August 7, 2024

CC:PA:01:PR (REG-115710-22)
Room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C., 20044

Re: Excise Tax Final Procedural Regulations and Recent Supreme Court Case Law

To Whom It May Concern:

SIFMA[1] submits these comments in response to (1) recently finalized procedural regulations pursuant to section 4501, (2) certain administrative law cases decided by the U.S. Supreme Court (the "Court") and (3) the notice of hearing for the Proposed Computational Regulations (defined below) scheduled for August 27, 2024.[2] The relevant procedural and judicial history is as follows:

- On April 12, 2024, the Treasury and IRS published proposed regulations that would provide rules on procedure and administration applicable to the reporting and payment of the excise tax on repurchases of corporate stock imposed by section 4501 of the Internal Revenue Code of 1986 (the "Code") ("Proposed Procedural Regulations").[3]

- On the same day, the Treasury and IRS also published a separate notice of proposed rulemaking that would provide operating rules relating to the computation of the stock repurchase excise tax ("Proposed Computation Regulations").[4] On June 11, 2024, SIFMA submitted comments on the Proposed Computation Regulations ("June SIFMA Comment")

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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 *See* 89 Fed. Reg. 58306 (July 18, 2024).

3 *See* REG-118499-23, 89 Fed. Reg. 25829.

4 *See* REG-115710-22, 89 Fed. Reg. 25980.

contending that the Proposed Funding Rule contained therein (as defined in the June SIFMA Comment) purportedly implementing section 4501(d) was "unreasonably overbroad, and presents substantial compliance and administrability challenges."[5] We recommended the deletion of the Proposed Funding Rule and retention solely of the targeted Downstream Rebuttable Presumption Rule (as defined in the June SIFMA Comment).

- On June 27, 2024 and June 28, 2024, respectively, the Court decided two landmark cases that affect the Treasury's and IRS's regulatory decisions and process: *Loper Bright Enters. v. Raimondo*[6] and *Ohio v. Environmental Protection Agency*.[7]

    - In *Loper Bright*, the Court overruled *Chevron* and its doctrine of deference to agency rulemaking where statutory rules were ambiguous. Focusing its analysis on the text of the Administrative Procedure Act ("APA"), the Court held that *Chevron* deference was impermissible because it prevented courts from "decid[ing] all relevant questions of law, interpret[ing] constitutional and statutory provisions, and determin[ing] the meaning or applicability of the terms of an agency action."[8] As the Court held, courts "need not and under the APA may not defer to an agency interpretation of the law simply because a statue is ambiguous."[9] Instead, courts must engage in their own interpretation of the statute and determine the best reading because "[i]n the business of statutory interpretation, if it is not the best, it is not permissible."[10]

    - In *Ohio v. EPA*, the Court emphasized the obligation (as delineated in *Motor Vehicle Mfrs. Assn. v. State Farm*) of the governmental agency to consider all important issues and comments under the APA before issuing regulations or other rules, and to provide an explicit, contemporaneous rationale for the decisions that it makes on such issues. The Court held that "an agency cannot simply ignore 'an important aspect of the problem,'"[11] and refused to consider the EPA's post hoc response to a previously ignored comment. The Court's decision thus re-affirms the fundamental administrative law rule that agency actions must be reasonable and reasonably explained—and not "sidestep"—important aspects raised in comments.

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5 *Id*. at 2.

6 603 U.S. ___, 144 S. Ct. 2244 (2024).

7 603 U.S. ___, 144 S. Ct. 2040 (2024).

8 Slip Op. at 14.

9 *Id*. at 35.

10 *Id*. at 23.

11 *Id*. at 12

- On July 3, 2024, the Treasury and IRS finalized the Proposed Procedural Regulations in Treasury Decision 10002 ("Final Procedural Regulations").[12] The Final Procedural Regulations mandate that any taxpayer subject to section 4501 (including domestic subsidiaries of foreign-parented groups subject to section 4501(d)) with a taxable year ending after December 31, 2022 and on or before June 28, 2024, must report on Form 7208 (via attachment to Form 720) and pay any stock repurchase excise tax due by ***October 31, 2024*** (as opposed to December 31, 2024 as originally contemplated by the Proposed Procedural Regulations). The preamble to the Final Procedural Regulations states that the Treasury chose this earlier date "to facilitate the IRS's administration and enforcement of the stock repurchase excise tax and provide guidance to taxpayers as quickly as possible."[13]

In light of these recent developments, SIFMA respectfully supplements its previously submitted comments to highlight four points.

First, the June SIFMA Comment and other comments raised significant administrability concerns with the Proposed Funding Rule in general and with respect to foreign parented banking groups in particular.[14] 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 parented banking groups where cross-border funding transactions are integral to the core businesses of banking, lending, and finance. Given this, it is unclear how affected taxpayers can be reasonably expected to comply with an October 31, 2024 return filing date or mitigate risks of tax penalties and underpayment interest even if a filing is timely made. Considering the uncertainties here, SIFMA requests that the Treasury and IRS suspend any and all filing and payment requirements for taxpayers potentially subject to section 4501(d) and the Proposed Funding Rule until at least a year after the publication of final regulations.

