

May 25, 2007

CC:PA:LPD:PR (REG-156779-06)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20044

Dear Sir/Madam:

On behalf of the Securities Industry and Financial Markets Association (SIFMA),¹ I am pleased to submit comments on the new proposed regulations providing guidance relating to the determination of the amount of taxes paid for purposes of section 901 (the "Proposed Noncompulsory Payment Regulations").

Thank you for your consideration of our views. Please do not hesitate to contact me (at 202-216-2031 or pmclanahan@sifma.com) or Edward Kleinbard of Cleary Gottlieb Steen & Hamilton LLP, SIFMA's outside counsel on this matter (at 212-225-2480 or ekleinbard@cgsh.com), if SIFMA can be helpful in any way as you proceed with your work in this area.

Sincerely,

Patricia McClanahan
Managing Director, SIFMA

Cc: Benedetta Kissel
Steve Musher
Barbara Felker
John Harrington
Bethany Ingwalson

¹ The Securities Industry Association merged with The Bond Market Association in November 2006 to become the Securities Industry and Financial Markets Association ("SIFMA"). SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

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SUBMISSION IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING REGARDING
THE DETERMINATION OF TAXES PAID FOR PURPOSES OF SECTION 901

I. INTRODUCTION.

A. The Proposed Noncompulsory Payment Regulations.

On March 30, 2007, the Internal Revenue Service (the "IRS") published a Notice of Proposed Rulemaking with respect to a regulation project titled "Determining the Amount of Taxes Paid for Purposes of Section 901" (REG-156779-06),² which project would amend Treasury regulation section 1.901-2(e) and -2(h) (the "Proposed Noncompulsory Payment Regulations").³

We are pleased to submit the comments of the Securities Industry and Financial Markets Association ("SIFMA")⁴ with respect to the Proposed Noncompulsory Payment

² 72 Federal Register 15081 (March 30, 2007).

³ Unless indicated otherwise, all section references herein are to the Internal Revenue Code of 1986, as amended (the "Code") or to Treasury regulations promulgated thereunder.

⁴ The Securities Industry Association merged with The Bond Market Association in November 2006 to become the Securities Industry and Financial Markets Association ("SIFMA"). SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

Regulations. This letter was prepared on behalf of SIFMA’s Committee on the Federal Taxation of the Securities Industry.

The Proposed Noncompulsory Payment Regulations contain two main provisions: (1) Proposed Treasury regulation section 1.901-2(e)(5)(iii), which is a grouping rule clarifying that the surrender of a loss from one member of an affiliated group to another will not by itself cause taxes subsequently paid by the surrendering affiliate to be deemed to be noncompulsory payments rather than creditable taxes; and (2) Proposed Treasury regulation section 1.901-2(e)(5)(iv), which provides a set of criteria defining certain “structured passive investment arrangements” that the IRS and Treasury Department believe to be abusive and with respect to which foreign tax credits will be disallowed. The Proposed Noncompulsory Payment Regulations provide that they will be effective “for foreign taxes paid or accrued during taxable years of the taxpayer ending on or after the date on which these regulations are published as final regulations in the Federal Register.”⁵

This comment letter addresses only the application of the Proposed Noncompulsory Payment Regulations’ effective date provision to Proposed Treasury regulation section 1.901-2(e)(5)(iv). This letter explains why we respectfully object to the retroactive application of section 1.901-2(e)(5)(iv) to foreign income taxes imposed on income earned in periods prior to the publication of the regulations in final form. We anticipate providing additional comments regarding substantive issues raised by Proposed Treasury regulation section 1.901-2(e)(5)(iv) in a second submission.

In brief, the positions taken by the Proposed Noncompulsory Payment Regulations represent a fundamental shift in the interpretation of the noncompulsory payment

⁵ Proposed Treasury regulation section 1.901-2(h).

rules, and adversely affect taxpayers that have planned transactions in compliance with the broadly-held prior understanding of those rules. In addition, the Proposed Noncompulsory Payment Regulations' effective date rule suffers from important technical deficiencies that in some cases would lead, in the absence of revision, to retroactive impacts stretching back far into the past, not merely to January 1, 2007.

Part II of this letter describes how the Proposed Noncompulsory Payment Regulations significantly depart from the established understanding of when putative foreign tax payments will be treated as noncompulsory payments. Part III argues that retroactivity would be unfair to taxpayers, and presents two examples of situations in which the retroactive effect of the Proposed Noncompulsory Payment Regulations would be significantly greater than we believe might have been intended. Part III then goes on to describe an apparent internal inconsistency between the Proposed Noncompulsory Payment Regulations and recently-published Proposed Treasury regulation section 1.901-2(f) (the "Proposed Technical Taxpayer Regulations").⁶ This uncertainty further militates against the retroactive application of these new rules.

B. Summary of SIFMA's Recommendations Regarding the Effective Date of the Proposed Noncompulsory Payment Regulations.

We believe that the Proposed Noncompulsory Payment Regulations interpret the concept of a noncompulsory payment in a novel manner, and apply that novel interpretation surprisingly broadly. Accordingly, they should be applied prospectively. We respectfully suggest, therefore, that final Treasury regulations be effective in general with respect to foreign payments (taxes) paid or accrued in taxable years of the entity on which foreign law imposes legal liability for such foreign payment (as determined under the principles of Treasury regulation section 1.901-2(f)) beginning after the date on which the regulations are published in

⁶ Proposed Treasury regulation section 1.901-2(f), REG-124152-06, 71 Federal Register 44240 (Aug. 8, 2006).

final form in the Federal Register. Alternatively, if more immediately effective (but still prospective) application of the new rules is thought necessary (at the price of increased complexity), then the final regulations could be made to apply with respect to “foreign payments” (taxes) of the entity on which foreign law imposes legal liability for such foreign payments (as determined under the principles of Treasury regulation section 1.901-2(f)) that are related (under Treasury regulation section 1.904-6(a)) to the taxpayer’s income accruing after the date on which the regulations are published in final form in the Federal Register.

In either case, a special rule should clarify that the “deemed paid” mechanism of section 902 would not be treated as a separate foreign payment (tax) for purposes of the effective date. As a result, in cases to which section 902 applies, the determination of creditability under the new rules would be made once, at the level of the foreign corporation in which the domestic corporation owns 10 percent or more of the voting stock, and which foreign corporation is the original entity on which foreign law imposed legal liability for such foreign payments (again as determined under the principles of section 1.901-2(f)).

