December 13, 2023

The Honorable Lily Batchelder
Assistant Secretary (Tax Policy)
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Michael Plowgian
Deputy Assistant Secretary (International
Tax Affairs) U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable William M. Paul
Acting Chief Counsel and Deputy Chief Counsel (Technical)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Extension of Transition Period for QDP Reporting (Notice 2022-30)

Dear Ms. Batchelder and Messrs. Plowgian and Paul:

On April 20 and August 28, 2020, the Securities Industry and Financial Markets Association (SIFMA)[1] submitted comment letters to Treasury and the IRS (together, "Treasury") on the qualified derivative payment ("QDP") reporting requirements in Section 1.59A-6(b) of the final regulations under Section 59A[2] (the "Final Regulations," and the "QDP Reporting Requirement"). For your convenience, copies of those comment letters are attached.[3]

Treasury has included regulations with respect to the QDP Reporting Requirement in the 2023-2024 Priority Guidance Plan. We are gratified that Treasury is actively considering how best to address the issues that we raised in our earlier comment letters. In those letters, we

[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] Except as otherwise indicated, all "Section" references refer to sections of the Internal Revenue Code of 1986, as amended (the "Code"), or to sections of the Treasury Regulations promulgated thereunder.

[3] Capitalized terms used and not otherwise defined herein are used as defined in the original letter dated April 20, 2020.

requested that Treasury clarify, in the form of revised final regulations, a revenue procedure or another type of written authoritative guidance that mark-to-market gains and losses for the securities leg of an intercompany securities lending or borrowing transaction not be subject to the QDP Reporting Requirement. We detailed the technical and policy grounds for why Treasury should issue such clarification, including that (i) mark-to-market losses on the securities leg of an intercompany securities lending or borrowing transaction are not payments to foreign related parties, and therefore should not be included in QDP reporting (including through operation of the BEAT Netting Rule), and (ii) including mark-to-market gains and losses on such transactions in the aggregate QDP amount that is reported on Form 8991 would affirmatively *degrade*, not enhance, the QDP information that the government receives, because the inclusion of such gains and losses would result in a number that, depending on the facts, may be either over- or under-inclusive of the actual statutorily-defined aggregate QDP amount that should be reported to the government. For these and the other reasons set forth in the letters, we continue to firmly believe that Treasury should clarify the QDP Reporting Requirement as we have requested.

In addition, in Notice 2022-30,[4] Treasury announced its intention to extend the transition period for QDP reporting set forth in the Final Regulations through taxable years beginning before January 1, 2025.[5] However, because (i) Treasury is continuing to actively consider changes to the QDP Reporting Requirement, and (ii) it seems likely that any revised final regulations or other guidance that is ultimately issued will not be issued until well into 2024 (at the earliest), we recommend that, as soon as possible, Treasury issue another notice further extending the transition period for QDP reporting for another two year, i.e., through taxable years beginning before January 1, 2027. This extension is necessary and appropriate for the following reasons:

- First, as we have explained in detail in our prior comment letters, financial institutions do not currently have any systems – for regulatory, GAAP or tax purposes – that maintain

[4] 2022-29 I.R.B. 70.

[5] Under Section 1.59A-6(b)(2)(i), a payment does not qualify as a QDP unless the taxpayer reports the information required in Section 1.6038A-2(b)(7)(ix) for the taxable year. Section 1.6038A-2(b)(7)(ix) requires a taxpayer subject to the BEAT to report on Form 8991 the aggregate amount of QDPs for the taxable year and make a representation that all payments satisfy the requirements of Section 1.59A-6(b)(2). If a taxpayer fails to satisfy the reporting requirements of Section 1.59A-6(b)(2)(i) with respect to any payments, Section 1.59A-6(b)(2)(ii) provides that those payments are not eligible for the QDP exception described in Section 1.59A-3(b)(3)(ii) and are base erosion payments unless another exception applies. Section 1.6038A-2(b)(7)(ix) applies to taxable years beginning on or after June 7, 2021. Section 1.6038A-2(g).

Before Section 1.6038A-2(b)(7)(ix) is applicable (the "transition period"), a taxpayer is treated as satisfying the QDP reporting requirement to the extent that the taxpayer reports the aggregate amount of QDPs on Form 8991, Schedule A, provided that the taxpayer reports this amount in good faith. See Section 1.59A-6(b)(2)(iv) and Section 1.6038A-2(g). In Notice 2021-36, 2021-26 I.R.B. 1227, Treasury announced the intention to extend the transition period through taxable years beginning before January 1, 2023, while Treasury studies the interaction of the QDP exception, the BEAT netting rule in Section 1.59A-2(e)(3)(vi), and the QDP reporting requirements in Sections 1.59A-6 and 1.6038A-2(b)(7)(ix). In Notice 2022-30, Treasury announced the intention to extend the transition period through taxable years beginning before January 1, 2025.

records on intercompany securities lending or borrowing transactions from which the amount of mark-to-market gains or losses on such transactions can be readily determined. These systems will need to be expanded to capture information on thousands, or even tens or hundreds of thousands, of transactions. Moreover, even identifying the relevant in-scope transactions – *cross-border* intercompany securities loans or borrows – will require guidance from Treasury and substantial systems changes. In many cases securities borrowings are made from a pool that holds securities owned by both U.S. customers and non-U.S. customers, and it is inherently unknowable whether a particular security borrowed should be viewed as borrowed from a U.S. customer or a non-U.S. customer. Because only the borrows from non-U.S. customers should be treated as giving rise to a cross-border intercompany securities loan from a non-U.S. affiliate (which has the relationship with the non-U.S. customer) to the U.S. financial institution, financial institutions will have to develop a methodology to identify whether securities have been borrowed from a U.S. customer or a non-U.S. customer (e.g., using a lottery system like that prescribed in Notice 2003-67, but now applying it throughout the year rather than just on payment dates). For all these reasons, financial institutions will have to expand their existing systems to reliably capture this information, which will require significant and costly technology investment that would be a bespoke toolset exclusively for this purpose without additional business function.

- Second, we estimate that it will take financial institutions up to two years to expand their existing systems to comply with the Final Regulations as currently written. As Treasury has recognized in its prior extensions of the transition period, it makes no sense for financial institutions to be required to start building systems today to comply with the QDP Reporting Requirement as set forth in the current Final Regulations when Treasury is actively considering necessary changes to those regulations. Rather, financial institutions should be required to begin this process only after Treasury has issued revised final regulations (or other authoritative guidance) that provide clear and administrable rules for QDP Reporting with respect to intercompany securities lending and borrowing transactions, with an appropriate extension of the transition period after revised final regulations are issued to give financial institutions the necessary time to build the systems necessary to comply with the revised final regulations.

We again wish to thank Treasury for its continuing consideration of the special issues that the BEAT rules, and especially the QDP Reporting Requirement, present for financial institutions. Should you have questions or wish to further discuss, please do not hesitate to contact me at (202) 962-7311 or paustin@sifma.org, or our outside counsel Michael Mollerus at Davis Polk & Wardwell LLP at (212) 450-4471 or michael.mollerus@davispolk.com.

Respectfully submitted,

P.J. Austin

P.J. Austin
Vice President, Tax

Attachment

cc: Erika Nijenhuis, Senior Counsel (International Tax Counsel), Department of Treasury
Sheila Ramaswamy, Attorney-Advisor, Internal Revenue Service