



SUBMITTED VIA REGULATIONS.GOV

Stephanie Bland
Branch Chief
Internal Revenue Service
Office of Chief Counsel
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: **Superfund Tax on Chemicals NPRM**
REG-105954-22

Dear Ms. Bland:

The American Chemistry Council (ACC) represents the leading companies engaged in the multibillion-dollar business of chemistry. ACC members apply the science of chemistry to make innovative products, technologies and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health, safety and security performance through Responsible Care; common sense advocacy addressing major public policy issues; and health and environmental research and product testing. ACC members and chemistry companies are among the largest investors in research and development, and are advancing products, processes and technologies to address climate change, enhance air and water quality, and progress toward a more sustainable, circular economy.

Since the sunset of the Superfund Tax on Chemicals in 1990s, much has changed. In the chemical industry, there have been significant advancements and efficiencies in chemical processes. All such advancements have been accomplished while also considering the necessary environmental protections and rules. The reinstatement of Superfund Tax on Chemicals (SCT) will impact the economy of chemicals and consumer market pricing; this is particularly true given that the tax was reinstated without modifications to reflect these advancements.

As we have previously stated, ACC continues its opposition to the reinstatement of the SCT. Nevertheless, we appreciate the Notice of Proposed Rulemaking (NPRM)¹ issued by the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) inasmuch as it

¹ 88 Fed. Reg. 18,446 (March 29, 2023).

provided some clarity around this reinstated tax. In response to the NPRM, ACC has the following comments for your consideration.

Recycling

One area where there has been significant advancement is in the recycling of chemicals. Recycling of taxable chemicals is now more common and more feasible than it was twenty-five years ago when the SCT was effective. Given the NPRM's acknowledgement that it was "[c]ongressional intent that the tax apply only once to a given quantity of a taxable chemical"² ACC was dismayed to see that the NPRM states that recyclers are considered manufacturers of the taxable chemical, thus triggering the tax.

The NPRM comes to this proposed rule by relying on the fact that the statute specifically calls out recycling in the context of chromium, cobalt, and nickel but nowhere else. We believe that Congress, when it drafted this legislation in 1980s, could never have imagined the importance recycling would play in the chemical industry. Given the statute does not define manufacturer, and consistent with the premise that the tax should only apply once, a recycler should not be considered a manufacturer.

At bare minimum, Treasury and IRS should clarify that certain activities are excluded from the definition of recycler and recycling, e.g. recycling activities should not include scenarios where a taxable chemical is reused. Such reuse would include when molecules of a taxable chemical are recaptured and reused (e.g., a catalyst). In these instances, rather than being "recycled" into a new product, the taxable chemical is used in a continuous or recurring process. Such a carveout is consistent with historic proposed rules issued in 1983 implementing the SCT.³

Hydrogen

Since the sunset of the SCT, hydrogen has become a critical alternative to traditional petroleum-based motor fuels and can also be used directly as a motor fuel in the fuel cells of certain electric vehicles. In fact, Congress recognized the importance of hydrogen in the Infrastructure, Investment and Jobs Act and the Inflation Reduction Act by incentivizing hydrogen production as part of the needed transition to a low-carbon economy. SCT must not operate to conflict with these incentives.

Today, hydrogen is primarily produced by steam methane reformer technology. This technology can provide vast quantities of hydrogen to meet demand in an otherwise fragile supply chain. Given the critical role methane plays in the production of hydrogen, and with the goal that SCT should not obstruct hydrogen production, we seek clarity on the methane fuel exception:

- Please confirm that to the extent methane is isolated from natural gas and is used in the domestic manufacture of hydrogen, and the hydrogen is ultimately for fuel production, no SCT attaches. In this instance, the methane has not been used other than as a fuel. There is a significant unfair advantage against hydrogen produced via methane in the United States

² Id. at 18,449.

³ See LR-16-81, 1983 CB 694, Jan. 1, 1983.

as compared to produced abroad and imported, since foreign sourced hydrogen escapes SCT on methane.

- Hydrogen is considered an alternative vehicle fuel under the Energy Policy Act of 1992. It is typically produced and delivered to hydrogen fueling stations in liquid form and pressurized to gaseous hydrogen at the time of vehicle fueling in a Fuel Cell Electric Vehicle tank. Please confirm such use of hydrogen would be considered use as a fuel.