In light of the importance of the Proposed Noncompulsory Payment Regulations and the substantial uncertainty over how to apply their effective date, we further urge the Treasury Department and the IRS to restate the Proposed Noncompulsory Payment Regulations’ effective date at the earliest possible occasion, so that taxpayers can plan their affairs to take into account the new rules that will apply.

II. THE PROPOSED NONCOMPULSORY PAYMENT REGULATIONS DEPART FROM PRIOR UNDERSTANDINGS OF NONCOMPULSORY PAYMENTS.

A. Background.

Section 901 permits a U.S. taxpayer to credit against its U.S. federal income tax the income and similar taxes paid or accrued to a foreign country or possession of the United States, subject to certain limitations. The purpose for the foreign tax credit is to mitigate the potential for double taxation when U.S. taxpayers conduct activities abroad that generate income subject to foreign taxation.⁷

Treasury regulation section 1.901-2(a)(2) defines a foreign levy as a tax for which a credit may be claimed if the levy is a “compulsory payment pursuant to the authority of a foreign country to levy taxes.” Treasury regulation section 1.901-2(e)(5) in turn provides rules for determining whether an amount paid is a “compulsory payment.” These rules provide generally that an amount paid is not a compulsory payment to the extent that it exceeds the amount of liability under foreign law for tax.

Historically, the rules of Treasury regulation section 1.901-2(e)(5) have been understood to target primarily the risk that a U.S. taxpayer doing business abroad, knowing that it could receive full credit in the United States for foreign taxes paid, even if wrongly levied, might rationally choose to make a gratuitous payment to a foreign government rather than undertake any effort to contest its foreign tax liability through foreign administrative procedures.⁸ To this end, Treasury regulation section 1.901-2(e)(5) provides that a putative tax payment does not exceed the taxpayer’s liability under foreign law for tax if the payment reflects a reasonable interpretation and application of the substantive and procedural provisions of

⁷ See *American Chicle Co. v. U.S.*, 316 U.S. 450, 451 (1942) (stating the purpose of section 131 the Revenue Acts of 1936 and 1938, predecessor to current section 901, “is to obviate double taxation”).

⁸ See Matthew A. Stevens, *IRS Says U.K. Tax Not Compulsory, But Taxpayers Need Not Agree*, 112 Tax Notes 1157 (Sept. 25, 2006).

foreign law (and applicable tax treaties), and if the taxpayer exhausts all effective and practical remedies, in both cases so as to reduce, over time, the taxpayer's reasonably expected foreign tax liability. These determinations traditionally have been considered to be "factual determination[s] to be made on a case-by-case basis."⁹

These principles are illustrated by six examples under Treasury regulation section 1.901-2(e)(5)(ii). Five of the six examples involve a taxpayer that either miscalculates its foreign tax liability or fails to pursue administrative or judicial remedies to obtain a refund for all or part of the foreign tax paid. The examples provide that, to the extent that the taxpayer's failure to pursue remedies might reasonably be excused, for instance because the cost of pursuing such remedies exceeds the expected benefit (taking into account the likelihood of success), the taxpayer will be considered to have made a compulsory payment, and thus to have paid a tax.¹⁰ To the extent that the taxpayer unreasonably overstated its foreign tax liability, or unreasonably failed to pursue effective and available remedies that might have resulted in a refund of the foreign tax, the taxpayer will be deemed to have made a noncompulsory payment to the foreign government and thus not to have paid a tax.¹¹

The sixth example illustrates the principle that a taxpayer is expected only to reduce its foreign tax liability "over time," and not to take every step that might reduce its current-year foreign tax liability at the cost of higher future taxes. The taxpayer in this example foregoes a current-year deduction of the full cost of newly acquired machinery in favor of an

⁹ FSA 1999-652 (Nov. 17, 1993) (noting that a payment would be deemed to be noncompulsory for failure to pursue competent authority procedures only when the particular facts suggest that such remedy would have been effective and practical); *see also* FSA 1998-58 (April 30, 1998) ("In all cases, the determination of whether an amount of tax paid is a noncompulsory amount and thus, a deduction in the amount of the U.S. foreign tax credit is a factual determination to be made on a case-by-case basis.").

¹⁰ *See* Treasury regulation section 1.901-2(e)(5)(ii) Examples (3) and (4).

¹¹ *See* Treasury regulation section 1.901-2(e)(5)(ii) Examples (1), (2) and (6).

election to depreciate the machinery over ten years. The regulations conclude that the taxpayer's election "merely shifts [the taxpayer's] tax liability to different years [and] does not result in a payment in excess of the amount" of the taxpayer's liability for foreign tax.¹²

Proposed Treasury regulation section 1.901-2(e)(5)(iv) would amend these regulations to treat as noncompulsory *per se* any "foreign payment" (that is, a purported tax payment to a foreign taxing authority) attributable to any "structured passive investment arrangement" that meets six specific conditions. We respectfully submit that the proposed rule sharply diverges from the prior consensus view of the scope and purpose of the noncompulsory payment rules. We therefore respectfully object to the retroactive application of the new understanding of that concept articulated in the Proposed Noncompulsory Payment Regulations.

B. Current Law.

The issue of whether a foreign payment is "compulsory" for purposes of the foreign tax credit rules has traditionally been analyzed within the framework of the taxpayer's business decisions, and not as a basis to challenge those decisions. In some ultimate sense, any income tax could be said to be voluntary, in that it can be levied against only those taxpayers that have taken affirmative steps to produce income or gains subject to the jurisdiction of the relevant taxing authority. So, too, in the case of the foreign tax credit, one could argue that the decision to conduct business abroad, or to derive income from foreign sources, is a purely voluntary decision, but that viewpoint, if carried to its logical extreme, would undercut the availability of the foreign tax credit in every case.

The relevant authorities in the foreign tax credit arena therefore have consistently applied a far narrower meaning to the concept of a noncompulsory foreign payment. This

¹² See Treasury regulation section 1.901-2(e)(5)(ii) Example (5).

section II.B articulates the consensus understanding prior to the Proposed Noncompulsory Payment Regulations of precisely what that narrower construction of the term was intended to encompass.

