March 11, 2025

U.S. Department of the Treasury
1500 Pennsylvania Ave NW
Washington, D.C. 20220

Re: 2024 Section 987 Regulations

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association (SIFMA)[1] submits these comments on the 2024 Final Regulations[2] and 2024 Proposed Regulations[3] recently issued under section 987.

These regulations are particularly important for SIFMA members given the significant impact of the matters they addressed on the business models of SIFMA members. It is with this context that SIFMA provides these comments to these regulations and looks forward to continuing to work with the Treasury Department and the IRS to further refine the implementation of the section 987 regulations in a manner that is most relevant to our industry.

I. Executive Summary

The United States Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") published proposed regulations under section 987 ("2023 Proposed Regulations") on November 14, 2023. SIFMA submitted comments to Treasury and the IRS suggesting numerous modifications to the 2023 proposed regulations. On December 11, 2024, Treasury and the IRS published the 2024 Final Regulations and the 2024 Proposed Regulations, respectively). SIFMA

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 TD 10016, December 11, 2024.

3 Reg. 117213-24 (Dec. 11, 2024).

appreciates Treasury and the IRS considering our comments and happily notes some of our recommendations were adopted in the 2024 Final Regulations. SIFMA recommended the addition of an elective regime to allow taxpayers hedging their foreign currency exposure associated with section 987 QBUs to eliminate the sourcing and separate limitation category asymmetries that can otherwise arise in relation to such hedging activity. In response, Treasury and the IRS introduced a new section 987 hedging transaction election ("Section 987 Hedging Transaction Election") in the 2024 Final Regulations.

As discussed in more detail below, SIFMA has some recommendations for modifications to the 2024 Final Regulations and the 2024 Proposed Regulations. Specifically, SIFMA recommends the following changes:

1. Expand the scope of foreign currency exposures covered by the Section 987 Hedging Transaction Election;
2. Allow taxpayers to take hedging activities conducted during pretransition periods into account when computing pretransition section 987 gain or loss;
3. Clarify intercompany transactions can qualify as section 987 hedging transactions;
4. Provide transition relief for hedging transactions that straddle the effective date of the Section 987 Hedging Transaction Election rules; and
5. Expand the scope of the frequently recurring transfer election in the 2024 Proposed Regulations to include intercompany lending transactions by banks and other financial entities.

II. Detailed Discussion and Recommended Changes

A. <u>Expand the scope of foreign currency exposures covered by the Section 987 Hedging Transaction Election</u>

<u>Discussion</u>

The 2024 Final Regulations added a new section 1.987-14 introducing a hedging election for taxpayers managing foreign currency exchange rate risk associated with their net investment in a section 987 QBU. This election allows the owner of a section 987 QBU to treat certain financial instruments as "section 987 hedging transactions," provided specific criteria are met. To qualify, the hedge must be entered into in the normal course of the owner's trade or business, aimed at managing foreign currency exchange rate risk related to the net investment in the section 987 QBU, and must be properly identified in the owner's books and records on the day on which the hedge is entered.

For a transaction to be considered a section 987 hedging transaction, several requirements must be satisfied:

1. <u>Identification</u>: The hedge must be clearly identified as a section 987 hedging transaction concerning the hedged QBU in the owner's records on the day on which the hedge is entered.

2. Current Rate Election: A current rate election must be in effect for the taxable year.
3. Mark-to-Market Accounting: Section 988 gain or loss related to the hedge must be accounted for under a mark-to-market method.
4. US GAAP Treatment: Foreign currency gain or loss on the hedge must be properly accounted for under U.S. generally accepted accounting principles as a cumulative foreign currency translation adjustment to shareholders' equity.
5. Section 987 QBU Owner's Hedging Transaction: The hedge must be entered into by the owner of the hedged QBU, not by the QBU itself.

The Section 987 Hedging Transaction Election effectively addressed the asymmetry in relation to hedging foreign currency exposure in section 987 QBUs when such exposure is accounted for under the US GAAP net investment hedging rules. However, taxpayers, including taxpayers in the financial services industry, often have significant foreign currency exposure in relation to section 987 QBUs not accounted for under the net investment hedging rules.