Second, it is widely acknowledged that the recent Court decisions in *Loper-Bright* and *Ohio v. EPA* will significantly affect the administrative rulemaking process, including this one. The Court's ruling overturning *Chevron* deference in *Loper-Bright* and its instruction to lower courts to unearth the "best" interpretation of the relevant statute, along with the searching review of regulatory justifications dictated by *Ohio v. EPA*, strongly reinforce the analysis explained in our June SIFMA Comment. In our view, the Proposed Funding Rule does not represent the best interpretation of the statutory text of section 4501(d) and the

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12 *See* 89 Fed. Reg. 55045.

13 89 Fed. Reg., at 55048.

14 *See, e.g.,* American Bankers Association, Comment Letter on Proposed Rule Regarding the Excise Tax on Repurchase of Corporate Stock (June 10, 2024); Global Business Alliance, Comment Letter on Proposed Rule Regarding the Excise Tax on Repurchase of Corporate Stock (June 11, 2024); Institute of International Bankers, Comment Letter on Proposed Rule Regarding the Excise Tax on Repurchase of Corporate Stock (June 11, 2024); National Association of Manufacturers, Comment Letter on Proposed Rule Regarding the Excise Tax on Repurchase of Corporate Stock (June 11, 2024); New York State Bar Association, Comment Letter on Proposed Rule Regarding the Excise Tax on Repurchase of Corporate Stock (June 4, 2024); U.S. Chamber of Commerce, Comment Letter on Proposed Rule Regarding the Excise Tax on Repurchase of Corporate Stock (June 11, 2024).

accompanying preamble for the Proposed Funding Rule is too sparse to support its proposed scope and complexity. The Court in *Loper-Bright* stated that even when an agency acts under an express delegation of authority, there are still meaningful limits on the agency's authority because courts must review the relevant statute, "fix the boundaries of the delegated authority," and ensure that "the agency has engaged in 'reasoned decisionmaking' within those boundaries."[15] Despite some suggestions otherwise, the Proposed Funding Rule patently fails this standard.

Third, reflecting upon the June SIFMA Comment and other comments submitted, SIFMA emphasizes that our comments should be read with a focus on Treasury's exercise (or application) of rulemaking authority. Our June SIFMA Comment plainly acknowledges Treasury's authority to publish Treasury Regulations and other tax guidance. Two imports of our June SIFMA Comment are that (1) the Proposed Funding Rule is not narrowly tailored to identify tax-avoidance transactions (for example, by applying longstanding and well-established agency tax law concepts) and (2) the guidance as proposed unnecessarily encompasses enormous volumes of ordinary course transactions that lack a tax avoidance motive or even an observable relevancy to a stock buyback by a foreign affiliate.[16] All interested parties (i.e., taxpayers, tax preparers, tax auditors, etc.) would benefit from clear and administrable guidance that targets the hallmarks of excise tax avoidance (implementing the best interpretation of the blackletter statutory text of section 4501(d)) rather than blanket rulemaking that shifts the risks and burdens to taxpayers to prove that an intercompany transaction (and even a series of transactions over a period of years among group affiliates), directly or indirectly, did not fund a stock buyback by any foreign affiliate (i.e., require the taxpayer to prove out a negative fact).

Finally, SIFMA seeks clarification when applying the additional tier 1 capital rules to certain savings and loan holding companies. In particular, the capital adequacy rules for qualifying preferred stock as additional tier 1 capital are functionally the same for bank holding companies and savings and loan holding companies with significant insurance operations.[17] While SIFMA interprets the proposed exemption to apply to all types of additional tier 1 capital described therein, industry participants seek confirmation that the exemption includes additional tier 1 capital described in 12 C.F.R. § 217.608 (i.e., considering the insurance industry modifications). SIFMA thus requests that the Treasury and IRS clarify that Prop. Reg. § 58.4501-1(b)(29)(ii) (and related netting rule relief) exempts preferred stock qualifying as additional tier 1 capital for savings and loan holding companies subject to 12 C.F.R. § 217.601-608.

SIFMA is evaluating if it will testify in person or by telephone. Nonetheless, SIFMA requests that these comments be included as part of the administrative record and be considered as a supplement to our June SIFMA Comment.

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[15] Slip. Op. at 18.

[16] The June SIFMA Comment ultimately recommends elimination of the Proposed Funding Rule. Please see the full discussion in the June SIFMA Comment.

[17] *Compare* 12 C.F.R. § 217.20(b) *with* 12 C.F.R. § 217.601-608.

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

Respectfully submitted,

P.J. Austin

Vice President, Tax

Cc:

Aviva Aron-Dine, Acting Assistant Secretary (Tax Policy), U.S. Treasury Department

Shelley Leonard, Acting Deputy Assistant Secretary (Tax Policy), U.S. Treasury Department

Krishna Vallabhaneni, Tax Legislative Counsel, U.S. Treasury Department

Colin Campbell, Jr., Associate Tax Legislative Counsel, U.S. Treasury Department

Scott Levine, Acting Deputy Assistant Secretary (International Tax Affairs), U.S. Treasury Department

Lindsay Kitzinger, International Tax Counsel, U.S. Treasury Department

Marjorie Rollinson, Chief Counsel, Internal Revenue Service

Mark Schneider, Associate Chief Counsel (Corporate), Internal Revenue Service

Samuel Trammell, Office of the Associate Chief Counsel (Corporate), Internal Revenue Service

Peter Blessing, Associate Chief Counsel (International), Internal Revenue Service

Arielle Borsos, Office of the Associate Chief Counsel (International), Internal Revenue Service