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June 11, 2024

Internal Revenue Service
1111 Constitution Ave. N.W.
Washington, D.C. 20224

Via electronic submission

RE: TEI Comments on REG–115710–22

Dear Sir or Madam:

President Biden signed the Inflation Reduction Act[1] ("IRA") into law on August 16, 2022. Among the IRA's tax provisions is a one percent excise tax imposed on the fair market value of certain corporate stock repurchases in new section 4501 (the "Excise Tax").[2] Section 4501 grants the U.S. Department of the Treasury ("Treasury") the authority to promulgate regulations or other guidance "necessary or appropriate to carry out, and to prevent the avoidance of, the purposes of" section 4501, among other things. The Internal Revenue Service (the "IRS") published Notice 2023-2 (the "Notice") in the Federal Register on January 17, 2023.[3] Treasury and the IRS (together, the "Government") then published proposed regulations on April 12, 2024 (the "Proposed Regulations").[4] On behalf of Tax Executives Institute, Inc. ("TEI"), I am pleased to present TEI's comments on the Proposed Regulations.

About Tax Executives Institute, Inc.

TEI was founded in 1944 to serve the needs of business tax professionals.[5] Today, the organization has 56 chapters in North and South America, Europe, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has

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1 Pub. L. No. 117-169.

2 All "section" references are to the Internal Revenue Code of 1986, as amended (the "Code").

3 2023-3 I.R.B. 374.

4 REG–115710–22, 89 Fed. Reg. 25980 (April 12, 2024).

5 TEI is organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the Code.

a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 6,300 individual members represent over 2,800 of the leading companies around the world.

TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the benefit of both government and taxpayers. These goals can be attained only through the members' voluntary actions and their adherence to the highest standards of professional competence and integrity. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner. The diversity, professional training, and global viewpoints of our members enable TEI to bring a balanced and practical perspective to issues related to the Excise Tax.

TEI Comments

The Excise Tax is equal to "1 percent of the fair market value of any stock of [a covered] corporation which is repurchased by such corporation during the taxable year."[6] A "covered corporation" is "any domestic corporation the stock of which is traded on an established securities market (within the meaning of section 7704(b)(1))" or what are generally referred to in common parlance as "publicly traded corporations."[7] Stock repurchases occurring after December 31, 2022, are subject to the Excise Tax.[8]

The Notice provided some needed guidance considering the simple language of the statute, but it also presented new concerns. Much of that guidance has been retained in the Proposed Regulations. Therefore, many of our concerns persist and many of our comments remain consistent with those we submitted with regard to the Notice. Those comments are attached as an appendix and referenced herein (the "Notice Comments"). In particular, our prior comments regarding the application of the Excise Tax to certain preferred stock and many of our previous comments on the funding rule also apply to the Proposed Regulations.

Retroactivity

Provided a taxpayer applies the provisions consistently, a taxpayer may rely on either the rules in the Notice or the rules in the Proposed Regulations for repurchases and issuances made after December 31, 2022, but on or before April 12, 2024.[9] The Proposed Regulations do not indicate how a

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6 Section 4501(a).

7 Section 4501(b).

8 Pub. L. 117–169, title I, section 10201(d), Aug. 16, 2022, 136 Stat. 1831.

9 See the Preamble to the Proposed Regulations, REG-115710- 22, 89 Fed. Reg. at 26020, 26030 (April 12, 2024).

taxpayer may choose to apply the Proposed Regulations retroactively to that time period, whether through election, disclosure, mere application, or another method.

TEI requests clarification on this issue in order to provide taxpayers with certainty that they effectively have opted into the rules in the Proposed Regulations. We believe that the simplest means to provide such clarity would be to include an affirmative statement or disclosure on Form 8275. But, regardless, we request that future guidance clarify this issue.

Preferred Stock

The Proposed Regulations generally do not include special rules for preferred stock,[10] although the Notice had requested comments on whether such rules should be provided for redeemable preferred stock or other special classes of stock or debt. Consistent with our recommendation in the Notice Comments, TEI continues to request that redemptions of non-convertible preferred stock that is limited and preferred as to dividends and that does not participate in corporate growth to any significant extent be exempted from the Excise Tax as such redemptions are economically similar to the repayment of debt.[11] TEI also continues to alternatively request transitional relief for repurchases of such preferred stock issued prior to the enactment of section 4501.[12]

The Funding Rule

The Proposed Regulations essentially retain the same basic funding rule as in the Notice, providing that an applicable specified affiliate would be treated as acquiring stock of an applicable foreign corporation to the extent the applicable specified affiliate (i) funds by any means (including through distributions, debt, or capital contributions), directly or indirectly, the repurchase or acquisition of the stock of the applicable foreign corporation by the applicable foreign corporation or a specified affiliate that is not also an applicable specified affiliate (ii) with a principal purpose of avoiding the Excise Tax (the "Funding Rule").[13] The Proposed Regulations expand the scope of the "a principal purpose" prong of the Funding Rule by adding that there is a principal purpose of avoiding the Excise Tax if a

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10 The Proposed Regulations do provide a special rule for "additional tier 1 preferred stock." Proposed § 58.4501-1(b)(29).