When a hedge is designated against a net investment in a foreign branch or subsidiary, the foreign currency gain or loss arising from the hedge must be properly accounted for under United States generally accepted accounting principles (US GAAP) as a cumulative foreign currency translation adjustment (CTA) within shareholders' equity. Determining what portion of a company's investment in a foreign branch qualifies as a "net investment" under US GAAP involves a careful evaluation based on functional currency, management intent, and the permanence of intercompany balances. Primarily governed by ASC 830 and ASC 815, a net investment in a foreign branch is identified as the portion of the branch's net assets (assets minus liabilities) whose foreign currency fluctuations impact the reporting entity's equity. This determination first requires that the branch's functional currency differ from that of the parent company, ensuring genuine currency exposure.

Critical to this assessment is the entity's intent and ability to indefinitely maintain these net assets in the branch. Intercompany transactions, such as advances or loans between the branch and parent, can be included in the net investment only if settlement is neither planned nor anticipated in the foreseeable future. Temporary funding arrangements, short-term intercompany loans, or receivables/payables expected to be settled soon are excluded from the net investment calculation.

In practice, companies must thoroughly document their intention and clearly delineate permanent versus temporary funding arrangements. Only permanent, long-term intercompany balances and equity-like commitments qualify as part of the net investment. Amounts determined not to be part of the net investment must be accounted for separately, typically with currency gains and losses recognized immediately in earnings rather than deferred in Other Comprehensive Income (OCI). Proper delineation ensures accurate hedge accounting treatment, aligning accounting results with the underlying economic realities and the company's risk management strategies.

When determining what portion of a company's investment in a foreign subsidiary qualifies as a net investment, similar principles apply, with additional consideration for equity versus intercompany debt. The net investment in a subsidiary always includes the parent's equity investment—its proportional share of the subsidiary's net assets (assets minus liabilities). This equity portion is translated at current exchange rates, with resulting currency fluctuations recorded in OCI.

Intercompany loans or advances to the subsidiary may also qualify as part of the net investment, provided they meet specific criteria. To include debt as part of the net investment, the parent must demonstrate and document clearly that repayment is neither planned nor anticipated in the foreseeable future. Such debt should have an equity-like nature, signifying a permanent commitment to maintain capital within the subsidiary.

Conversely, intercompany loans expected to be repaid, settled, or actively managed as monetary assets do not qualify as part of the net investment. These balances require immediate recognition of foreign exchange gains and losses in earnings rather than deferral in OCI. Also, items of gain and loss arising from hedging transactions in relation to such balances similarly are recognized in earnings rather than deferred in OCI. Proper documentation of intent and consistent application of this distinction ensures accurate accounting aligned with the economic realities and the company's foreign currency risk management objectives.

In contrast with the US GAAP rules governing the categorization of capital advanced to a section 987 QBU, be it a true branch or a DRE, the section 987 rules generally treat all such capital as equity. When determining the unrecognized section 987 gain or loss for a taxable year of an owner of a section 987 QBU, the amount utilized as the capital base or exposure amount for this calculation is the so-called “owner functional currency net value” or OFCNV. Generally, OFCNV of an owner relative to a section 987 QBU is calculated by computing the aggregate amount of assets attributed to the QBU and subtracting from that amount the aggregate amount of liabilities attributed to the QBU.[4] Importantly, the assets and liabilities utilized in this determination have been adjusted to conform to Federal income tax principles.[5] Accordingly, capital provided by the owner of the QBU forms part of the owner’s OFCNV relative to that QBU regardless of the form or US GAAP treatment of that capital.

Because the section 987 rules do not distinguish between debt and equity capital advanced to a section 987 QBU whereas the US GAAP rules for classifying such capital generally result in a bifurcation between net investment and other capital, taxpayers often have significant section 987 exposure that is not accounted for under the net investment hedging rules. Accordingly, without modifications to the Section 987 Hedging Transaction Election, as presented in the 2024 Final Regulations, would not afford such taxpayers with the ability to address the aforementioned asymmetries in relation to a significant portion of their section 987 exposure.

Recommendation

We recommend eliminating the requirement that hedges be treated as CTA adjustments to shareholder’s equity to qualify as section 987 hedging transactions. This change will help ensure the opportunity to eliminate the asymmetry targeted by the introduction to the Section 987 Hedging Transaction Election applies to all relevant section 987 exposures of a taxpayer. Also, the change will simplify a taxpayer’s ability to comply with the rules. Without this change, taxpayers, when applying the Section 987 Hedging Transaction election rules, would be required to bifurcate their section 987 exposure associated with a specific section 987 QBU between the portion corresponding to their net investment amount and any other portion. We believe that the

[4] Treas. Reg. 1.987-4(e).
[5] Treas. Reg. 1.987-2(b).

remaining requirements described in Treas. Reg. 1.987-14(b)(2) and the existing anti-abuse rule of Treas. Reg. 1.987-14(b)(3) would be sufficient to address any potential abuse, and that the risk of abuse or unanticipated outcomes would be low.