1. Origins of the “Noncompulsory Payments” Rule. The noncompulsory payments component of the foreign tax credit regulations traces its lineage to domestic cases dealing with the deductibility of contested state or federal non-income tax liabilities. For example, in *Cooperstown Corp. v. Commissioner*, the taxpayer paid a federal “capital stock” tax in 1937; that tax appears to have been applicable only to corporations engaged in a trade or business in the year in question.¹³ The taxpayer deducted this tax payment on its 1937 federal income tax return, which it filed in early 1938. About one month later, the taxpayer filed a claim for a refund of the capital stock tax, on the basis that it in fact had not been engaged in a trade or business in 1937. The taxpayer prevailed, and obtained a refund of the tax in 1939.

The Commissioner disallowed the 1937 federal income tax deduction that the taxpayer had claimed with respect to the now-refunded tax. The taxpayer argued that it was entitled under the principles of cash method accounting to claim a deduction for the tax in 1937, when the tax was paid, and in turn was required to recognize the refund of that tax as income in 1939.¹⁴

The Third Circuit agreed with the IRS, and held that it was within the government’s authority to disallow the deduction for 1937, because the 1937 payment represented only a “voluntary appraisal” by the taxpayer, which in fact was not “under a legal

¹³ 144 F.2d 693, 694 (3d Cir. 1944).

¹⁴ *Id.*

obligation for the payment at the time it was made.”¹⁵ A few years later, *Kenyon Instrument Co. v. Commissioner* arrived at a similar conclusion with respect to an accrual method taxpayer.¹⁶

Prior to 1980, neither the Code nor any Treasury regulation directly addressed the question of whether a purported payment of foreign income taxes should be treated as noncreditable if the tax was not a compulsory legal obligation of the taxpayer. Nonetheless, a series of administrative rulings and cases in the 1970s applied the principles of *Cooperstown* and *Kenyon* to the foreign tax credit arena. These rulings established that a foreign payment would be considered not to constitute a bona fide payment of tax, and thus not be creditable, to the extent that the payment did not reflect a legal liability of the taxpayer.¹⁷

For example, in Revenue Ruling 76-508,¹⁸ the IRS allocated income from a wholly-owned controlled foreign corporation to its U.S. parent company under the authority of section 482. As a result, at least under U.S. principles, the foreign subsidiary in fact had paid foreign income tax on another person’s income. The relevant tax treaty contained a competent authority procedure, by which means the U.S. taxpayer could have requested assistance to coordinate the tax due to the country in which its subsidiary was domiciled and to the United

¹⁵ *Id.* at 696.

¹⁶ 16 T.C. 732, 741 (1951) (holding, in part, that no “deduction is authorized for payment of that part of a tax for which there is no apparent liability”).

¹⁷ *See, e.g.*, Rev. Rul. 77-267, 1977-2 C.B. 243 (concluding that a taxpayer that had reasonably settled its refund claim with foreign authorities had sufficiently exhausted the effective and practical administrative remedies that the unrefunded portion would constitute a creditable legal liability for tax under the principles of *Cooperstown* and *Kenyon*); Rev. Rul. 76-508, 1976-2 C.B. 225 (concluding that foreign tax payments made with respect to income later adjusted pursuant to section 482, and with respect to which the taxpayer failed to seek a refund, constituted uncreditable “contributions” to the foreign government under the principles of *Kenyon*); General Counsel Memorandum 36722 (May 7, 1976) (same); LTR 7825006 (March 17, 1978) (concluding that a Swiss tax imposed upon liquidation of the taxpayer’s Swiss subsidiary constituted a creditable tax under principles of U.S. law, including the principles of *Kenyon*); LTR 7822001 (Jan. 26, 1978) (concluding that a tax imposed by the Canadian province of British Columbia on mining income constituted a creditable tax under principles of U.S. law, including the principles of *Kenyon*); PLR 7609101040A (Sept. 10, 1976) (characterizing foreign taxes paid in respect of income later adjusted pursuant to section 482 to be “a voluntary overpayment of taxes” and not creditable, with citations to *Cooperstown* and *Kenyon*).

¹⁸ 1976-2 C.B. 225, *amplified by* Rev. Rul. 80-231, 1980-2 C.B. 219 *and superseded by* Rev. Rul. 92-75, 1992-2 C.B. 197.

States. Neither the U.S. parent company nor its subsidiary pursued any administrative remedies to reduce the subsidiary's foreign income tax assessment in light of the IRS's section 482 adjustment. The IRS concluded that, because the taxpayer was on notice (through the section 482 adjustment) that there was a possibility of reducing its subsidiary's foreign tax liability, but chose not to pursue its available administrative remedies, the foreign tax attributable to the reallocated income would not be allowed as a foreign tax credit.

Similarly, the Tax Court in 1978 in *Schering Corp. v. Commissioner* relied upon domestic tax cases for its conclusion that the foreign tax credit rules required a taxpayer to pursue remedies to obtain a refund or reduction in foreign tax following a reallocation of income pursuant to section 482, but only to the extent that such remedies would reasonably be expected to be effective.¹⁹ One of the taxpayer's subsidiaries in *Schering* had sought a ruling from the appropriate foreign tax authorities, and had been informed that published authorities supported imposition of the foreign tax. Accordingly, the taxpayer was excused from further pursuing remedies that had no reasonable likelihood of success.

All of the authorities from this time period of which we are aware addressed fact patterns similar to Revenue Ruling 76-508 and *Schering*; that is, they adjudicated whether, in different circumstances, taxpayers reasonably applied foreign law and appropriately pursued available administrative or judicial remedies to reduce the amount of foreign income tax for which they had been assessed. None of these authorities suggested that a payment might be considered noncompulsory on the grounds that it could have been avoided by the choice of a different business form or location.

¹⁹ 69 T.C. 579, 601-02 (1978) (citing *Hart Furniture Co.*, 12 T.C. 1103, 1108 (1949) *rev'd on other grounds* 188 F.2d 968 (5th Cir. 1950)).

