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Re: Final Regulations Under Section 1446(f)

Dear Ladies & Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates your consideration of our comments on the final regulations under section 1446(f)[2] relating to transfers of interests in publicly traded partnerships ("PTPs") by foreign persons. We acknowledge the thought and time that went into drafting and finalizing these regulations and we greatly appreciate the continued engagement of the Treasury Department ("Treasury") and the Internal Revenue Service ("IRS") as financial institutions work to implement the regulations. While the final regulations did offer clarity on several ambiguities, numerous questions remain, and the regulations further present several operational challenges for withholding agents. SIFMA is seeking

[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] Withholding of Tax and Information Reporting With Respect to Interests in Partnerships Engaged in a U.S. Trade or Business, 85 FED. REG. 76910 (Nov. 30, 2020).

clarification and guidance on the following technical and practical matters so that our members may properly implement the regulations.

1. Additional time is necessary beyond the January 1, 2022 effective date

Financial institutions and withholding agents have spent the past few months following release of the final regulations working diligently to interpret the guidance and assess changes that must be made to systems, processes and procedures in order to implement the new rules. In doing so, several questions have emerged regarding ambiguities in the rules, which we will detail further in this letter, many of which require clarification before work implementing the regulations can continue. As SIFMA has previously noted, even absent further clarifying questions, regulations requiring significant operational changes, such as those promulgated under section 1446(f), typically require a minimum of 18-months implementation time.

The final regulations under section 1446(f) introduce a new U.S. withholding tax on gross proceeds paid to foreign persons, requiring brokers to update systems, processes, and procedures in order to withhold and report in accordance with the new rules. The withholding and reporting requirements diverge in many areas from withholding and reporting on U.S. source income under Chapters 3 and 4, and introduce significant changes for qualified intermediaries ("QIs") and nonqualified intermediaries.

The final regulations also provide that Forms W-8 and instructions to such forms will be amended to account for changes to section 1446. In particular, withholding statements associated with Forms W-8IMY will generally have to be amended in potentially significant ways, which could lead to delays in clients providing valid Form W-8IMY packages to withholding agents. Based on our experience, we do not expect the IRS to release amended Forms W-8 and instructions until late spring or the summer of 2021 at the earliest. Withholding agents will require time to analyze new forms and withholding statements, and to implement system builds to capture required data under section 1446. We furthermore expect a complete Form W-8IMY package can then take clients several months to complete. Withholding agents may require several additional months to validate these packages since the more complex withholding statements tend to involve considerable back and forth communications with clients. Other updated Forms W-8 (e.g., Forms W-8 with treaty claims, and Forms W-8ECI for U.S. branches of non-U.S. dealers) will also have to be collected and validated. Based on our experience implementing new and revised tax documentation, it would be extremely challenging to operationalize these new form validation rules by the end of 2021.

As we have detailed in previous letters, brokers have never before been required to withhold on gross proceeds from the sale of a publicly traded security held by a foreign person and have never had to report such transactions on Forms 1042-S. The difficulty of implementing withholding on gross proceeds paid to non-U.S. persons was acknowledged by the IRS and Treasury when they proposed to eliminate the requirement to do so under the Foreign Account Tax Compliance Act ("FATCA") at the end of 2018. In addition, executing/clearing brokers have not had to withhold on other brokers in the context of high volume delivery versus payment ("DVP") transactions. Given these novel requirements and the outstanding questions, brokers will need

enough time in order to design, build and implement the necessary system and procedural changes for this new withholding regime.

Accordingly, we respectfully request the Treasury and IRS grant an extension of the effective date of withholding under section 1446(f) with respect to transfers of interests in PTPs until January 1, 2023, so that the remaining questions can be clarified and brokers can implement the necessary system, process and procedural changes. While a mid-year effective date is generally more difficult to implement than a year-end change, at a minimum, SIFMA requests that withholding be delayed until July 1, 2022. It is important that a more realistic effective date timeline (or other effective relief from the January 1, 2022 withholding requirements) be promulgated to enable financial institutions to satisfy their withholding and information reporting obligations.