B. *Allow taxpayers to take hedging activities conducted during the pretransition period into account when computing pretransition section 987 gain or loss*

Discussion

Subject to our recommendation above concerning scope, the Section 987 Hedging Transaction Election included in the 2024 Final Regulations should be effective at eliminating the asymmetries that Treasury and the IRS agreed were inappropriate when section 987 exposures are appropriately hedged. However, many taxpayers who have hedged their section 987 exposures historically could still be impacted in the post-transition environment by such asymmetries in relation to the calculation of their pretransition section 987 gain or loss.

As part of transition to the section 987 regime established by the 2024 Final Regulations, a taxpayer is required to compute its pretransition gain or loss. As part of the calculation of as taxpayer's pretransition gain or loss, such taxpayer must determine its unrecognized section 987 gain or loss. Generally, a taxpayer determines its unrecognized section 987 gain or loss under the eligible pretransition method it has historically utilized or by utilizing a modified version of the general methodology for computing section 987 gain or loss in the 2024 Final Regulations.

A taxpayer that has hedged its section 987 exposure historically will likely have recognized section 988 taxable items in relation to the hedging transactions in pretransition taxable years. Such taxable items would likely be allocated and apportioned to the domestic source general category income. However, to the extent the relevant section 987 QBU has not had remittances or other section 987 recognition events, such taxpayer may be sitting on a significant unrecognized section 987 loss that would be allocated and apportioned to foreign source foreign branch category income when recognized. The effect of recognizing such losses would produce the asymmetry in the post-transition environment that we sought to eliminate by recommending the hedging election and Treasury and the IRS sought to eliminate by including the Section 987 Hedging Transaction Election in the 2024 Final Regulations.

Recommendation

To ensure the new section 987 regime established by the 2024 Final Regulations is free from asymmetries to the extent possible, taxpayers should be able to consider hedging activities they conducted during the pretransition period when computing their pretransition gain or loss. This could be achieved by adapting the requirements and the mechanics of the Section 987 Hedging Transactions Election to apply to pretransition hedging activities.

Adaptation of Requirements

As described above, the 2024 Final Regulations impose several requirements to be satisfied for a hedging transaction to qualify as a section 987 hedging transaction. Each requirement could be adapted to allow for application to pretransition gain or loss calculations. Each of the requirements could be adapted as follows (the CTA adjustment requirement has been omitted in light of our first recommendation):

1. Identification: The 2024 Final Regulations require taxpayers to specifically identify any section 987 hedging transactions with respect to a hedged section 987 QBU. In order to take pretransition hedging activity into account for purposes of calculating pretransition gain or loss, contemporaneous identification would not be possible.[6] However, the taxpayer may have identified the hedging transactions on a contemporaneous basis under section 1221 and such identification could be leveraged if deemed necessary. Additionally, taxpayers could still be required to identify any relevant hedging transactions for Treas. Section 1.987-14 purposes in their historical books and records by a specified deadline (e.g., the due date of the tax return for the first taxable year to which the 2024 Final Regulations apply).

2. Current Rate Election: While the current rate election cannot be made for prior years, a few options could be considered:

    a) Require an electing taxpayer to calculate their pretransition section 987 gain or loss as if they had the current rate election in place in all relevant taxable years.

    b) Eliminate the current rate election requirement when considering pretransition gain or loss calculations. The preamble to the 2024 Final Regulations indicated the reason for the current rate election requirement was to ensure matching in amounts between the hedge taxable item and the associated section 987 gain or loss. Specifically, the preamble states, "In the absence of a current rate election, gain or loss on a net investment hedge is unlikely to be comparable in amount to the owner's unrecognized section 987 gain or loss, and thus the rules of § 1.987–14 would not serve their intended function." However, it's not clear such matching is critical to ensuring the regs have their intended effect. If a hedge result is different than the section 987 item then the item with the smaller absolute value would control the extent of the effect of the rule. If the hedge taxable item was a $100 gain and the section 987 result was a $120 loss then only $100 of the section 987 loss would be impacted by the rule. Thus, imposing a current rate election requirement when applying these rules to the pretransition gain or loss calculation may not be necessary.