In addition to the production of hydrogen, the flexibility of ammonia to interchange to hydrogen, and vice versa, is critical to how hydrogen will be transported safely and efficiently, both to meet the demands of domestic hydrogen consumption as well as deliver to the export market. Ammonia is a listed taxable chemical. Given its importance, we request Treasury and the IRS provide consideration and advisement on the taxability of ammonia when a domestic manufacturer creates and uses ammonia to produce hydrogen which is then sold for production of a fuel. Note that if this is a taxable event, there would be a significant unfair advantage against hydrogen produced in the United States as compared to that produced abroad and imported.

Tax-Free Sales of Substances Produced from Both Tax-Exempt Chemicals and Non-Exempt Chemicals

Section 4662(b) enumerates a number of exceptions to SCT when certain taxable chemicals are derived from or used for certain materials and activities. Three of the exceptions are related to an exemption for certain specifically-enumerated taxable chemicals being sold for or used in qualified fertilizer, fuel, and animal feed uses. Section 4671(d)(1) provides that similar fertilizer, fuel, and animal feed rules apply to taxable substances. In elaborating on the exceptions from SCT for fertilizer, fuel, and animal feed, the NPRM allows the tax-free sale of taxable substances by an importer or reseller when used or sold for certain fertilizer, fuel, and animal feed uses *only if all* taxable chemicals used in the manufacture or production of such substance would have been exempt if sold in the United States. If some of the taxable chemicals do not qualify for exemption (e.g. only certain, specified taxable chemicals are eligible for the fertilizer exemption but many taxable chemicals that make fertilizer are not), under the NPRM the tax is imposed on the entire substance, and it is then up to the purchaser to file a claim for credit or refund for the tax-exempt chemical(s) utilized.

This is not the correct result given the statutory language. Specifically, Section 4671(b)(1) provides that the amount of tax imposed on a substance is the amount of the Section 4661 tax on the taxable chemicals used in the manufacture or production of such substance if such taxable chemicals had been sold in the United States for use in the manufacture or production of such substance. The statute further states that domestically, certain taxable chemicals may be sold tax-free for certain fertilizer, fuel, and animal feed uses. These two statutory provisions taken together indicate that the NPRM came to an incorrect interpretation. In other words, if you are directed to calculate the tax on taxable substances by looking through to the underlying taxable chemical content, where some of the taxable chemicals should be exempt, why is the NPRM imposing SCT on those taxable chemicals.

Rather than tax the entire substance as proposed, the final regulations should only impose the tax on the non-exempt taxable chemical(s). This treatment would remove the requirement for the end

user to acquire (1) a certificate from the person that paid the tax and (2) information regarding the component taxable chemicals to support the claim. Acquiring such information will be difficult and in some instances, the manufacturer/producer may not want to provide this proprietary information. To effectuate the purpose of the SCT, the final regulations should put the person with the best information—in this case, the importer—in a position to ensure proper compliance by documenting the taxable use portion and paying the appropriate tax. Our recommendation would provide tax parity between imports and domestic production of substances; but if left as proposed the impact of imposing the tax on the full price of the substance would result in market disparities between imports and domestically produced substances. It also forces taxpayers to file claims and burdens the IRS with the processing of those claims.

Certificates and Claims for Tax-Free Fertilizer, Qualified Fuel, or Animal Feed Use

The NPRM provides that a manufacturer, producer, importer, and reseller seeking to make tax-free sales of certain qualified substances (ammonia, nitric acid, sulfuric acid, or methane used to produce ammonia) for a fertilizer or animal feed use, or other qualified substances (acetylene, benzene, butylene, butadiene, ethylene, naphthalene, propylene, toluene, and xylene) for a qualified fuel use, must obtain an unexpired exemption certificate from its purchaser prior to, or at the time, of sale. Any entity in the fertilizer chemical, fuel chemical or animal feed chemical supply chain that does not obtain an unexpired exemption certificate from its purchaser is deemed to be the manufacturer of the taxable chemical and is liable for the SCT on the sale or use of such fertilizer chemical, fuel chemical, or animal feed chemical.

The NPRM also provides that a purchaser of a previously tax-paid taxable chemical can claim a refund if used under the fertilizer, fuel, or animal feed use exception only if it obtains a certificate from the original taxpayer specifying that the amount and time of tax paid as well as waiving any right to a refund by the person that originally paid the tax. This requirement applies even if there are multiple intervening sales and the original taxpayer is multiple levels upstream in the supply chain.

