this agency or conduit notion, however, to the foreign parent or to additional transactions between the foreign parent and other foreign affiliates (as in Example 7) stretches far beyond the bounds of applicable agency or conduit case law or basic tax principles.

For these reasons, we believe that the Proposed Funding Rule as drafted exceeds the authority granted the IRS and Treasury in section 4501(f)(3) and (d)(1).

B. *The Proposed Funding Rule Raises Material Administrability Concerns*

SIFMA and several other commentators raised significant administrability concerns with respect to Notice 2023-2 and the Prior Funding Rule.[24] As currently drafted, the Proposed Funding Rule amplifies these administrability concerns for taxpayers and IRS examination agents. Indeed, in the context of any foreign-parented group in which cash moves seamlessly across borders, the Proposed Funding Rule, absent any requested exceptions or further guidance, imposes compliance burdens that far exceed any possible policy concern. SIFMA members simply do not know where to start or end the proper analysis under the Proposed Funding Rule within their global foreign banking group.

The Proposed Funding Rule requires two elements: (1) a funding by a domestic-connected affiliate of the foreign parent *by any means*, and (2) a purpose to fund, *directly or indirectly*, a covered purchase. As noted above, this rule has no temporal limits or required ordering of the foreign parent stock repurchase and funding. Any large multinational organization moves cash around the globe to meet operational and customer needs, whether part of a cash pooling arrangement, basic treasury operations, or other arm's length transactions. In such cases, basic cash movements could trigger the first element of the Proposed Funding Rule and taxpayers will need to prove to the satisfaction of IRS examination agents the absence of a subjective purpose to fund, directly or indirectly, a foreign parent repurchase – often on the basis of hindsight. Thus, whenever a foreign parent repurchase occurs, taxpayers will need to uniformly and properly compute any section 4501 tax due, and will need to scour records to ensure the absence of *any* indirect funding transaction at some indeterminate time before or after the repurchase. Proving a negative during an IRS examination or trying to memorialize all

[22] *See Commissioner v. Bollinger*, 485 U.S. 340 (1988); *Northern Ind. Pub. Serv. Co. v. Commissioner*, 115 F.3d 506 (7th Cir. 1997); *Merck & Co., Inc., v. United States*, 652 F.3d 475, aff'g sub. nom. S*chering-Plough Corp. v. United States*, 651 F. Supp. 2d 219 (D. N.J. 2009).

[23] *See* Preamble, 89 Fed. Reg., at 26,024 (noting that this rule "would apply only to a limited category of fundings and could be rebutted.")

[24] *See, e.g.*, Prior SIFMA Comment at 10; NYSBA Tax Section, Report on Notice 2023-2, at 29-30 (March 20, 2023); Institute of International Bankers, Comments on Notice 2023, at 4 (March 17, 2023) ("IIB Comment").

potentially relevant facts to substantiate the section 4501 return without any concrete guidelines is simply unworkable.

These administrability concerns grow exponentially in the context of foreign banking operations ("FBOs") and similar foreign-parented financial institutions. As explained in the Prior SIFMA Comment and similar comments, cash pooling and cash management operations represent the quintessential activity of financial institutions.[25] Financial institutions use thousands of intercompany funding transactions on a daily basis for customer, operational, regulatory, and other business reasons wholly divorced from any tax considerations or even internal tax department visibility.[26] Further, unlike physical cash pooling arrangement where there are generally one or two treasury centers, financial institutions move cash and assets globally on a country, regional, and global basis among dozens of entities, trading desks, and treasury centers to optimize liquidity, interest rate, credit, and currency risks as well as manage collateral and sweep excess deposits to the appropriate central banks.[27] Finally, these cash movements arise in many forms: overnight and short-term deposits, longer-term debt, internal TLAC ("total loss absorbing capacity") securities, repos, collateralized securities lending transactions and back-to-back derivatives, intercompany service, royalty, and purchase and sales transactions, and (less frequently) distributions.[28]

In the absence of concrete guidance regarding the scope of the Proposed Funding Rule, proving whether and to what extent these intercompany cash flows indirectly funded a foreign parent repurchase is infeasible and impracticable. Example 7's application of the Proposed Funding Rule would require tracking each and every one of these cash flows through the global group, and even transfers of cash equivalent securities could be caught by the Proposed Funding Rule if converted to cash by the foreign parent or a foreign related party at some time near a foreign parent repurchase. These intercompany transactions across the global group are generally netted, aggregated, and eliminated in consolidated financial statements and thus SIFMA members would need to undertake a tax-only process to untangle, disaggregate, reconstruct, and trace such flows from what is essentially raw data. In such case, the compliance burden demanded by the Proposed Funding Rule is overwhelming. Treasury and the IRS, however, refused to take into account this heavy and impractical burden when promulgating the

[25] *Id*. at 9

[26] *Id.*; *see also* IIB Comment at 3-4.