2. The 1983 Final Regulations. In 1979, the Treasury Department initiated the rulemaking process that ultimately produced current Treasury regulation section 1.901-2(e).²⁰ The first set of proposed regulations (the “1979 Proposed Regulations”) adopted the principle that, “in order to be a tax, payment of the charge must be compulsory.”²¹ The 1979 Proposed Regulations further provided that a foreign payment would be considered to be “not compulsory to the extent that it exceeds legal liability,” and explained by way of example that a payment might exceed legal liability if the taxpayer had not exhausted all “effective and practical remedies” with respect to the payment, or if the taxpayer had not taken advantage of “all available provisions of foreign law which would permanently reduce, with reasonable certainty, the legal liability to the foreign government.”²² In this respect, the 1979 Proposed Regulations could be said to follow closely the pre-1979 rulings and cases summarized above, by construing the compulsory payment issue to relate primarily to the taxpayer’s obligation to pursue administrative and judicial avenues to reduce the foreign taxes assessed against it. The 1979 Proposed Regulations did not suggest that the taxpayer’s choice in the first instance to subject itself to tax in a foreign jurisdiction could cause a payment of tax to be deemed to be noncompulsory.

In November 1980, the Treasury issued temporary regulations (the “1980 Temporary Regulations”).²³ Like the 1979 Proposed Regulations, the 1980 Temporary

²⁰ Proposed Treasury regulation section 1.901-2, 44 Federal Register 36071 (June 20, 1979).

²¹ Proposed Treasury regulation section 1.901-2(a)(2)(i) (1979).

²² Proposed Treasury regulation section 1.901-2(a)(2)(ii) (1979). The 1979 Proposed Regulations clarified that a payment would not be deemed to be noncompulsory simply because it resulted from a decision to shift possible future tax liabilities to the present, for instance by electing to depreciate property over the longest period permitted by foreign law. *Id.*

²³ Temporary Treasury regulation section 4.901-2, 45 Federal Register 75647 (Nov. 17, 1980). The 1980 Temporary Regulations were also issued as proposed regulations on the same date. *See* 45 Federal Register 75695 (Nov. 17, 1980).

Regulations provided that a foreign payment would not be a payment of foreign tax “to the extent that the amount exceeds liability under foreign law for income tax.”²⁴ Once again, the substantive provisions of the regulations gave no indication that a payment might be deemed to be noncompulsory on the ground that the taxpayer could have avoided the tax by choosing to conduct business in a different form or location. In fact, the 1980 Temporary Regulations introduced the explicit assurance (carried over to current Treasury regulation section 1.901-2(e)) that “[a] person need not alter its form of doing business or its business conduct to reduce its liability under foreign law for income tax.”²⁵

The 1980 Temporary Regulations did, however, include an example that implied, for the first time, that a payment could be deemed to be voluntary because it resulted from the taxpayer’s choice of how or where to conduct business. Example 14 provided:

A is a citizen of the United States and a resident of country X. Country X imposes no tax on gains from the sale of investment property. A travels to country Y, which imposes a 10-percent charge on such gains, to sell investment property. A had no significant purpose for doing so other than to avoid the rule of section 904(b)(3)(C). Under paragraph (f)(5) of this section, the amount paid by A to country Y is not income tax paid or accrued because A has altered his conduct to incur unnecessary liability to country Y.²⁶

This example has some similarity to the rules of Proposed Treasury regulation section 1.901-2(e)(5)(iv), in the sense that both propose to characterize as noncompulsory purported foreign tax payments made with respect to certain transactions where the amount of the liability is in fact compulsory, given the transaction into which the taxpayer entered, but where the taxpayer’s

²⁴ Temporary Treasury regulation section 4.901-2(f)(5) (1980).

²⁵ *Id.*

²⁶ Temporary Treasury regulation section 4.901-2(f)(9) Example 14 (1980). Section 904(b)(3) at the time provided that gain from the disposition of personal property outside the United States would be treated as U.S.-source gain for purposes of the foreign tax credit limitation, unless the gain was subject to foreign tax of 10 percent or more.

decision to enter into the transaction was motivated at least in part by tax considerations, including the availability of a foreign tax credit. Neither the 1980 Temporary Regulations nor the preamble thereto explained the basis for Example 14 or attempted to reconcile it with the regulations' equally clear statement that "[a] person need not alter its form of doing business or its business conduct to reduce its liability under foreign law for income tax."²⁷

Critically, the Treasury Department *abandoned* Example 14 in new regulations that it proposed in April 1983 (the "1983 Proposed Regulations").²⁸ In a report urging adoption of the 1983 Proposed Regulations, with revisions, the Tax Section of the New York State Bar Association ("NYSBA") discussed Example 14 at some length.²⁹ The NYSBA Report noted that the language of both the 1980 and 1983 Final Regulations, considered in light of Example 14, would apparently require a taxpayer to minimize its foreign taxes even at the cost of increasing its worldwide tax burden. According to the NYSBA Report, such a requirement would represent a significant departure from judicial and administrative authorities that had allowed taxpayers to make substantive elections under foreign law that might increase their foreign tax burden without jeopardizing the creditability of the foreign taxes.³⁰ The NYSBA Report nevertheless recommended that Example 14 be reinstated in the final regulations with language that would consider a payment of foreign tax to be compulsory "if the taxpayer has not altered his normal business conduct (*unlike* Temp. Reg. § 4.901-2(f)(9), *Example 14*) . . . [and if the payment] is

²⁷ Temporary Treasury regulation section 4.901-2(f)(5) (1980).

²⁸ See Proposed Treasury regulation section 1.901-2, 48 Federal Register 14641 (April 5, 1983).

²⁹ Committee on Foreign Activities of U.S. Taxpayers, Tax Section, New York State Bar Association, *Report on Proposed Foreign Tax Credit Regulations* (June 21, 1983) [hereinafter, "NYSBA Report"].

³⁰ See NYSBA Report at 26–28 (discussing *Gulf-Puerto Rico Lines, Inc.*, 61 T.C. 664 (1974) and Rev. Rul. 80-4, 1980-1 C.B. 161).

determined in a manner consistent with both the express provisions of foreign law and the normal practice of other taxpayers subject to the foreign tax.”³¹

After considering this comment and others, the Treasury Department promulgated final regulations in late 1983 (the “1983 Final Regulations”).³² The noncompulsory payment rule of current Treasury regulation section 1.901-2(e)(5) has remained unchanged in the 24 years since.³³ Like the 1980 Temporary Regulations and the 1983 Proposed Regulations, the 1983 Final Regulations provided that a taxpayer was required to interpret and apply foreign law in a manner that would reduce its liability for foreign tax over time, but was “not required to alter its form of doing business, its business conduct, or the form of any business transaction in order to reduce its liability under foreign law for tax.”³⁴ The 1983 Final Regulations contained the six examples explicating the noncompulsory payment rules that this submission has briefly summarized above; as previously explained, five of the six examples deal simply with the application of foreign law and the pursuit of administrative remedies, and the sixth addresses the distinction between permanent and timing differences.³⁵ The 1983 Final Regulations did *not*, however, reinstate Example 14.