3. Mark-to-Market Accounting: This requirement can apply as is without modification.

4. Section 987 QBU Owner's Hedging Transaction: [see other discussion] This requirement may need some tweaking to account for the possibility a taxpayer may not have had a Treas. Reg. 1.1221-2(e)(2) separate entity election in effect for all relevant pretransition years to enable them to apply section 1221 to intercompany hedging transactions.

Adaptation of Mechanics

The mechanics of how the section 987 hedging transaction rule eliminates asymmetry would likely need to be adapted when applied to pretransition section 987 gain or loss calculations. The 2024 Final Regulations eliminate asymmetry by deferring recognition of the

[6] Contemporaneous identification would not be possible under Treas. Reg. Section 1.987-14, as this specific identification requirement was not created prior to the implementation of the Regulations. However, some taxpayers have specifically identified hedging transactions under Regulation 1.1221-1.

section 988 taxable item arising from the section 987 hedging transaction and reducing the amount of the associated section 987 gain or loss. Such a mechanic would not likely be practical when adapting the rule to apply to the calculation of a taxpayer's pretransition section 987 gain or loss given section 988 taxable items arising from pretransition hedging activities will have already been included in taxable income in prior years.

One possible way to adapt the mechanics of the section 987 hedging transaction rules when applying them to the calculation of the pretransition section 987 gain or loss would be to change the source and limitation category of the pretransition unrecognized section 987 gain or loss of the section 987 QBU to match that of the section 988 taxable item recognized in relation to the relevant hedging transaction.

Example 1: USP, a domestic corporation, owns a section 987 QBU (QBU) with a EUR functional currency. For each year USP has owned QBU, USP has hedged its long EUR exposure associated with QBU. In a pretransition tax year, USP recognized a $100 US source general category taxable gain associated with the hedging transactions it had entered to hedge its long EUR exposure associated with QBU. USP saw an increase of its unrecognized section 987 loss of $100 in relation to QBU during the same tax year. The hedging transactions qualify as section 987 hedging transactions. If USP elects to apply the Section 987 Hedging Transaction Election rules to the calculation of its pretransition section 987 gain or loss then rather than reduce the amount of the section 988 taxable item from the hedge recognized in a prior taxable year and the unrecognized section 987 loss in relation to QBU each by $100, USP would treat the unrecognized $100 section 987 loss as a domestic source general category loss when recognized. The effect of this approach is to match the source and limitation category of the section 987 taxable item to the section 987 hedging transaction's section 988 taxable item recognized previously.

C. *Clarify Intercompany Transactions can qualify as section 987 hedging transactions*

Discussion

As discussed above, the 2024 Final Regulations require a hedge to be entered into by the owner of a section 987 QBU (the "Owner Requirement"). The 2024 Final Regulations clarify if the section 987 QBU is owned by a member of a consolidated group, the hedge must be entered into by the member of such group that owns such QBU. This requirement can create problems given the additional requirements the hedging transaction be identified in a manner that meets the requirements of Treas. Reg. 1.1221-2(f)(4).[7]

Many taxpayers apply section 1221 and the regulations thereunder to their hedging transactions. Generally, such hedging transactions are identified under section 1221 to ensure they receive ordinary treatment rather than capital treatment. However, the default approach of the section 1221 rules when applied to a consolidated group is to treat all consolidated group members as a single entity. Accordingly, intercompany hedging transactions are not within scope of the section 1221 rules and a question arises whether intercompany hedging transactions can satisfy the identification requirement described above.

[7] Treas. Reg. 1.987-14(c)(1).

Taxpayers may centralize their market-facing hedging transactions in a single entity for various purposes including counterparty preferences, hedging efficiencies, and cost efficiencies. For example, a parent entity (Parent) may own multiple operating subsidiaries each with section 987 QBUs with foreign currency exposures to be hedged. If Parent is taking a centralized approach to hedging, it may require its operating subsidiaries to enter into intercompany hedging transactions with Parent and Parent will enter into back-to-back hedging transactions with unrelated counterparties. Such taxpayers may have concerns they cannot avail themselves of the Section 987 Hedging Transaction Election because they cannot satisfy the identification requirement in relation to their intercompany hedging transactions.

