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March 20, 2023

Internal Revenue Service
CC:PA:LPD:PR (Notice 2023-2)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on Notice 2023-2, Initial Guidance Regarding the Application of the Excise Tax on Repurchases of Corporate Stock under Section 4501 of the Internal Revenue Code

To Whom It May Concern:

The American Chemistry Council (“ACC”), based in Washington, D.C., represents the leading companies engaged in the business of chemistry. ACC member companies apply the science of chemistry to create and manufacture innovative products that make people’s lives better, healthier, and safer. A complete listing of our member companies can be found at our website www.americanchemistry.com.

ACC appreciates the opportunity to provide comments on Notice 2023-2 (the Notice) regarding section 4501, a one percent excise tax on repurchases of corporate stock (the Excise Tax), which was enacted as part of the Inflation Reduction Act.¹ The Excise Tax applies to the fair market value of any stock repurchased by a U.S. corporation that is traded on a securities exchange. In the case of foreign-headquartered corporation, the Excise Tax applies to a purchase from third parties of foreign-parent stock by a U.S. corporation or partnership that is more than 50% owned, directly or indirectly, by such foreign parent.²

The Notice expands the application of the excise tax to foreign corporations in meaningful ways. Section 3.05(2)(ii)(a) of the Notice contains two funding rules: a Principal Purpose Rule and a Per Se Rule (collectively, the Funding Rules). Under the Principal Purpose Rule, a U.S. corporation

¹ Public Law 117-169, 136 Stat. 1818 (August 16, 2022).

² Section 4501(d)(1).

or partnership is treated as acquiring foreign parent stock if the U.S. entity funds by any means (including through distributions, debt or capital contributions) the acquisition or stock repurchase, and such funding is undertaken for a principal purpose of avoiding the Excise Tax. The Per Se Rule subsumes the Principal Purpose Rule by deeming a principal purpose if a U.S. subsidiary (corporation or partnership) funds by any means, other than through distributions, a foreign parent or a specified affiliate that acquires or repurchases stock of the foreign parent within two years of the funding.³ Alternatively stated, the Per Se Rule would apply to all transactions between a foreign parent and its U.S. operations, other than distributions.

For the following reasons, we respectfully request that the Funding Rules be withdrawn.

First, the operation of the Funding Rules is contrary to the plain language of section 4501. Congress intended to narrowly apply the excise tax to foreign corporations, in contrast to covered surrogate foreign corporations which are covered more broadly. A U.S. corporation that inverts after September 20, 2021 (a covered surrogate foreign corporation), is treated as a domestic corporation for purposes of the excise tax. All of its stock repurchases are subject to section 4501. The Funding Rules would eliminate the distinction made in the statute between foreign and covered surrogate foreign corporations, subjecting all foreign-parented groups to the one percent excise stack on its foreign repurchases.

For example, over a two year period, foreign parent (FP) sells \$150 million in inventory to its U.S. corporate subsidiary (USC) to be sold by USC to the U.S. corporation's customers. At the end of year two, FP repurchases \$100 million of its stock from third parties. By applying the Funding Rules, USC is deemed to have funded FP by \$150 million, and the full FP stock repurchase is subject to the Excise Tax. This is the same result is dictated by statute for a covered surrogate foreign corporation; had Congress wanted the same result it would have written a different statute..

Further, the Funding Rules would convert every regular business transaction into a funding for a foreign stock repurchase. Any acquisition of chemicals or ingredients from a foreign parent for resale to a U.S. customer would be treated as a funding. Similarly, a U.S. subsidiary may license intangible property (business processes, patents, and trademarks) to manufacture chemicals in the United States. The Funding Rules would treat such payments as funding the foreign parent and prevent a taxpayer from establishing that ordinary business transactions have no connection to a future foreign parent stock repurchase.

The Funding Rules also effectively override the arm's-length standard. U.S. transfer pricing rules require that controlled entities must price transactions in the same way that uncontrolled entities would under similar circumstances. Adding the incidence of the Excise Tax to all cross-border transactions would increase the prices of such transactions to ensure they are no longer at arm's length. In fact, third party transactions between a foreign corporation and an unrelated U.S. party would be lower because the Funding Rules do not apply to third party transactions.

Finally, the Funding Rules create a dangerous precedent that foreign countries could apply to U.S. headquartered groups. ACC notes the Inclusive Framework at the Organisation for Cooperation and Development (OECD) is working to reach agreement on the tax challenges arising from

³ Notice § 3.05(2)(a)(ii)(B).

digitalization (Pillar One). As part of the Pillar One agreement, countries will be required to remove unilateral measures, such as digital service taxes. ACC is concerned that the Funding Rules operate as a unilateral measure that other countries could adopt to tax U.S. groups. Once adopted in final regulations, the Funding Rules would provide a U.S.-approved template to override the arm's-length standard to tax profits with minimal connection to foreign market jurisdictions.

For the reasons set forth above, Treasury and the IRS should withdraw the Funding Rules as contained in the Notice. ACC appreciates the opportunity to provide this feedback on Notice 2023-2. We look forward to working with you to address these and other issues related to the implementation of section 4501. Thank you for your time and attention.

Very truly yours,



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Cc:

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