2. Qualified Notice Issues and Withholding Exemptions

    a. Confirmation that section 1446(f) withholding on PTP distributions is not required where the PTP does not issue a qualified notice or issues a deficient qualified notice

SIFMA is seeking written confirmation from the Treasury and IRS—as has been stated by IRS officials at recent events—that withholding on a PTP distribution pursuant to section 1446(f) is not required in instances where: (i) the PTP does not issue a qualified notice, or (ii) the qualified notice issued by the PTP does not specifically identify a portion of the distribution as in excess of cumulative net income ("CNI").

This interpretation is consistent with the rule set forth in the preamble and final regulations that says a broker that properly withholds on a distribution based on a qualified notice is not liable for underwithholding. The final regulations also state that a partnership that issues a qualified notice that causes a broker to underwithhold on a distribution will be liable for any underwithholding. However, the regulations are ambiguous with respect to a broker's responsibility in the absence of a qualified notice or in the case of a qualified notice that does not clearly indicate if any portion of a distribution is in excess of CNI. With respect to a distribution for which a qualified notice is not issued, it would appear that section 1446(f) withholding is not required based upon the application of the Treas. Reg. section 1.1446-4(d) default withholding rule, which requires withholding at the highest applicable income tax rate (currently, 30 percent if the payee is a corporation and 37 percent if the payee is not a corporation). Notably, the default withholding rule does not require 10 percent withholding under section 1446(f) in addition to withholding at that highest applicable income tax rate. With respect to PTPs that fail to allocate a portion of a distribution as in excess of CNI, Treas. Reg. section 1.1446(f)-4(c)(2)(iii) appears to provide that a broker is not required to withhold under section 1446(f), considering that "[i]f a broker properly withholds based on the qualified notice…the broker is not liable for any underwithholding on any amount attributable to an amount in excess of cumulative net income." We request that the language in Treas. Reg. section 1.1446(f)-4(c)(2)(iii) be revised, or other guidance issued, to clearly state withholding is not required in cases where a qualified notice is not issued or where no portion of the distribution is explicitly identified as in excess of CNI.

b. Reliance on qualified notice estimates

In order to facilitate timely reporting and withholding, SIFMA requests the IRS confirm our understanding that withholding agents may rely on qualified notices in instances where they include language that indicate amounts are estimated. We are of the view that it is appropriate for brokers to rely on reasonable estimates[3] in order to calculate the effectively connected taxable income ("ECTI") and fixed, determinable, annual, or periodic ("FDAP") income breakdown. Because of the nature in which partnerships operate, amounts may be estimates until the following year. Further, by analogy, the regulations provide that PTPs themselves are not liable for underwithholding by a broker when the partnership issues a qualified notice that incorrectly states the applicability of the 10 percent exception if the PTP made a "reasonable estimate" of the amounts required for determining the applicability of the 10 percent exception. Whether the qualified notices specify amounts as estimates or do not specify amounts as estimates (since all amounts could be estimates until the following year), inclusion of the word "estimate" or lack thereof should not preclude brokers from relying on the qualified notice.

c. Brokers should be able to treat certain U.S. exempt recipients as U.S. persons and exempt from section 1446(f) withholding, without having to obtain a Form W-9

Treas. Reg. section 1.1446(f)-4(b)(2) provides that a broker is not required to withhold with respect to a transfer of a PTP interest if the broker relies on a certification of non-foreign status from the transferor. The regulation further provides that for this purpose, "a certification of non-foreign status . . . means a Form W-9, Request for Taxpayer Identification Number and Certification, or valid substitute form . . .." This exception to section 1446(f) withholding is critical, as we expect the majority of clients holding PTPs organized inside the United States will be U.S. persons.