While taxpayers may avail themselves of the separate entity election under Treas. Reg. 1.1221-2(e)(2) whereby members of a consolidated group are treated as a separate entities for section 1221 purposes, this election may not be a practical option for taxpayers to ensure intercompany hedging transactions can qualify as section 987 hedging transactions. Generally, banks apply section 1221 based on the single-entity approach, i.e., all members of a consolidated group are treated as a single entity. This approach allows for consolidated risk analysis, more comprehensive and centralized hedging, and simplified documentation and compliance. Ideally, taxpayers would not be required to relinquish the benefits of the single entity approach to section 1221 to avail themselves of the Section 987 Hedging Transaction Election.

Recommendation

Modify Owner Requirement to require either the section 987 QBU owner or a party related to such person within the meaning of section 267(b) enter the hedging transaction when determining whether the hedging transaction constitutes a section 987 hedging transaction.

D. *Provide for transition relief for hedging transactions that straddle the effective date of the Section 987 Hedging Transaction Election rules*

Discussion

Taxpayers typically enter into hedges for specified periods of time and many will likely have entered into hedging transactions prior to the first taxable year to which the 2024 Final Regulations are effective. Such taxpayers may not be able to identify such hedging transactions as section 987 hedging transactions, given the regulations only apply to taxable years beginning after December 31, 2024 and have a contemporaneous identification requirement.

Recommendation

We recommend the adoption of rule whereby any hedging transactions entered into prior to the beginning of a taxpayer's first year beginning after December 31, 2024 can be identified as a section 987 hedging transaction as long as it satisfies all other relevant requirements for such treatment and such transaction is identified within a reasonable amount of time (e.g., 60 days) of the date of publication of a rule in the Federal Register allowing the taxpayer to do so. Only taxable items arising from the hedging transaction on or after the first day of a taxpayer's first taxable year beginning after December 31, 2024 would be taken into account when applying the mechanics of the Section 987 Hedging Transaction Election.

E. Expand the scope of the frequently recurring transfer election in the 2024 Proposed Regulations to include intercompany lending transactions

Discussion

The 2024 Proposed Regulations[8] provide an election under which taxpayers can translate a group of frequently recurring transfers (the "recurring transfer group") between a section 987 QBU and its owner using the yearly average exchange rate instead of the spot rate applicable on the date of each transfer.[9] The election is only available to taxpayers that have made the current rate election.[10]

Generally, a group of frequently recurring transfers is a group of frequently recurring transfers between a section 987 QBU and its owner (or another eligible QBU of the owner) that are made in the ordinary course of a trade or business.[11] However, only transfers made in connection with the sales of inventory, payments for services, or rent and royalty transactions can be included in a recurring transfer group.[12] As explained in the preamble, these types of transactions are specifically identified because they are likely to be ordinary business transactions for which the use of the yearly average exchange rate, rather than the spot exchange rates, would not cause significant distortions, and which could be burdensome if taxpayers were required to calculate at spot exchange rates.[13] Comments were requested as to whether additional types of transfers should be included in a recurring transfer group: specifically, intercompany lending transactions within banks.[14] The preamble to the 2024 Proposed Regulations expresses concern that it may be difficult to distinguish between ordinary course loans and extraordinary loans, and that banks could combine the two and thus manipulate their unrecognized section 987 gain or loss.[15]

Banks frequently utilize branch and DRE structures around the world for a variety of business reasons in the ordinary course of their operations. To ensure the smooth functioning of banking operations, banks must make many intercompany loan-type transactions and pay interest to entities within its structure on such transactions on a frequent (sometimes daily) basis. Because intercompany lending transactions are ordinary business transactions that banks must engage in, allowing such transactions to be included in the recurring transfer group would fall within the stated goal in the preamble of the 2024 Proposed Regulations of including "ordinary business transactions" in the group.

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8 Reg. 117213-24 (Dec. 11, 2024).
9 Prop. Treas. Reg. 1.987-2(f)(1).
10 *Id*.
11 Prop. Treas. Reg. 1.987-2(f)(2)(i).
12 Prop. Treas. Reg. 1.987-2(f)(2)(ii).
13 89 Fed. Reg. 99872, 99875 (Dec. 11, 2024)
14 *Id*.
15 *Id*.

While the average yearly exchange rate will differ from the spot exchange rates on each day, it is unclear why this difference should give rise to significantly greater concern than the differences in such rates on, for example, rent payments.

