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Re: Notice 2023-8

Dear Ladies & Gentlemen:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ would like to thank the Internal Revenue Service (the “IRS”) for issuing Notice 2023-8 (the “Notice”) regarding Internal Revenue Code (“Code”) section 1446(f) withholding on transfers of interests in publicly traded partnerships (“PTP”), which adopts many of the recommendations that SIFMA made in prior comment letters.

Specifically, SIFMA welcomes the guidance and clarification provided in the Notice with respect to withholding on short sales of PTPs. However, SIFMA takes this opportunity to propose several recommendations for the Treasury Department and the IRS to consider in drafting regulations with respect to the provisions in the Notice regarding short sales.

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 one million employees, we advocate on 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).

In summary, SIFMA requests that the Treasury Department and the IRS issue regulations that provide that a broker is required to withhold under section 1446(f) on proceeds from short sales only: (1) if the taxpayer holds identical property in the same account from which the short sale is effected; and (2) to the extent of such property held long on the date of the short sale.

(1) Limit Withholding to Identical Property in Same Account

The Notice provides that withholding under section 1446(f) is required on proceeds from short sales “if on the date that the [short] sale...is entered on the books of the broker (i) the taxpayer holds substantially identical property (within the meaning of section 1233) in an account with the broker or (ii) the broker has actual knowledge that the taxpayer holds substantially identical property in an account with another broker.” Certain aspects of those provisions are not administrable by brokers.

First, withholding agents' withholding and information reporting systems are not currently designed to withhold or report based on the identification of “substantially identical property” because this is not required by any specific existing withholding or information reporting rules. For example, Treas. Reg. § 1.6045-1(d)(7)(v) specifically provides that a broker is not required to apply section 1233(b)(2) (regarding effect of short sale on holding period of substantially identical property) for purposes of Form 1099-B reporting. In addition, brokers must apply the wash sale rules only if both the sale and purchase transactions (1) are of identical securities, i.e., have the same CUSIP number, and (2) take place in the same account. See Code section 6045(g)(2)(B)(ii) (“the customer's adjusted basis shall be determined without regard to section 1091 (relating to loss from wash sales of stock or securities) unless the transactions occur in the same account with respect to identical securities”); Treas. Reg. §§ 1.6045-1(d)(6)(iii); 1.6045-1(d)(7)(ii). Accordingly, any withholding or reporting required other than with respect to identical property within the same account would necessitate a manual override, which may be subject to operational error, or significant system developments to apply automatically. Therefore, we request that brokers only be required to withhold on proceeds from short sales if the broker holds identical property, i.e., a security with the same CUSIP number, in the same account in which the short sale is effected.

Second, updating withholding and information reporting systems to identify “substantially identical property” is not feasible because identifying such property requires a facts and circumstances analysis,² whereas withholding and information reporting systems generally require bright line determinations. As noted above, Congress and Treasury appreciated this concern when drafting the Form 1099-B cost basis reporting rules, and accordingly, brokers have never had to determine whether or not property is substantially identical. Even if brokers could undertake such an analysis, which we question, brokers would likely come to different conclusions on whether a particular property is “substantially identical,” resulting in inconsistent withholding practices across the industry and in overwithholding by brokers who act conservatively given their joint and several liability for the withholding tax.

(2) Limit Withholding to the Extent of Property Held

We believe that the Notice, which provides that withholding would be required on proceeds of a short sale “if the taxpayer holds substantially identical property,” should be interpreted to require withholding on the proceeds of a short sale only to the extent of the taxpayer's long position in the PTP on the date of the short sale. For example, consider a taxpayer who holds long 100 units of a PTP and sells short 200 units

² The primary authority, Treas. Reg. §1.1233-1(d)(1), provides that the “term ‘substantially identical property’ is to be applied according to the facts and circumstances in each case.”

of the PTP. In that situation, for purposes of section 1233, the positions are “substantially identical” only to the extent of 100 units and the “appreciated financial position” pursuant to the constructive sale rules in Code section 1259(a)(1) consists of 100 units, so the gain, if any, recognized on the short sale would be limited to the gain on 100 units that the taxpayer holds long. Consistent with the substantive income tax treatment, withholding should be limited to the proceeds from such short sale attributable to 100 units. Because this is not explicitly provided for in the Notice, we believe that Treasury and the IRS should clarify this point in the Regulations.

We appreciate your consideration of our recommendations. If you have questions and would like to discuss this matter, please do not hesitate to contact me at jsok@sifma.org or (202) 962-7399.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Justin Sok". The signature is written in a cursive, flowing style.

Justin Sok
Managing Director, Tax