SIFMA
Securities Industry and Financial Markets Association

March 24, 2010

The Honorable Max Baucus
Chairman
Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20515

The Honorable Sander Levin
Acting Chairman
Committee on Ways and Means
1102 Longworth House Office Building
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20515

The Honorable Dave Camp
Ranking Member
Committee on Ways and Means
1102 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Baucus, Ranking Member Grassley, Acting Chairman Levin and Ranking Member Camp:

RE: Transition Relief for Section 6045A[1]

The Energy Improvement and Extension Act of 2008 (P.L. 110-343) enacted new rules relating to broker reporting of customers' tax basis in securities sold or exchanged. On December 16, 2009, the Treasury Department issued proposed regulations to implement these new requirements. In particular, new Code section 6045A requires that certain transferors of securities furnish basis information on the transferred securities to the transferee broker ("transfer reporting"). The rules with respect to transfer reporting take effect on January 1, 2011. To date, however, final Treasury Regulations have not been issued. The Securities Industry and Financial Markets Association (SIFMA)[2] requests that you urge the Treasury and the Internal Revenue Service ("IRS") to provide transition relief for transfer reporting under Code section 6045A by delaying the current effective date for transfer statements until January 1, 2012. This request is consistent with SIFMA's comments in its February 8, 2010 letter to the IRS[3] ("SIFMA Letter"). We believe Treasury has the authority to delay the effective date, and

[1] All section references are to the Internal Revenue Code of 1986, as amended (the "Code").
[2] SIFMA brings together the shared interests of 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.
[3] See, Letter from Ms. N. Ellen McCarthy, Managing Director, SIFMA, to Mr. Stephen Schaeffer, Office of Associate Chief Counsel (Procedure & Administration), dated February 8, 2010, regarding the reporting of customer basis in securities transactions.

that a delay would further the legislative intent of assisting taxpayers and the IRS to ensure accurate and complete reporting of tax basis on federal income tax returns.

SIFMA is concerned that if brokers and applicable persons are required to send and receive transfer statements, effective for transfers beginning on January 15, 2011, inaccurate or incomplete basis information will be transmitted, resulting in excessive levels of corrected information returns (i.e., Form 1099-B), causing taxpayers to file amended tax returns. A one year postponement of the section 6045A effective date would ensure a much more manageable transition to the new cost basis reporting regime for reporting entities, the IRS and taxpayers. Such action would be consistent with prior actions where the Commissioner of Internal Revenue ("Commissioner") acted through regulatory or other published guidance to delay statutory effective dates because there was a significant tax administration purpose served by such postponement. Even if final regulations are issued by April 2010, there still would not be enough time prior to the current effective date to develop the external reporting systems needed to transmit transfer reports. As the SIFMA Letter points out,

> "We believe if brokers and applicable persons are required to send and receive transfer statements beginning January 15, 2011, many statements will not be sent in a secure, automated or standardized manner. This will result in a manually intensive and error-prone process for sending and receiving transfer statements, which could increase identity theft, and cause inaccurate and incomplete information to be furnished to customers and to the IRS. This will, in turn, result in excessive levels of corrected information returns (i.e., Form 1099-B), which will cause taxpayers to file amended returns….A delay in the effective date to January 1, 2012…would give industry sufficient time to develop systems that are needed to comply with the provisions of the [section] 6045A in a reliable, efficient and consistent manner."[4]

As discussed below, the IRS has taken remedial measures to limit the impact of Code provisions that may impair effective tax administration. The Commissioner also has undertaken similar remedial measures, at Congress' request, provided that such measures served the interest of effective tax administration. The SIFMA Letter demonstrates that Code section 6045A's January 1, 2011 effective date will significantly impair effective tax administration and, as such, a one year postponement would be consistent with the IRS and the Commissioner's past practice in similar circumstances.

Remedial Action – IRS and Commissioner's Past Practice

Recent examples of IRS remedial action are in the form of IRS notices, and three examples are offered below. In addition, the Commissioner recently agreed to a remedial measure, at Congress' request, because the measure served the interest of effective tax administration. The Commissioner's recent remedial measure is also explained below.

IRS Action

[4] SIFMA Letter.