Example 2: Suppose that Bank A conducts intercompany lending transactions, and makes or receives interest payments on such transactions, nearly every day of the year. Suppose that Entity B makes rent payments, which qualify under the Proposed Regulations as part of its recurring transfer group, at the end of each month. There is no guarantee that the difference (i.e., the distortive effect) in the daily spot and yearly exchange rates Bank A uses would be greater than the difference between the daily spot (at the end of each month) and yearly exchange rates Entity B would have used. It could even be the case that Bank A achieves an even smaller distortive effect than Entity B. This is because, by conducting intercompany lending transactions nearly every day, the average of all of the daily spot rates used is more likely to approximate the yearly average rate than the average of the comparatively fewer number of daily spot rates that Entity B would have used. Thus, while Treasury's concern of using the difference in spot and average rates to achieve a distortive effect on a bank's section 987 gain or loss is well noted, it is not the case that intercompany lending transactions would necessarily give rise to a greater distortive effect than the types of transactions already permitted – and could in fact achieve a less distortive effect.

If banks cannot include intercompany lending transactions in their recurring transfer groups, they will be required to disaggregate and track every loan and every interest payment at the daily spot rates. Given the volume of intercompany lending transactions that large banks engage in, the administrative burden of tracking these transactions in this way would be high. Conversely, if banks were permitted to include intercompany lending transactions in their recurring transfer group, they could aggregate each intercompany lending position and calculate at just one rate – the yearly average rate – to comply with the 2024 Proposed Regulations. The administrative burden of this approach, as compared to the alternative, would be significantly lower, thus achieving one of the objectives stated in the preamble.

Treasury has indicated a concern banks might combine "extraordinary" intercompany lending transactions with those conducted in the ordinary course of business for the purpose of manipulating their section 987 gain or loss. As a practical matter, banks are subject to significant federal and state regulatory oversight including in relation to transactions with foreign branches and foreign DREs. However, if there are specific manipulations Treasury and the IRS are intending to protect against by excluding intercompany lending transactions of banks or other financial entities then we would advise adding an anti-abuse rule targeting such manipulations when removing the exclusion for intercompany lending transactions.

Including intercompany lending transactions in banks' recurring transfer group would allow banks to include certain transactions that are conducted in the ordinary course of their business, ease administrative burdens, and are not any more likely to create distortive effects due to the difference in spot and yearly average exchange rates, or by combining ordinary and extraordinary transactions, then the types of transactions currently permitted under the 2024 Proposed Regulations. For these reasons, we propose that intercompany lending transactions should be included in the recurring transfer group for banks.

Additionally, as part of fundamental asset liability management, the liquidity needs and activities of the investment/lending/deposit operations within a bank can be influenced by many factors resulting in spiking of liquidity activities around discrete events. For example, a large influx of short-term customer deposits at quarter ends, loan maturities or repayments, short-term funding for short-term increases in required levels of liquid assets, actual or pending law or regulatory changes and other significant market disruptions can lead to quarterly volatility in a bank's lending operations and related liquidity flows. As a result, banks could find themselves in violation of the so-called "50/80 test" contained in the 2024 Proposed Regulations as a result of their ordinary business activities. Prop. Treas. Reg. §1.987-2(f)(6), (the "50/80 test") is intended to limit the application of the recurring item exception by assessing whether a disproportionate amount of assets—defined as 50% or more of annual asset transfers occurring within a single quarter, or 80% or more within two consecutive quarters—has been transferred to or from a Section 987 QBU during a taxable year. If this threshold is crossed, the recurring item exception would generally not apply, potentially requiring recognition of currency gains or losses that would otherwise be deferred. The rationale behind this test is to prevent manipulation of currency gain or loss recognition through concentrated or timed transfers of assets. We think some form of relief, either automatic or discretionary, should be provided in relation to the 50/80 test. For example, perhaps a rebuttal option could be made available. Pursuant to this approach, the 50/.80 test has a presumption that transfers that trigger its application are intent on manipulating a section 987 outcome but that presumption can be rebutted by a taxpayer by filing a statement explaining the non-tax factors that led to the concentration of transfers resulting in a failure of the 50/80 test.

III. Conclusion

SIFMA appreciates the opportunity to provide comments to the IRS and Treasury on 2024 Final Regulations and 2024 Proposed Regulations, and we look forward to working with the government to modify these regulations in a manner that is most relevant and accommodating to the business models, day-to-day operations and regulation of global banks, broker dealers, and asset managers. Please contact Josh Wilsusen (jwilsusen@sifma.org) if you have any questions regarding this submission.

Respectfully Submitted,

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