However, brokers and withholding agents may not always have, or otherwise need, Forms W-9 on file for certain types of U.S. clients that are considered "exempt recipients." Under Treas. Reg. section 1.6049-4(c)(1)(ii), payors are permitted to treat certain U.S. payees as U.S. exempt recipients, without requiring a Form W-9, if the payee is known to be an exempt recipient, either to the payor or more generally. For example, under Treas. Reg. section 1.6049-4(c)(1)(ii)(B), payors are permitted to treat an organization that is exempt under section 501(a) as an exempt recipient, without requiring a Form W-9, "if the organization is known to the payor to be a tax-exempt organization"; and under Treas. Reg. section 1.6049-4(c)(1)(ii)(C), a payor may treat an individual retirement plan of which it is the trustee or custodian as an exempt recipient without requiring a Form W-9.[4]

[3] Akin to the "reasonable estimate" rule for corporate distributions in Treas. Reg. section 1.1441-3(c)(2).

[4] Other categories treated as U.S. exempt recipients without needing to provide a W-9 include the United States and state or local governments; securities or commodities dealers; REITs and entities registered under the Investment Company Act of 1940; and common trust funds.

In addition, certain exempt recipients described in Treas. Reg. section 1.6049-4(c)(1)(ii) may not have obtained a U.S. taxpayer identification number ("TIN") necessary to complete a Form W-9. As such, requiring these categories of transferors to provide a Form W-9 for the narrow purpose of documenting the exception to section 1446(f) withholding is inconsistent with other sections of the Internal Revenue Code (the "Code") and may prove to be an onerous and confusing exercise, resulting in documentation gaps. Requiring brokers to withhold on clients that are clearly known to them to be U.S. exempt recipients, but for whom they do not have a Form W-9 on file, therefore may lead to unduly overwithholding.

Accordingly, we request clarification that brokers are not required to withhold if they obtain a certification of non-foreign status from the transferor, or if the transferor is known to the broker to be a U.S. person that is an exempt recipient described in Treas. Reg. section 1.6049-4(c)(1)(ii)(B), (C), (D), (E), (I), (J), (K), (L) or (N).[5]

d. Certain Form W-8EXP providers should be exempt from section 1446 withholding

Treas. Reg. section 1.1446-1(c)(2)(ii)(G) provides that the Form W-8EXP generally cannot be used by a withholding agent to reduce withholding on effectively connected taxable income ("ECTI") under section 1446. In connection with income from PTPs, this appears inconsistent with the application of other provisions of the Code. For example, SIFMA notes that foreign governments are generally exempt from tax on investment income from "other securities," including PTPs[6], and international organizations and governments of U.S. possession, are generally exempt from U.S. income tax[7], yet it is not clear there is a corresponding exemption from withholding in the section 1446 regulations. Treas. Reg. section 1.1446-2(b)(2)(iii) suggests a foreign partner's allocable share of partnership effectively connected taxable income ("ECTI") does not include income or gain that is exempt from U.S. tax, but it is unclear how this exemption should be documented if the Form W-8EXP cannot be relied upon for this purpose. We therefore request a technical correction to the final regulations.

In particular, under section 892(b), the exemption provided for international organizations[8] is extremely broad: "the income of international organizations received from investments in the United States in stocks, bonds, or other domestic securities owned by such international organizations, or from interest on deposits in banks in the United States of moneys belonging to such international organizations, or from any other source within the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle."

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[5] This rule would be consistent with the FATCA presumption rules, which permit a withholding agent to treat U.S. payees as other than a specified U.S. persons in the absence of documentation, if the withholding agent can apply the presumption rules of Treas. Reg. section 1.6049-4(c)(1)(ii)(B),(C), (D), (E), (I), (J), (K), (L), or (N). See Treas. Reg. section 1.1471-3(f)(3).

[6] See Treas. Reg. section 1.892-3T(a)(1)(i) and (3).

[7] See Treas. Reg. section 1.892-6T(a) and section 115(2).

[8] Note further that international organizations are not considered foreign corporations under the Internal Revenue Code but are defined separately under section 7701(a)(18).