Three recent examples of IRS remedial action in the form of IRS notices are detailed below. The situations addressed are in many ways analogous to those being encountered by the securities industry with regard to transfers of securities.

- IRS Notice 2007-54[5] (postponed effective date of certain amendments to section 6694(a)): On May 25, 2007, Congress passed the Small Business and Work Opportunity Act of 2007, which substantially amended the standards and penalty regime governing return preparers under section 6694(a). The amendments were statutorily effective on May 26, 2007. In Notice 2007-54, the IRS postponed the effective date of the amendments until January 1, 2008. The notice generally advised that tax return preparers would be subject to the pre-amendment rules for income tax returns due on or before December 31, 2007, even though the congressional amendments were supposed to be effective on May 26, 2007. According to the notice, transitional relief was warranted in the interest of effective tax administration. The notice notes, in particular, that: "The amendments…raise questions regarding activities representing preparation of a tax return, who is a return preparer…and how the statute applies to signing and non-signing preparers…Because [the amendments extend] the types of returns subject to the new provisions, changes are required to the relevant forms and publications. The Service must also alter existing procedures in order to process disclosures with certain forms and in electronic formats. Because the amendments to section 6694 are effective immediately for returns prepared after May 25, 2007, the Service and Treasury Department believe that effective tax administration requires transitional relief with respect to the new standards of conduct under section 6694(a)."

- IRS Notice 2005-94[6] (suspended certain calendar year 2005 requirements under section 409A): The American Jobs Creation Act of 2004, effective October 22, 2004, added section 409A (as well as amended relevant Code provisions) and imposed additional reporting and withholding requirements, which were generally effective for compensation amounts deferred after December 31, 2004. Due to the lack of guidance on how employers were to calculate relevant deferred compensation amounts and how employees were to report income without accurate data from the employers, professional payroll preparers, among others, requested that the IRS grant a waiver relative to certain filing and withholding requirements for the calendar year 2005 (which would enable the employers, employees, and IRS ample time to resolve the relevant open issues). In Notice 2005-94, the IRS granted the waiver, suspending for calendar year 2005 the Form W-2 and Form 1099-MISC reporting and wage withholding requirements of section 409A. It seems fairly clear that the IRS issued Notice 2005-94 in the interest of tax administration due to the confusion that persisted in the wake of the new requirements.[7]

- IRS Notice 2002-24[8] (suspended statutory reporting requirement under section 6039D): The IRS has used its notice authority to suspend the application of the statutory reporting

[5] 2007-2 C.B. 12, obsoleted by T.D. 9436, 2009-1 C.B. 268.
[6] 2005-2, C.B. 1208, superseded by Notice 2006-100, 2006-2 C.B. 1109.
[7] *See generally*, BNA, Daily Tax Report, No. 236, December 9, 2004, *IRS Suspends Section 409A Reporting, Withholding Requirements for 2005*, at p. G-2; BNA, Daily Tax Reports, No. 239, December 14, 2005, *Payroll Groups Welcome Deferral But Say Early Guidance Required for 2006*, at p. G-4.
[8] 2002-1 C.B. 785

requirement under section 6039D in the interest of effective tax administration. Notice 2002-24 suspended the filing requirement imposed on specified fringe benefit plans under Section 6039D. In an April 11, 2002 statement to Congress, Commissioner Rossotti explained the rationale for the suspension: "This is part of our ongoing commitment to reduce unnecessary taxpayer burden. Our effort will simplify tax administration and eliminate the filing of about 200,000 forms each year…During the suspension period, the IRS will review reporting requirements and electronic filing options."[9]

Commissioner Action

As noted above, in addition to the IRS undertaking remedial action in the interest of effective tax administration, the Commissioner has also agreed to implement remedial measures in certain situations. For example, Commissioner Shulman, at the request of leaders in the Senate Finance Committee and the House Ways and Means Committee[10], has agreed to suspend collection enforcement actions on section 6707A penalties for certain taxpayers until June 1, 2010.[11] Section 6707A imposes a strict liability penalty for a taxpayer's failure to disclose a reportable transaction. This strict liability penalty has had a significant impact on individuals and small businesses who have innocently participated in certain listed transactions, only learning during the IRS examination process that they participated in such transactions. As the penalty is a strict liability penalty, these individuals and small businesses have been assessed penalties that significantly exceed any tax benefit gained from their participation in the listed transactions.[12]