These certificate requirements are burdensome and make compliance difficult if not impossible for taxpayers, particularly downstream purchasers. All entities in the supply chain would be required to obtain exemption certificates prior to making any tax-free sales. If an entity is charged the SCT from a vendor and then uses the otherwise taxable chemical in a way that qualifies for an exemption, the entity would likely face challenges in securing a proper certificate or furnishing the required detail to support a refund claim, the entity may not be able to identify or otherwise contact the original taxpayer or have visibility to the exact chemical composition and production process of the product it purchased. The rules for exports in the NPRM entail the same difficulties for persons who purchase taxable chemical or substances tax paid and then export and claim a credit or refund.

The NPRM notes that one commentator requested specific guidance on the use of invoices to support credit and refund claims. This commentator likely understood the difficulties involved in going back through the supply chain to document information directly from an original manufacturer/producer/importer seller when the seller could make such information available through invoices that could be passed on through intermediate parties in the chain. The NPRM

does not discuss why it rejected pursuing such an approach, instead just citing that the NPRM is consistent with other areas of excise tax law. The NPRM requires that a person who makes a use that gives rise to a right to a refund of chemicals tax already paid must have a specific certificate from the original taxpayer that tax had already been paid on the taxable chemicals involved, including the amounts and dates. Two points must be made: first, the IRS successfully administered this same SCT for over 10 years without such excessive documentation requirements. Second, unlike other excise taxes, the SCT is imposed on upstream commodity chemicals that go through multiple derivative manufacturing processes before their final use may be ascertained. The other excise tax areas referred to by the NPRM are generally finished goods where the imposition of the tax is downstream and rights to refunds are not separated by so many degrees from the initial implementation of the tax.

In fact, the more analogous case to the SCT refund procedures are the excise tax regulations existing under the ozone depleting chemical (“ODC”) excise tax. For instance, Section 4682(d)(4) provides that under regulations prescribed by the Secretary, if an ODC tax was paid and such chemical was subsequently used and entirely consumed as a feedstock in the production of some other chemical, than the amount of ODC tax already paid is allowed as a credit or refund to the person who made such use. The regulations implementing this refund procedure under Treas. Reg. § 52.4682-1(c) do not require the refund claimant to obtain a signed perjury statement from the manufacturer that it had originally already paid the tax, only that procedures of Section 6402 and its regulations be followed. In fact, these regulations were promulgated much more closely in time to the original enactment of SCT. It therefore appears that the NPRM is arbitrary in rejecting out of hand making any analysis of why less burdensome ways of documenting claims for refund cannot be made available to taxpayers, consistent with prior practice as well as the most analogous excise tax refund provisions. So, in fact, the commentator’s suggestion of the use of information on upstream invoices actually would provide even more documentation that the IRS has previously required in the case of ODC refunds. The same approach should also apply to document claims for refund by exporters of tax paid chemicals.

Potential improvements to the proposed regime include: (1) allowing manufacturers, producers, distributors, and retailers to waive their rights to tax refunds at the time of sale, allowing the end-user to claim any related tax overpayment with documentation available at the time of its purchase, including via invoice terms; (2) allowing downstream purchases to prove the prior payment of tax by the invoices issued by upstream sellers, (3) providing that certificates are not required once a product is identified and packaged as a fertilizer or animal feed product; and (4) providing that certificates are not required for sales made to end user farmers and other agricultural businesses. These potential improvements should be considered in tandem to reduce the cumulative effect of easing taxpayer burden while at the same time achieving the overall compliance goals.

Documentation of Qualified Tax-Free Use by Manufacturer, Producer or Importer of Taxable Chemical or Importer of Taxable Substance

The statute, at Section 4662(d)(1), provides that any manufacturer, producer, or importer which itself uses the taxable chemical is taxed in the same manner as if such person had sold the taxable chemical. See also the NPRM Prop. Treas. Reg. §52.4661-1(c)(1). Likewise, Prop. Treas. Reg. § 52.4662-2(b),(e), and (f) provide exemptions from tax upon the qualified use of certain taxable

chemicals to produce fertilizer, motor fuel, or animal feed. The NPRM has very specific information that a seller of a taxable chemical must obtain from its purchaser, such as certificates as to how the taxable chemical will be used in the future for tax free sales of a taxable chemical. See Prop. Treas. Reg. § 52.4661-2(h). Similar rules apply when an importer of a taxable substance makes a sale for the purchaser to provide a certificate of its intended use. See Prop. Treas. Reg. § 52.4671-2(b)(3).