An attentive taxpayer reasonably could conclude from this history that, by retaining the sentence quoted in the prior paragraph, refraining from reinstating Example 14, and giving as examples cases that were directly inspired by Revenue Ruling 76-508, *Schering*, and similar fact patterns, the Treasury Department had reaffirmed its decision to require taxpayers to

³¹ NYSBA Report at 28–29 (underlining replaced with italics).

³² Treasury Decision 7918, 1983-2 C.B. 113.

³³ The one amendment to the 1983 Final Regulations, in 1991, related to the subsidy rules of section 901(i). *See* Treasury Decision 8372, 1991-2 CB 338.

³⁴ Treasury regulation section 1.901-2(e)(5)(i).

³⁵ *See supra* notes 10 –12.

make tax elections and pursue available administrative or judicial remedies if doing so would permanently lower their foreign tax liabilities—but had consciously decided *not* to imply that taxpayers could be required to alter in any manner the form in which they conducted business or the form of any business transaction.

3. Post-1983 Guidance. The cases and administrative guidance following promulgation of the 1983 Final Regulations have generally focused on the sufficiency of taxpayers’ efforts to reduce foreign taxes imposed as a consequence of their business decisions, not the legitimacy of those decisions themselves.³⁶ As such, the post-1983 authorities are strikingly similar to those from the 1970s, in that in almost every case the relevant inquiry has been simply whether the taxpayer was sufficiently vigorous in pursuing the administrative and judicial pathways available to it to minimize the tax liabilities imposed on it in respect of the business structures and transactions that it adopted.

A Chief Counsel Advisory (“CCA”) issued in 2005 addressed the creditability of foreign payments made with respect to an entity that undertook a multi-step financing transaction involving a dual-resident hybrid entity.³⁷ Despite finding that the taxpayer “chose to subject itself to double taxation on the Country Y interest payments by becoming a resident of Country X according to that country’s domestic law,” the CCA did not advise that the foreign payments

³⁶ See, e.g., *Riggs National Corp. v Commissioner*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) (holding a payment of foreign withholding taxes by central bank counterparty pursuant to binding private letter ruling to be a creditable payment of foreign tax, notwithstanding contrary non-binding judicial authorities under foreign law); *IBM Corp. v. United States*, 38 Fed. Cl. 661, 675 (1997) (holding IBM pursued judicial remedies with respect to assessment of foreign tax sufficiently that payments with respect thereto were compulsory and creditable); Rev. Rul. 92-75, 1992-2 C.B. 197 (providing that an allocation of income by the IRS pursuant to section 482 constitutes notice that a refund or reduction of foreign tax could be sought, and that the amount of such possible refund or reduction will be treated as a voluntary payment if the taxpayer unreasonably fails to pursue the appropriate effective and practical remedies); FSA 200049010 (Aug. 22, 2000) (concluding a surcharge for late payment of taxes is not a compulsory payment); FSA 1998-58 (April 30, 1998) (concluding that section 1.901-2(e)(5) requires a taxpayer only “to exhaust all effective and practical remedies,” not all remedies under all circumstances”); FSA 1999-652 (Nov. 17, 1993) (same); FSA 1998-231 (March 12, 1992) (concluding that a taxpayer had sufficiently exhausted remedies, but that the claim for foreign tax credits might still be denied under the doctrine of “equitable recoupment”).

³⁷ Chief Counsel Advisory 200532044, 2005 TNT 156-9 (May 5, 2005).

could be deemed to be voluntary because they resulted from that choice. Instead, the CCA advised that the payments could be deemed to be voluntary on the ground that the taxpayer had failed to ask the competent authorities to resolve its dual-resident status and therefore had failed to exhaust the effective and practical remedies that were available to it.³⁸

If there was a general understanding that the 1983 Final Regulations embodied an implicit principle that a foreign payment could be said to be noncompulsory simply because that payment resulted from a choice that the taxpayer made with respect to its form of business or the form of a specific transaction, the 2005 CCA could have concluded that the foreign payments at issue were not compulsory irrespective of the taxpayer's exhaustion of remedies. We believe that a fair reading of the 2005 CCA is that it took an alternate approach because such a principle is in fact *not* implicit in the current regulations. This conclusion follows from the history of the 1980 Temporary Regulations' Example 14, the handful of cases and revenue rulings in the area, and from a straightforward application of the 1983 Final Regulations' assurance that a taxpayer is "not required to alter its form of doing business, its business conduct, or the form of any business transaction in order to reduce its liability under foreign law for tax."³⁹

³⁸ *Id.*

³⁹ Treasury regulation section 1.901-2(e)(5)(i); *see also* Stevens, *supra* note 8, at 1159 (observing that the "critical" phrase in the noncompulsory payment regulations obligating taxpayers to act "in such a way as to reduce, over time, . . ." their foreign tax liabilities "is so general as to be virtually meaningless."); *id.* at 1160 ("The noncompulsory payment regulations should generally be confined to the taxpayer's administrative actions with respect to the taxing authorities.").

The Service has recently released a CCA that addresses the noncompulsory payment rule in the context of the U.K. withholding tax on manufactured overseas dividends ("MODs"). *See* Chief Counsel Advisory 200622044, 2006 TNT 107-81 (June 5, 2006). The conclusion reached by this CCA, which has been controversial, *see, e.g.*, Stevens, *supra* note 8, at 1163-64 ("[T]he IRS's conclusion was not required from a technical perspective and was a considerable stretch from a policy standpoint."), rested on the regulatory requirement that taxpayers make such elections as might permanently reduce their liability under foreign law for tax, and did not challenge the form in which the taxpayer chose to conduct its business.