Based on the above, we would expect foreign governments, international organizations and governments of a U.S. possession to be granted broader exemptions from withholding under section 1446, and we request that the IRS provide a technical correction clarifying that these entities may establish eligibility for such exemption from withholding on Form W-8EXP.

e. Allow withholding agents to use a late received Form W-9 as a cure

SIFMA requests clarification regarding the potential use of a late-received Form W-9 to "cure" any potential underwithholding from section 1446(f). Under Treas. Reg. section 1.1446(f)-5(b), a withholding agent is not liable for underwithholding to the extent that the withholding agent can prove the underlying tax from section 864(c)(8) has been paid. Although a late-received Form W-9 does not prove any payment of tax, it does establish that the section 864(c)(8) tax simply does not apply since the relevant person (transferor or broker) is a U.S. person. Consequently, SIFMA recommends that the IRS clarify that the late receipt of a Form W-9 may be used to cure any underwithholding from section 1446(f). We believe receiving a Form W-9 up to 30 days after the relevant transaction, or later with an affidavit, would be appropriate for curing potential underwithholding.

SIFMA also requests clarification that the IRS permit the use of a retroactive affidavit for a Form W-8 provided after the date of payment relating to section 1446. Currently, section 1446 does not explicitly provide for the clear use of an affidavit with a Form W-8. Both Treas. Reg. section 1.1441-1(b)(7)(ii) and section 1.1471-3(c)(7)(ii) allow the use of an affidavit for a Form W-8, and the IRS should make clear that such a retroactive affidavit is effective with respect to section 1446 withholding as well.

3. Scope of section 1446(f) Withholding

a. Application of section 1446(f) withholding to non-U.S. PTPs

SIFMA requests the Treasury and IRS provide a presumption for brokers that an entity that is organized outside the U.S. is not a PTP, absent knowledge to the contrary, such as the broker receiving a qualified notice from the entity. SIFMA is concerned about the ability of brokers to reliably identify entities organized outside of the U.S. that are PTPs (non-U.S. PTPs), considering that the U.S. tax classification of entities organized outside the United States is not readily and consistently available to the broker community at large (save for *per se* foreign corporations). In this regard, we believe that requiring section 1446(f) withholding on sales of all non-U.S. entities with an unknown U.S. tax classification would place undue burdens on brokers trying to identify non-U.S. PTPs. We understand anecdotally that the vast majority of publicly traded non-U.S. entities are not PTPs. This understanding is based upon the U.S. tax classifications of non-U.S. entities that are actually known to brokers, as well as the expectation that most entities that are publicly traded would be classified as corporations under the default entity classification rules considering the logical expectation that, in general, all of the owners of such entities would be expected to have limited liability.

Additionally, SIFMA requests that Treasury and IRS provide a presumption that a non-U.S. PTP does not have effectively connected income ("ECI"), absent the withholding agent receiving a qualified notice to the contrary, since we expect that only a narrow subset of the non-U.S. PTPs have ECI. Accordingly, we expect that a presumption of ECI, in the absence of any indication from the PTP to the contrary, would result in overwithholding in the majority of instances on sales of these PTP interests. In addition, such a presumption would be outside of international tax standards, as SIFMA is not aware of any taxing jurisdiction that imposes a default presumption that an entity organized outside of the taxing jurisdiction has a trade or business in that jurisdiction for purposes of imposing a withholding tax. SIFMA believes that such a far-reaching requirement would result in overwithholding, and that SIFMA's proposed presumption would rectify this concern.

b. Clarification that section 1446(f) does not apply to securities lending transactions and collateral arrangements

SIFMA raised the issue of loans of PTPs and the posting of PTPs as collateral in its August 2, 2018[9] comment letter, noting that publicly traded securities—including PTP interests—are included in standard commercial securities lending practices and collateral arrangements. At that time, we requested that the Treasury and IRS provide an exception to withholding under section 1446(f) for loans of PTPs and the posting of PTPs as collateral. Not providing this exception, we suggested, would potentially create a disruption of the securities lending and collateral markets. Additionally, while it is not settled law whether there is a recognition event under section 1001 by the securities lender at the time it loans such PTP, there are common law and IRS authorities supporting nonrecognition treatment.[10] We believe that the IRS and Treasury need not resolve this uncertainty, however. In particular, we note that the definition of "amount realized" in Treas. Reg. section 1.1446(f)-4(c)(2), which cross-references the definition of "gross proceeds" in Treas. Reg. section 1.6045-1(d)(5), should apply only to cash proceeds (see Treas. Reg. section 1.6045-1(a)(9)), and therefore a securities loan (or similar transaction) and securities posted as collateral should not generate an "amount realized" as defined for section 1446(f) purposes. The securities lender receives only a promise to receive back identical securities at a later date,[11] which should not be considered "gross proceeds" that would be subject to withholding tax. Any cash received by the securities lender is mere collateral, which also should not be treated as "gross proceeds." In addition, any collateral returned by the security lender upon the security borrower returning the borrowed security is clearly not, and should not be treated as, "gross proceeds." For all of these reasons, SIFMA continues to believe that securities lending transactions, as well as the posting, return and rehypothecation of collateral under securities lending or other transactions, are not