Notably, the June 12, 2009 Letter from congressional leaders to Commissioner Shulman requests the Commissioner "to use the discretion provided to the IRS with its effective tax administration authority to suspend efforts to collect [section] 6707A liabilities in cases where the annual tax benefits resulting from the listed transactions are less than $100,000 for individuals and $200,000 for other cases while Congress acts to remedy this situation."[13] In agreeing to abide Congress' request, the Commissioner pointed out that that a strict application of section 6707A requires IRS examiners "to assess penalties that are way out of line with penalties for other similar cases of non-compliance." Due to the incongruity between the tax penalties and the tax benefits, Commissioner Shulman advised Congress that: "Given your indication of a commitment to enact legislation to address this issue, and to provide Congress the opportunity, we will not undertake any collection enforcement action through September

---

[9] Statement by Commissioner of Internal Revenue Charles O. Rossotti before the House Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs (Paperwork and Burden Reduction, April 11, 2002).

[10] Letter from Senator Max Baucus, Chairman, Senate Finance Committee, Senator Charles Grassely, Ranking Member, Senate Finance Committee, Congressman John Lewis, Chairman, House Committee on Ways and Means, Subcommittee on Oversight, and Congressman Charles Boustany Ranking Member, House Committee on Ways and Means Subcommittee on Oversight, to Douglas Shulman, IRS Commissioner, dated June 12, 2009 ("June 12, 2009 Letter").

[11] Commissioner Shulman initially agreed to suspend collection until September 30, 2009. *See*, Letter from Douglas Shulman, IRS Commissioner to Congressman John Lewis, Chairman, House Committee on Ways and Means, Subcommittee on Oversight, dated July 8, 2009 ("July 8, 2009 Letter"). Thereafter, Commissioner Shulman agreed to extend the suspension thereafter, and, currently, the suspension is now effective through June 1, 2010. *See*, ILM 20100302.

[12] *See*, June 12, 2009 Letter.

[13] Id.

30, 2009 [now June 1, 2010], on cases where the annual tax benefit from the transaction is less than $100,000 for individuals or $200,000 for other taxpayers per year." [14]

Conclusion

As the above examples demonstrate, the IRS and the Commissioner are inclined to redress a Code provision that significantly impairs effective tax administration. Whether the remedial measure is in the form of an IRS notice or the Commissioner's letter to Congress the measure is generally a temporary suspension of a congressional mandate; the remedial action does not supersede the congressional mandate. Such action serves a significant tax administrative goal. For example, Notice 2007-54, by delaying the effective date of the section 6694(a) amendments, provided the IRS (as well as tax practitioners) with ample time to address the impact of the new standards and penalty regime. Similarly, Notice 2005-94 granted employers and employees temporary relief in the wake of the new section 409A statutory requirements, and Notice 2002-24 enabled the IRS to refine and streamline the relevant information return process. Finally, Commissioner Shulman's decision to abide Congress' request to suspend the collection of Section 6707A penalties for certain taxpayer's was based on Congress' commitment to address the problem, i.e., fundamentally, a tax administration problem, through legislative means.

Since the January 1, 2011 effective date for transfer statements under Code section 6045A is a significant threat to effective tax administration, SIFMA strongly urges congressional support of a one year postponement of the effective date. This is consistent with the remedial action undertaken by the IRS and Commissioner in similar situations.

If you have any questions or need more information, please do not hesitate to contact Ellen McCarthy at (202-962-7333) or by e-mail at emccarthy@sifma.org.

Sincerely,

N. Ellen McCarthy

Ellen McCarthy
Managing Director, Government Affairs
Securities Industry and Financial Markets Association

Cc:
Stephen Schaeffer, Office of Associate Chief Counsel

[14] July 8, 2009 Letter. *See* also, Section 7803(a)(2)(A)("The Commissioner [of Internal Revenue] shall have such duties and powers as the Secretary may prescribe, including the power to – administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party.").