The NPRM, however, does not address what the documentation requirements are if the manufacturer, producer or importer itself makes a qualified use of the taxable chemical (or if the importer of a taxable substance itself makes a qualified use of the taxable substance⁴). We believe this silence was purposeful as no documentation should be required when a manufacturer, producer or importer itself can attest to the fact that the taxable chemical or taxable substance was used in a non-taxable qualified manner. The final rules should confirm this rule. For example, if a taxpayer imports ammonia (taxable chemical) or urea (taxable substance) and uses it to make a fertilizer, the taxpayer would be able to document in its records that it made that fertilizer use itself without the necessity of a certificate from any subsequent purchaser of what is already fertilizer.

Export Documentation

The NPRM, at §52.4662-5(b)(3), requires the manufacturer or producer of a taxable chemical for export, if first shipping to a location in the US, to obtain a statement from the “first purchaser” documenting that the purchase is to fill existing or future orders for shipment outside the US or for resale to a second purchaser engaged in the business of exporting and that will export the taxable chemical.

The export exemption will cease to apply unless the manufacturer/producer receives proof of export within six months of the first sale or shipment (whichever is earlier). Specifically, §52.4662-5(b)(5)(ii) requires that if the manufacturer or producer of a taxable chemical is not the exporter of the taxable chemical, the manufacturer or producer must have in its possession a statement from the first purchaser stating that the taxable chemical was, in fact, exported by the first purchaser, or was resold to a second purchaser that exported the taxable chemical.

Since in situations where the manufacturer / importer is not the exporter, the purchaser is required to provide assurances prior to or at the time of purchase that the product is being purchased for export or sale to another in export, the purchaser should be able to furnish documentation, perhaps something like a modified version of the Exemption Certificate found in §52.4662-2(h)(2)(ii), that certifies to the manufacturer that the product is being purchased for export and that appropriate proof of exportation will be maintained. Like the Exemption Certificate used for animal feed, fertilizer use, and fuel use, such a statement could have language that provides that the purchaser, if the product does not end up being exported, will be considered the manufacturer of the product and liable for SCT upon sale or use for non-export.

⁴ Prop. Treas. Reg. § 52.4671-2(a) of the NPRM states that the exemptions for fertilizer, motor fuel and animal feed apply to an importer of a taxable substance upon the sale **or use** of that substance.

Minimally, if Treasury and the IRS determine that a two-step regime of pre-transaction representation of export and post-transaction proof of exportation is the best manner to implement these requirements, we believe clarification is required detailing that the Statement of Export can be issued for multiple transactions.

Chemical Mixtures Defined and Treated as a Taxable Use when Produced Domestically

The NPRM, at §52.4662-1(c)(15), treats the manufacture or production of a chemical mixture or other substance (including by mixing or combining the taxable chemical with other substances) as a “use” subject to the Section 4661 tax. Under the NPRM, a “chemical mixture” generally means any substance composed of two or more physically-combined components that are not chemically bonded. If a taxable chemical is a component of said mixture, the taxable chemical remains subject to tax while part of the mixture.

This is contrary to historical proposed regulations which did not define “use” in such a broad manner. ACC members urge that the final regulations reflect the historic position of the IRS. Rather than triggering the tax when a chemical mixture is created, we suggest that a reasonable alternative would be to tax when that chemical mixture was sold or used. Such a change does not result in any difference for administration of the SCT, but rather impacts only the timing of the tax.

It is important to note that the NPRM is coming at a time when taxpayers have already invested significant amounts of time and money to establish processes for implementation of the SCT based on long-established definitions of use. Revising those systems and processes at this point as would be required under the NPRM would be burdensome and does not appear to result in effective tax administration. In any event, the manufacturer/producer will have the same documentation to substantiate the taxable chemical composition of the mixture (based on the actual weight of any taxable chemicals in the chemical mixture) as taxpayers would have been remitting on the resulting mixture at the time of its use or sale.

Further, the NPRM’s inclusion of a “chemical mixture” concept is not found in the statute. To the contrary, this approach is discordant with the SCT regime under which manufacturers collect the tax on the taxable portion of the product sold. However, if the IRS proceeds with this proposal, it should clarify how to report chemical mixtures on the quarterly Form 6627.