[9] Please see p. 11 of our comment letter dated August 2, 2018, *available at* https://www.sifma.org/resources/submissions/recommendations-on-implementation-of-section-1446f/.

[10] For a detailed discussion of these issues, see Report of the Tax Section of the New York State Bar Association on Certain Aspects of the Taxation of Securities Loans and the Operation of Section 1058, June 9, 2011.

[11] Section 1058(a) describes nonrecognition with respect to a transfer of securities under an applicable agreement in "exchange…for an obligation under such agreement, or on the exchange of rights under such agreement by that taxpayer for securities identical to the securities transferred by that taxpayer."

subject to withholding under section 1446(f). However, it would be helpful to receive clarity on this point, and accordingly, SIFMA requests confirmation that for purposes of section 1446(f), neither securities loans of PTPs nor the posting, return or rehypothecation of PTPs as collateral results in a disposition with gross proceeds that is subject to withholding under section 1446(f) for the reasons stated above.

4. Tax Form Requests

    a. Changes to forms and instructions

We appreciate that the IRS intends to issue revisions to the impacted forms and instructions to reflect the final regulations. SIFMA respectfully requests that forms and instructions be issued in draft form with sufficient time for financial institutions to review, provide comments and (after, and assuming the IRS provides clarifications) implement associated internal system and operational changes. In advance of updates to the forms and instructions, we recommend that instructions to Line 15 of the Form 1042-S be revised to make clear withholding agents are not required to identify Chapter 3 or Chapter 4 status codes or the country code for PTPs, given that PTPs are not required to provide such information to withholding agents.[12]

In addition, we are seeking information on the application of treaty benefits and to determine when and how treaty benefits can be validly claimed. To facilitate accurate withholding, SIFMA requests that the treaty tables included in Publication 515 be updated to include a column for section 1446.

    b. Clarification regarding "modified amount realized" and withholding statements

SIFMA requests that the "modified amount realized" concept set forth in the final regulations that are applicable to nonwithholding foreign partnerships be extended to nonwithholding foreign trusts.

SIFMA also requests clarification on the proper format of a nonwithholding foreign partnership or nonwithholding foreign trust Form W-8IMY withholding statement in order to take advantage of the modified amount realized provisions. Specifically, we request IRS clarify that in order to take advantage of the modified amount realized, a withholding statement need not necessarily allocate items of "partnership gain" (but may allocate partnership "income" more

[12] When a PTP interest is held by a nominee, and the PTP makes a distribution of ECI subject to section 1446(a) withholding, the Form 1042-S instructions for 2020 provide that lines 15a-15i should be completed with the name of the PTP and the applicable PTP data. In particular, we would request clarification on how to complete lines: 15b, Chapter 3 status code; 15c, Chapter 4 status code; and 15f, country code. In so clarifying, we would appreciate consideration of the following: (A) a U.S. PTP does not have an obvious Chapter 3 or Chapter 4 status, and per Publication 1187, we believe reporting "US" on line 15f would cause the submission to the IRS to be rejected (observing that while "US" can now be entered on line 12f starting with 2020 reporting, this seems to apply only to line 12f and not also to line 15f); and (B) a non-U.S. PTP will have a Chapter 4 status, but absent a Form W-8 the nominee will not know the status.

generally). We request that the IRS permit this flexibility in order to make the modified amount realized concept workable for withholding agents and their clients, ensuring that accounts remain documented, rather than forcing withholding agents to assume the burden of repapering all existing withholding statements.