C. The Proposed Noncompulsory Payment Regulations.

Proposed Treasury regulation section 1.901-2(e)(5)(iv) provides that foreign payments with respect to certain “structured passive investment arrangements,” as defined by six formal criteria, will be deemed to be *per se* noncompulsory payments, and thus not payments of creditable taxes, irrespective of any underlying business purpose. The Proposed Noncompulsory Payment Regulations thus represent a dramatic change in the understanding of the noncompulsory payment rules. Previously, the question of whether a payment was noncompulsory was understood to inquire into the nature of taxpayer’s legal liabilities, and not to second guess the propriety of the taxpayer’s business decisions. Under the Proposed Noncompulsory Payment Regulations, however, the first inquiry must be whether a taxpayer is conducting its affairs according to a proscribed form. The difference between the inquiries is one of kind as well as of degree.

The preamble to the Proposed Noncompulsory Payment Regulations concedes that “often there is a business purpose for the financing or portfolio investment underlying” the structured passive investment arrangement, and acknowledges that in making such a purpose irrelevant the Proposed Noncompulsory Payment Regulations adopt a new exception to the well-established principle, dating back to the 1980 Temporary Regulations, that a taxpayer need not alter its form of doing business or the structure of any transaction in order to preserve the creditability of its foreign tax payments.⁴⁰ It is more accurate to say that the Proposed Noncompulsory Payment Regulations represent a *reversal* of this longstanding rule, insofar as

⁴⁰ See 72 Federal Register 15081, 15084 (March 30, 2007) (“The proposed regulations would retain the general rule in the existing regulations that a taxpayer need not alter its form of doing business or the form of any transaction in order to reduce its foreign tax liability. However, the proposed regulations would provide that, *notwithstanding the general rule*, an amount paid to a foreign country (a ‘foreign payment’) is not a compulsory payment, and thus is not an amount of tax paid, if the foreign payment is attributable to a structured passive investment arrangement.” (Emphasis added.)).

they treat a taxpayer conducting business in certain specified forms identically to a taxpayer that unreasonably failed to minimize its foreign tax liability by failing, for example, to pursue available administrative remedies.

III. THE PROPOSED NONCOMPULSORY PAYMENT REGULATIONS SHOULD NOT BE FINALIZED WITH RETROACTIVE EFFECT.

A. Retroactive Application of Novel Rules Is Not Appropriate.

The Proposed Noncompulsory Payment Regulations provide that they will be effective for “foreign taxes paid or accrued during taxable years of the taxpayer ending on or after the date on which these regulations are published as final regulations in the Federal Register.”⁴¹ If the Proposed Noncompulsory Payment Regulations are finalized in 2007, then the effect of this provision will be to apply the new rule in respect of calendar year taxpayers retroactively to January 1, 2007. For the reasons described in the preceding pages, we respectfully urge that this result would be unfair, in light of the radical differences between the Proposed Noncompulsory Payment Regulations and current law in their interpretation of the meaning of the compulsory payment rule.

Moreover, the Proposed Noncompulsory Payment Regulations in fact can apply with much greater retroactive effect than the drafters may have appreciated. In practice, the Proposed Noncompulsory Payment Regulations could easily reach income earned more than a year prior to the promulgation of final regulations, and perhaps indefinitely into the past.⁴² The

⁴¹ Proposed Treasury regulation section 1.901-2(h).

⁴² The preamble to the Proposed Noncompulsory Payment Regulations implies that the retroactivity may be inadvertent. After describing the effective date provision, the preamble states that “[n]o inference is intended regarding the U.S. tax consequences of structured passive investment arrangements prior to the effective date of the regulations.” 72 Federal Register 15081, 15086.

following two examples illustrate situations in which the Proposed Noncompulsory Payment Regulations might have a surprisingly extensive retroactive effect.

First, structured passive investment arrangements involving entities with different tax years may be exposed to greater retroactivity than arrangements involving entities that have synchronized tax years. For example, imagine that a U.S. taxpayer has a taxable year ending September 30th and participates in a structured passive investment arrangement that employs a foreign vehicle satisfying the criteria of Proposed Treasury regulation section 1.901-2(e)(5)(iv)(B)(1) (an “SPV”). The SPV is a true partnership for U.S. federal income tax purposes and uses a calendar tax year for both U.S. and foreign tax purposes. The foreign taxes imposed on the SPV with respect to income earned in calendar 2006 will be deemed to accrue no earlier than December 31, 2006, because that is when the liability for tax is fixed and the amount of the liability can be determined.⁴³ To the extent that a credit would be allowable to the U.S. party with respect to such foreign taxes, the credit would be allowable for the U.S. party’s taxable year ending on September 30, 2007.⁴⁴ As a result, if the Proposed Noncompulsory Payment Regulations were to be finalized earlier than September 30, 2007, they would apply in this example to foreign taxes imposed in respect of income earned as early as January 1, 2006. The retroactive effect of the regulations in this case will reach as much as 21 months before the regulations were published in final form.

As a second example, consider the application of the Proposed Noncompulsory Payment Regulations’ effective date rule to a controlled foreign corporation (a “CFC”) whose

⁴³ See Rev. Rul. 61-93, 1961-1 C.B. 390 (holding that taxes accrue on the last day of the tax year).

⁴⁴ Cf. Rev. Rul. 61-93 (holding that credits for Hong Kong taxes are allowable for a cash method U.S. taxpayer in the U.S. taxable year in which the Hong Kong tax year ends).

income does not constitute subpart F income.⁴⁵ That CFC could itself be an SPV within the meaning of the Proposed Noncompulsory Payment Regulations, but much more likely would be the participant in a lower-tier SPV.

If the CFC's earnings and profits are later distributed as a dividend to a U.S. corporation that is a 10-percent shareholder in the CFC, then under section 902 the U.S. shareholder will be deemed to have paid the proportional share of post-1986 foreign taxes paid by the CFC with respect to the earnings and profits being distributed as a dividend, and generally will be entitled to a foreign tax credit with respect thereto.⁴⁶ Section 902's "deemed-paid" mechanism treats the U.S. shareholder as paying the underlying foreign tax in the year that the dividend is received, not the year the foreign corporation paid the foreign tax liability. As a result, it is possible that a U.S. corporation could receive in 2007 (or 2008, for that matter) a dividend from a CFC in which it is a 10-percent shareholder and, if the Proposed Noncompulsory Payment Regulations are finalized before the end of the year, be denied a credit for foreign taxes levied against the foreign subsidiary's income stretching back as far as 1987 (or even earlier, in the event of a dividend exceeding the CFC's accumulated and undistributed post-1986 earnings and profits). In such cases, the Proposed Noncompulsory Payment Regulations would quite surprisingly reach income that had in fact been earned years earlier.⁴⁷

The preamble to the Proposed Noncompulsory Payment Regulations, after describing the effective date provision, states that "[n]o inference is intended regarding the U.S.

