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Re: Final Regulations Under Section 1446(f) - Request for Delay

Dear Ladies & Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")¹ appreciates your consideration of our comments on the proposed regulations under section 1446(f) relating to

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

transfers of interests in publicly traded partnerships (“PTPs”) by foreign persons as well as our subsequent letter on the final regulations sent on February 24th, 2021 (attached, for reference). While we understand that you are still reviewing our most recent submission, SIFMA would like to reiterate the following concerns that our members view as in need of clarification in order to properly implement the regulations. We fully acknowledge and commend you for the work that went into drafting and finalizing these regulations as well as the continued engagement of the Treasury Department (“Treasury”) and the Internal Revenue Service (“IRS”) as our members work to operationalize the regulations.

Most importantly, SIFMA would like to again 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. If this full relief is not possible, we respectfully request that the application of the rules to delivery versus payment (“DVP”) transactions be extended by one year. With the January 1, 2022 effective date for withholding requirements fast approaching, there are still significant challenges and questions, both technical and practical, that present considerable operational challenges for withholding agents as our members make every effort to prepare for the effective date. This letter reiterates some of the many challenges in implementing the section 1446(f) regulations and explains the need for Treasury and the IRS to extend the effective date.

1. Delayed Effective Date Needed Due to Lack of Critical Guidance

As SIFMA has previously noted, final regulations requiring significant operational builds, such as those promulgated under section 1446(f), typically require a minimum of 18 months to implement. This timing can change if key components necessary to implement the rules are not made available. To that end, we have yet to see published drafts of the amended Forms W-8 or Form 1042-S and the related instructions to reflect the final regulations. Updated forms are necessary to redocument impacted clients and implement the new rules. Additionally, updating our validation processes and systems to reflect revised tax forms requires appropriate lead time. Thus, even if the updated forms are released immediately, it would be extremely challenging to redocument clients and make the required updates by the current effective date.

We are also awaiting the Rider to the Qualified Intermediary (“QI”) Agreement to clarify how a QI should disclose specific payee information for a partner receiving a distribution or amount realized. Similar to the concerns expressed above with respect to revised tax forms, QIs cannot accurately update their systems and processes without the Rider to the QI Agreement. SIFMA

therefore requests that Treasury and the IRS postpone the effective date of the section 1446(f) regulations by one year to January 1, 2023.

2. Relief for DVP Requirements

While SIFMA believes that the extension requested above is necessary, if such uniform relief is not possible, and assuming the critical guidance discussed above is released immediately, application of the rules to DVP transactions should be extended. Due to the nature of these novel requirements, brokers continue to face significant challenges in implementing documentation, withholding, and reporting for DVP trades. As previously noted, 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. Further, brokers have not previously had to withhold at all on other brokers in the context of DVP transactions. As a result, with no operational framework currently in place, we respectfully request, and urge you to strongly consider, extending these bespoke requirements by one year to January 1, 2023 with or without a broad extension of the regulation package.

3. Relief for Trades of Foreign PTPs and Non-PTPs

SIFMA would like to reiterate our request that the Treasury and IRS provide a presumption for brokers that an entity that is organized outside the U.S. is not a PTP, absent actual knowledge to the contrary, such as the broker receiving a qualified notice from the entity. SIFMA remains 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. Anecdotally, we understand that there is no vendor who can currently accurately and reliably identify all of these non-U.S. PTPs.

Further, SIFMA again requests that Treasury and IRS also provide a presumption that a non-U.S. PTP does not have effectively connected income, absent the withholding agent receiving a qualified notice to the contrary. In sum, we maintain our view that without such presumptions, such a far-reaching requirement would result in an excessive amount of overwithholding.

Our request is supported by the daunting -- and herculean -- task facing any broker attempting to identify a complete list of non-U.S. PTPs subject to withholding under section 1446(f). It is important to note that, under the new regulations, the sale of *any* non-U.S. PTP would be subject to withholding (unless the PTP issues a qualified notice excluding the sale from withholding). To identify all non-U.S. PTPs, a broker must evaluate all entities traded on: (1) an established securities market; or (2) a secondary market or the substantial equivalent thereof. See Treas. Reg. §§1.1446(f)-1(b)(6) and 1.7704-1(a). Focusing on just established securities markets, there are around 85 foreign securities markets today, and the number of issuers in these markets exceeds

43,000.² Consequently, *on an ongoing basis*, brokers would need to determine if over 43,000 issuers qualify as partnerships for U.S. tax purposes subject to 10 percent withholding. This would impose an undue burden on withholding agents that would exceed any potential loss to the fisc.

SIFMA's request for an actual knowledge standard would harmonize the section 1446(f) withholding requirements with long-standing principles of withholding agent liabilities³ and current safe harbors under §1.1441-2(d) (withholding obligations arise only when the withholding agent "has knowledge of the facts that give rise to the payment") .

* * *

We appreciate your consideration of our recommendations. As always, SIFMA member firms will continue to work diligently and in earnest to comply with all regulatory changes and requirements. If you have questions and would like to discuss this matter, please do not hesitate to contact me at wcardon@sifma.org or 202-962-7465.

Respectfully submitted,



Liam Cardon
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² See data available from the World Federation of Exchanges (<https://focus.world-exchanges.org/issue/june-2021/market-statistics>).

³ See Dale, "Withholding Tax on Payments to Foreign Persons," 36 Tax L. Rev. 49, 65 (1980-81) ("No one should be a withholding agent unless it is reasonable and sensible to charge the person with actual knowledge of, or a duty to inquire about, the facts that determine the taxability of a payment made by him."), citing *Bank of America NT & SA v. Chaco*, 79-1 U.S.T.C. ¶ 9232 (D. Guam 1979).