[27] Prior SIFMA Comment, at 9.

[28] *See* IIB Comment, 3-4, We note that, unlike most industries, capital and distributions on capital by a top-tier U.S. holding company ("Intermediate Holding Company" or "IHC") to its FBO parent are heavily regulated, and distributions must be approved by U.S. banking regulators at the IHC level and are considered by the foreign banking regulators in the jurisdiction in which the FBO parent resides. *See* IIB Comment at 6-8. Furthermore, cross-border dividends from the United States to an FBO often attract U.S. withholding tax (given the limited number of income tax treaties that eliminate U.S. dividend withholding taxes). In such case, it is difficult to see how any such distribution would ever be undertaken for the principal purpose of avoiding section 4501(d).

Proposed Funding Rule or otherwise provide any guidance with respect to the applicable scope of this rule.[29]

Taxpayers such as financial institutions and other large multinational corporations may respond to this uncertainty by making blanket identifications of large swaths of transactions as devoid of any principal purpose to fund a foreign parent repurchase. Blanket identifications, however, are generally disfavored, and sections 475(b)(2) and 1092(a)(2); are not consistent with the "wait-and-see" application of the Proposed Funding Rule in Example 7; and, in any event, may provide cold comfort at best in any IRS examination if a foreign parent stock repurchase does in fact occur.[30]

Further, beyond facing the need to document thousands of intercompany transactions in multiple forms on a daily basis, domestic subsidiaries of FBOs and other foreign financial institutions simply do not control the decisions of their foreign parents or control subsequent events that may accelerate or postpone an anticipated buyback of publicly traded shares by a foreign parent. Global capital needs and capital plans evolve over the course of a year (and over the course of multi-year periods) due to operational changes, business cycles, regulatory changes, or other facts and circumstances that require adjustments to the funding of the foreign parent or other affiliates or to capital more broadly. In fact, the U.S. tax group or U.S. treasury center of an FBO may distribute cash in the early part of the year with no express expectation of an FBO stock repurchase but then the FBO Board may decide later to use that cash for a repurchase, or use the cash to replenish reserves as part of its capital management, or lend the cash to an affiliate (and possibly back to the U.S. affiliate that distributed cash). Nothing in the Proposed Funding Rule or Preamble informs taxpayers regarding how to assess or establish whether section 4501(d) applies in such scenarios – other than to look at "facts and circumstances." One or more of these same scenarios can arise 2-3 years before or after a foreign parent stock repurchase or other covered purchase and potentially subject the domestic affiliate to section 4501(d) taxation. The absence of any guidance to more concretely assess potential taxation pursuant to section 4501(d) at the time of filing tax returns or during an IRS examination is unreasonable.

IV. Request

For all the reasons described above, SIFMA requests that Treasury and the IRS eliminate the Proposed Funding Rule and retain solely the Downstream Rebuttable Presumption Rule.[31] Alternatively, we are happy to work with Treasury and the IRS to limit the scope or provide additional guidance regarding the application and administration of the Proposed Funding Rule.

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[29] For the same reasons, SIFMA is also concerned that the Proposed Funding Rule will likewise frustrate the accrual of expense and the consideration of tax contingencies for financial statement purposes. Very generally, a liability for excise tax must be accrued when probable and that amount can be reasonably estimated. It is not clear how this can be done with high confidence under the proposed rulemaking.

[30] *See, e.g.*, Treas. Reg. § 1.446-4(d), § 1.1221-2(f)

[31] A narrowly tailored application of section 4501(d) in the United States may also mitigate or prevent double taxation of the same foreign parent stock repurchase as other countries move toward adoption of a similar stock buyback excise tax (as has happened in the Netherlands and is moving forward in Canada).

Please do not hesitate to contact me at paustin@sifma.org or (202)-962-7311 if you have any questions.

Respectfully submitted,

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