⁴⁵ For example, because the CFC's U.S. shareholders might have made a "high-tax election" to exclude from subpart F items of income subject to a high rate of foreign tax. See Treasury regulation section 1.954-1(d)(1).

⁴⁶ See section 902(a); Treasury regulation section 1.902-1T(d). Foreign taxes for 1986 and earlier years also could be reached by section 902's "deemed-paid" mechanism, in the event of a dividend distribution exceeding the CFC's undistributed post-1986 earnings and profits. See section 902(c)(6) (providing that dividends distributed by controlled foreign corporations shall be treated as made first from post-1986 earnings).

⁴⁷ This example appears to be problematic regardless of whether the relevant "taxpayer" for this purpose is the U.S. parent company or the CFC. See Section III.B, *infra*.

tax consequences of structured passive investment arrangements prior to the effective date of the regulations.”⁴⁸ If the Proposed Noncompulsory Payment Regulations are finalized so that they apply in the manner described above, however, the regulations will not simply raise an inference regarding the tax consequences of structured passive investment arrangements predating the effective date of the regulations, but could in fact *determine* the tax consequences applicable to income generated through such arrangements, with no limit to the extent of such retroactivity.

Finally, because the date of the promulgation of final regulations is unknown, taxpayers today cannot determine the scope of any retroactive tax for which they might be liable, and for which they will need to provide, both as a cash management and as a financial accounting matter. For example, if the Proposed Noncompulsory Payment Regulations are finalized in December 2007, the final rules will be retroactive for calendar year taxpayers (whoever they may be) for the previous 11 months, but will be effectively prospective for September 30th fiscal year taxpayers. And if the regulations, by contrast, are not finalized until January 2008, their retroactive impact again will be radically different, because the final regulations will not apply at all to the 2007 year of calendar year taxpayers.

B. Recent Comments Regarding Who Is the Relevant Taxpayer Further Argue for Fully Prospective Application.

The Proposed Noncompulsory Payment Regulations by their terms clearly have some retroactive impact (for example, to January 1, 2007, in the case of a calendar year U.S. parent company with an investment in a calendar year SPV—assuming in turn that the Proposed Noncompulsory Payment Regulations are finalized in 2007). The scope of that retroactivity, however, is surprisingly uncertain, as a result of recent confusion regarding whether the “taxpayer” addressed by the effective date provision is the foreign SPV or the U.S. taxpayer.

⁴⁸ 72 Federal Register 15081, 15086.

The Proposed Noncompulsory Payment Regulations provide that they will be effective for foreign taxes paid or accrued during taxable years “of the taxpayer,” without specifying whether that taxpayer is the U.S. party or the SPV.⁴⁹ When the Proposed Noncompulsory Payment Regulations were published, many observers reasonably concluded that the effective date provision referred to taxable years of the foreign SPV, rather than the U.S. person. Recent remarks by an IRS official, however, contradict that conclusion and suggest that the Treasury Department intends to make the final regulations effective with respect to taxable years of the U.S. owner of the SPV.⁵⁰ This unexpected interpretation is further reason to make the regulations apply prospectively.

Treasury regulation section 1.901-2(f) provides that, “[f]or purposes of *this section* . . . the person on whom foreign law imposes [liability for tax] is referred to as the ‘taxpayer’” (emphasis added). This “technical taxpayer” regulation was itself repropounded in late 2006, in considerably expanded form, in the Proposed Technical Taxpayer Regulations. The Proposed Technical Taxpayer Regulations by their terms also will apply to all of Treasury regulation section 1.901-2, which of course includes the noncompulsory payment rule of existing (and proposed) Treasury regulation section 1.901-2(e).⁵¹ Accordingly, the logical approach to the effective date provision of the Proposed Noncompulsory Payment Regulations is to interpret the word “taxpayer” in accordance with the specific definition consistently supplied by both current Treasury regulation section 1.901-2(f) and the Proposed Technical Taxpayer Regulations.

⁴⁹ Proposed Treasury regulation section 1.901-2(h).

⁵⁰ See Alison Bennett, *Government Said to Be Working to Maintain Balance in Foreign Credit Generator Rules*, 94 BNA Daily Tax Report G-1 (May 16, 2007) (quoting Bethany A. Ingwolson, Senior Counsel in the Internal Revenue Service’s Office of Associate Chief Counsel (International)).

⁵¹ Proposed Treasury regulation section 1.901-2(f)(1)(i) (“The person on whom foreign law imposes legal liability is referred to as the ‘taxpayer’ for purposes of this section . . .”).

Under the Proposed Technical Taxpayer Regulations, an SPV that is a corporation or a hybrid partnership is treated as an entity, and is therefore treated as the “taxpayer” in respect of foreign taxes imposed on the income thereof.⁵² Reverse hybrid entities also are treated as “taxpayers” under the Proposed Technical Taxpayer Regulations—in their case, effectively in respect of the foreign taxes actually imposed on the members thereof.⁵³ Finally, the owner of a disregarded entity, or the owners of a non-hybrid partnership, are treated as the taxpayers in respect of the foreign taxes actually imposed on the income of those entities.⁵⁴

The Proposed Technical Taxpayer Regulations are to be effective for “foreign taxes paid or accrued during taxable years of the taxpayer *beginning on or after January 1, 2007.*”⁵⁵ By contrast, the Proposed Noncompulsory Payment Regulations are to be effective “for foreign taxes paid or accrued during taxable years of the taxpayer *ending on or after* the date on which” final regulations are promulgated.⁵⁶

An IRS official recently acknowledged publicly that observers have interpreted the effective date provision of the Noncompulsory Payment Regulations in light of the Proposed Technical Taxpayer Regulations, but nevertheless argued that it was “certainly not” the IRS’s intention to make the relevant tax year that of the SPV rather than the U.S. party, and that “[i]t’s reasonable to think [the Proposed Noncompulsory Payment Regulations] should apply to the U.S. party’s tax year.”⁵⁷ To the contrary, we respectfully suggest that the most reasonable

⁵² *Id.* (general rule); Proposed Treasury regulation section 1.901-2(f)(3)(i) (hybrid partnership rule).