5. Reporting Issues

    a. Clarification regarding coordination of withholding under sections 1441, 1446(a) and 1446(f) on the same portion of a distribution

SIFMA previously commented[13] on the proposed regulations requesting clarification regarding the coordination of withholding under sections 1446(f) and 1446(a), highlighting the operational complexity of simultaneously applying withholding on a PTP distribution as an allocation of income and as a disposition, and further noting that such treatment would likely result in excessive withholding. We understand that the final regulations continue to require withholding under section 1446(f) on a distribution made with respect to a PTP interest, and further provide an exception for adjusting the amount realized to the amount of a distribution in excess of CNI (that is, "cumulative," rather than "current," net income). However, concerns remain that there could be situations where a qualified notice identifies a portion of a distribution in whole or in part as U.S. source FDAP, ECI, and in excess of CNI. For example, a partnership may designate 100 percent of the income distributed as both ECI and in excess of CNI. Under the final regulations, we understand that a withholding agent would withhold 47 percent on a non-corporate client who provided a Form W-8BEN (37 percent under 1446(a) and 10 percent under 1446(f)). To further complicate matters, there could be situations where a partnership designates part of the income as U.S. source FDAP and therefore subject to section 1441 withholding, another portion of the income as ECI and therefore subject to section 1446(a) withholding, as well as in excess of CNI and therefore also subject to section 1446(f) withholding. Accordingly, we are requesting guidance on how to properly report on Forms 1042 and 1042-S in these situations where a portion of a single distribution is subject to withholding under sections 1441 or 1446(a) as well as under section 1446(f). Specifically, would withholding agents need to issue two or three separate Forms 1042-S reporting the same amount, resulting in duplicative reporting? If so, this would make it challenging to reconcile Form 1042-S filings to the withholding agent's Form 1042.

    b. Clarification on QI procedures for disclosing and nominee reporting under section 6031 for Disclosing QIs

We appreciate that the final regulations provide an exception to withholding for a nominee paying a distribution to a QI that has assumed primary withholding responsibilities or to a U.S. branch that is also a nominee for the distribution. We also appreciate that the preamble describes how a QI will be able to disclose specific payee information for a partner receiving a distribution or an amount realized. The upcoming "rider" to the QI Agreement will, presumably, clarify this new process. There are, however, certain specifics we would like to see confirmed:

[13] Please see our comment letter dated July 15, 2019.

- With respect to any disclosed partner, the regulations or other guidance should provide that the disclosing QI will not be subject to nominee reporting under section 6031.
- By disclosing sufficient information to the upstream withholding agent, the regulations or other guidance should provide that the disclosing QI will have no withholding responsibility under section 1446(a) and (f) and no related tax reporting responsibility (Form 1042-S or 1099).
- The regulations or other guidance should provide that there should be no limitation on the number of "tiers" of QIs that may make such a disclosure.

SIFMA believes that a disclosing QI should be able to shift the nominee reporting upstream, provided that the rider to the QI Agreement and the revised QI Agreement (effective January 1, 2023) require that the QI: (i) furnishes all of the information enumerated in Treas. Reg. section 1.6031(c)-1T, including a valid Form W-8 or W-9 with a TIN for the person on whose behalf the QI is acting, and (ii) establishes a segregated account with respect to each disclosed partner. For an omnibus account held by a QI, it would not be practicable for the upstream withholding agent to include all of the information required to be furnished to PTPs under -1T, such as the acquisition cost of interests in PTPs attributable to each person on whose behalf the QI is acting, considering that the withholding agent does not maintain this information in the ordinary course. Furthermore, we believe the TIN requirement should be made on a prospective basis, allowing QIs to rely on existing Forms W-8 until the end of their normal expiration period.[14]

* * *

We greatly appreciate your consideration of our remaining questions and requests and would be happy to discuss further if you have any questions. Please don't hesitate to contact me at jenoch@sifma.org or 202-962-7339.

Respectfully submitted,

Jillian Enoch
Vice President, Federal Government Affairs

[14] Please see our comment letter dated March 23, 2020, regarding additional QI issues, including the need to extend the responsible officer certification deadline to July 1 of the second year after the end of the certification period.