Chemical Mixtures and Alloys

Under the NPRM, if a taxable chemical is a component of an alloy, the taxable chemical remains a taxable chemical while in the alloy, thus subject to tax upon import. This result is contrary to the treatment of alloys in historical proposed regulations. Under the historical proposed regulations, alloys were not considered taxable chemicals because they are not commercially known or sold as the taxable chemical. Thus, for example, under the NPRM the import of nickel alloy would be taxable as nickel, but historically it would not because it is not commercially known or sold as nickel.

It should be further noted that the initial list of taxable substances under Section 4672(a)(3) includes iron alloys: ferronickel, ferrochromium, and ferrochrome. This strongly suggests that Congress intended certain alloys to be classified as taxable substances, not taxable chemicals, and that non-listed alloys should not be taxed at import.

In light of the fact that certain alloys are already considered taxable substances, ACC members ask that the final regulations revert back to the historic rules as they relate to alloys. If the intention is to tax other alloys, those can be added to the list of taxable substances.

If alloys are deemed taxable chemicals in a final rule, guidance should clarify that the treatment is the same for import and for export. For taxpayers relying on the historical proposed regulations, the IRS should clarify in the final rules that beyond the general applicability dates that such rules for mixtures and alloys apply prospectively only. In addition, sample tax calculation for the importation of an alloy should be included similar to the calculations provided in Rev. Proc. 2022-26, as modified by Rev. Proc. 2023-20 for computing the tax.

Further, the final regulations should include a provision making clear that alloys that have been formed into a finished product prior to importation are excluded from taxation. This would align with the treatment of synthetic organic and inorganic substances in §52.4672-2(b). Those provisions, when describing the materials that can be added to the list of taxable substances, i.e., subject to tax on import and eligible for credit or refund on export, exclude a “fabricated product that is molded, formed, woven [synthetic organic substances only], or otherwise finished into an end-use product.”

Signature Requirements

Although largely a function of statute, SCT requires much documentation and in many cases certifications. While not addressed in the NPRM, we request clarification and confirmation that SCT certificates can be signed electronically. This will significantly reduce burden.

Semimonthly Deposit Alternatives

While the NPRM is silent with regard to deposit payments, although existing Treas. Reg. § 40.6302(c)-1 requires semimonthly deposits for most excise taxes with limited exceptions. ACC members appreciate the short term relief offered through IRS notices, however an exception should be considered in the case of the SCT, as inventories of chemicals often are updated only on a monthly basis. For such taxpayers, data reports covering the first fifteen days of the month are often not available in time to meet current deposit requirements and if they are, their preparation is most likely on an estimated basis until inventories are reconciled for current month-end processes. In some cases, this specialized data gathering requirement may be too great a burden, forcing taxpayers into the safe harbor regime for deposits as a regular compliance practice. An alternative would be to allow taxpayers to remit the tax on a monthly or quarterly basis as has been allowed for other excise tax types (e.g., taxes on inland waterways, sport fishing equipment and bows and arrow components, and indoor tanning services).

Coordination with Superfund Tax on Petroleum Products

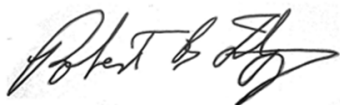
Subsequent to the reinstatement of the Superfund Tax on Chemicals, the Inflation Reduction Act reinstated Section 4611, the Hazardous Substance Superfund financing rate. Among other things, Section 4611 imposed a tax on petroleum products. Coordination guidance is needed to confirm that a substance cannot be taxed under both of these two regimes; a definition of petroleum products should exclude taxable chemicals. This most often arises in the context of benzene which is listed as a taxable chemical and also considered as a petroleum product. Benzene is an important chemical and the starting material for a wide range of manufacturing processes, taxing it twice is contrary to congressional intent and poor policy.

Taxable Rates of Taxable Substances

ACC appreciates the work of Treasury and IRS to publish tax rates for taxable substances, although notes that no rates have been published for a few - but important - remaining taxable substances. Under law, and per the NPRM, these rates are established by reference to the predominant method of production of the taxable substance. ACC requests that the final remaining rates be published and that Treasury and IRS provide transparency as to how the rates have been determined; to date no such documents have been provided to the public. Finally, Treasury and the IRS should also allow stakeholders to use the petition process to challenge the determined rates. Given stakeholders can petition to seek inclusion on the taxable substance list by showing chemical composition, stakeholders should also be provided transparency and the ability to comment on the rates established by Treasury and the IRS.

Thank you in advance for your consideration. Please let us know if you have questions.

Sincerely,



Robert B. Flagg
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American Chemistry Council