⁵³ Proposed Treasury regulation section 1.901-2(f)(2)(iii).

⁵⁴ Proposed Treasury regulation section 1.901-2(f)(3)(ii) (special rule for disregarded entity).

⁵⁵ Proposed Treasury regulation section 1.901-2(h), 71 Federal Register 44240, 44247 (Aug. 4, 2006) (emphasis added).

⁵⁶ Proposed Treasury regulation section 1.901-2(h), 72 Federal Register 15081, 15091 (March 30, 2007) (emphasis added).

⁵⁷ Bennett, *supra* note 50 (quoting Bethany A. Ingwalson, Senior Counsel in the Internal Revenue Service’s Office of Associate Chief Counsel (International)).

conduct to expect of taxpayers would be that they would interpret a technical term of art by reference to a preexisting regulatory definition that by its terms applied to the present case. Taxpayers accordingly have acted reasonably in relying on the plain language of the Proposed Technical Taxpayer Regulations to plan their affairs in light of the Proposed Noncompulsory Payment Regulations.

The recent suggestion that the term “taxpayer” has a different meaning for purposes of the Proposed Noncompulsory Payment Regulations’ effective date provision than it has under the Proposed Technical Taxpayer Regulations has significant consequences for the application of the Proposed Noncompulsory Payment Regulations, and constitutes an unfair surprise for taxpayers. Moreover, U.S. taxpayers today cannot know which interpretation of the proposed regulations eventually will prevail, and whether they should plan their affairs on the assumption that the effective date provision of the Proposed Noncompulsory Payment Regulations will relate to the taxable year of the SPV in a structured passive investment arrangement or to the taxable year of the U.S. owner of the SPV.

Finally, the uncertainty described in this section as to who is the relevant “taxpayer” arguably is compounded (or, more precisely, superseded) by the special statutory construction employed for section 902 deemed-paid credits. As described earlier, the current formulation of the Proposed Noncompulsory Payment Regulations’ effective date effectively puts in jeopardy section 902 credits in respect of taxes paid in past years, because the relevant income (and credits) is recognized in the year that the section 902 dividend is received. Even if the Proposed Noncompulsory Payment Regulations are finalized in a manner that clearly establishes that the term “taxpayer,” as used therein, has the same meaning as that given to the term by the Proposed Technical Taxpayer Regulations, the section 902 credit issue would

remain, because the effect of section 902 is to take the foreign taxes actually paid in prior years by a CFC (the “taxpayer” in the Treasury regulation section 1.901-2(f) sense) and to *deem* those taxes to have been paid by the U.S. shareholder in the year the associated dividend is received. Accordingly, regardless of the resolution of the ambiguity described in this section, the separate problem of the indefinite retroactive application of the Proposed Noncompulsory Payment Regulations to section 902 credits would remain.

IV. CONCLUSION AND RECOMMENDATION.

The Proposed Noncompulsory Payment Regulations adopt a novel interpretation of the noncompulsory payment component of the foreign tax credit rules. The magnitude of the Proposed Noncompulsory Payment Regulations’ rupture with the longstanding prior interpretation of the concept counsels in favor of prospectivity. To the extent that the Proposed Noncompulsory Payment Regulations might apply retroactively—which turns out to be a surprisingly great extent—the regulations represent an unfair surprise for taxpayers.

It is instructive that, when faced with a similar policy decision of designing an appropriate effective date, the drafters of the Proposed Technical Taxpayer Regulations elected to make those rules entirely prospective (at least relative to the date that the regulations originally were proposed). Here, the case for prospectivity is even more compelling. First, the Proposed Noncompulsory Payment Regulations represent a fundamental break with prior learning on the meaning of noncompulsory payments. Second, recent developments suggest that the IRS believes that the Proposed Noncompulsory Payment Regulations’ effective date rule employs the term “taxpayer” in a manner flatly contradicted by the Proposed Technical Taxpayer Regulations. And finally, the retroactive application of the new rules of the Proposed Noncompulsory Payment Regulations would have widely varying consequences for similarly-

situated taxpayers, depending on the resolution of who is the relevant “taxpayer,” the form of the SPV employed by the U.S. party (disregarded entity or hybrid partnership, for example), and complex permutations of differing taxable years of the U.S. party and the SPV that it employs, along again with the different possible legal forms for that SPV (as in our earlier example of the calendar year partnership in which a November 30th fiscal year end U.S. company is a partner).

We therefore respectfully suggest that final Treasury regulations be effective in general with respect to foreign payments (taxes) paid or accrued in taxable years of the entity on which foreign law imposes legal liability for such foreign payment (as determined under the principles of Treasury regulation section 1.901-2(f)) beginning after the date on which the regulations are published in final form in the Federal Register. Alternatively, if more immediately effective (but still prospective) application of the new rules is thought necessary (at the price of increased complexity), then the final regulations could be made to apply with respect to “foreign payments” (taxes) of the entity on which foreign law imposes legal liability for such foreign payments (as determined under the principles of Treasury regulation section 1.901-2(f)) that are related (under Treasury regulation section 1.904-6(a)) to the taxpayer’s income accruing after the date on which the regulations are published in final form in the Federal Register.

In either case, a special rule should clarify that the “deemed paid” mechanism of section 902 would not be treated as a separate foreign payment (tax) for purposes of the effective date. As a result, in cases to which section 902 applies, the determination of creditability under the new rules would be made once, at the level of the foreign corporation in which the domestic corporation owns 10 percent or more of the voting stock, and which is the original entity on which foreign law imposed legal liability for such foreign payments (again as determined under the principles of section 1.901-2(f)).

In light of the importance of the Proposed Noncompulsory Payment Regulations and the substantial uncertainty over how to apply their effective date, we further urge the Treasury Department and the IRS to restate the Proposed Noncompulsory Payment Regulations' effective date at the earliest possible occasion, so that taxpayers can plan their affairs to take into account the new rules that will apply.