11 See "Preferred Stock" in the Notice Comments.

12 Id.

13 Proposed § 58.4501-7(e)(1). An "applicable specified affiliate" is a specified affiliate that is not a foreign corporation or a foreign partnership (unless the partnership has a domestic entity as a direct or indirect partner). Proposed § 58.4501-7(b)(2)(iv). A "specified affiliate" is, with regard to a corporation, (i) any corporation more than 50 percent of the stock of which is owned (by vote or by value), directly or indirectly, by the corporation, and (ii) any partnership more than 50 percent of the capital interests or profits interests of which is held, directly or indirectly, by the corporation. Proposed § 58.4501-1(b)(25).

principal purpose of a funding is to fund, directly or indirectly, a covered purchase.[14] The Proposed Regulations do not include that a principal purpose is deemed to exist if there is a funding (other than through distributions) by an applicable specified affiliate and the funded entity acquires or repurchases stock of the applicable foreign corporation within two years of the funding (the "Notice Per Se Rule"). However, they do add a narrower rule than the Notice Per Se Rule that presumes a principal purpose of avoiding the Excise Tax during the same four-year period, but only for "downstream fundings."[15] The rule provides that a principal purpose is presumed to exist if an applicable specified affiliate funds by any means, directly or indirectly, a downstream relevant entity,[16] and the funding occurs within two years of a covered purchase by or on behalf of the downstream relevant entity (the "Rebuttable Presumption").[17] The Rebuttable Presumption may be rebutted only if facts and circumstances clearly establish that there was not a principal purpose to avoid the Excise Tax.

TEI appreciates that the Government narrowed the application of the Funding Rule by excluding the Notice Per Se Rule, limiting the new timing-based rule to downstream fundings, and converting that rule to a rebuttable presumption. However, we are concerned about the expansion of the overall scope of the Funding Rule through the expansion of the meaning of "a principal purpose." We continue to believe that the Funding Rule is not grounded in the statute, exceeds Congressional intent, and has potential problematic implications for U.S. companies with operations in other countries.[18] Additionally,

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14 Proposed § 58.4501-7(e)(1). A covered purchase is an AFC repurchase or an acquisition of stock of an applicable foreign corporation by a relevant entity. Proposed § 58.4501-7(b)(2)(vii).

15 Proposed § 58.4501-7(e)(2).

16 A ''downstream relevant entity'' is a relevant entity (i) 25 percent or more of the stock of which is owned (by vote or by value), directly or indirectly, by, individually or in aggregate, one or more applicable specified affiliates of an applicable foreign corporation, or (ii) 25 percent or more of the capital or profits interests in which are held, directly or indirectly, by, individually or in aggregate, one or more applicable specified affiliates of an applicable foreign corporation. Proposed § 58.4501-7(b)(2)(xi).

17 A covered purchase "on behalf of" a downstream relevant entity includes an acquisition by an agent or nominee of the downstream relevant entity for the downstream relevant entity's account.

18 See "Congressional Intent and Overbreadth of the Funding Rule" in the Notice Comments.

such a rule could result in double taxation of the same transactions.[19] Therefore, TEI continues to request that the Government exclude the Funding Rule from future guidance.[20]

If a funding rule is retained, TEI implores the Government to return to "a principal purpose" test focused on a principal purpose of avoiding the Excise Tax. If the Funding Rule is retained, TEI continues to request that the Government include much needed carve-outs to a rule that has the potential to pull in stock repurchases with no real nexus to the U.S. for multinationals with U.S. operations. Although we continue to believe all of the carve-outs we previously requested should be included within the updated Funding Rule present in the Proposed Regulations (and should be included in any future guidance that includes a similar funding rule),[21] we want to emphasize the need for a carve-out for ordinary course business transactions and Treasury functions.[22] Cash pooling arrangements, interest and principal repayments on debt, currency translation, payments for intercompany services, and royalty and inventory payments, among other ordinary course business transactions, still may be incorrectly treated as funding a repurchase by the Funding Rule. It is very difficult to prove a negative, or that none of those funds ultimately were used to fund the stock repurchase, even though that is not the reason for the initial movement of the funds. As these transactions are routine and occur throughout the year, this will not

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[19] Other countries are considering similar rules, and without coordination, the same repurchase could be taxed in multiple jurisdictions, depending on which cash each country determines has funded a repurchase. See also "Congressional Intent and Overbreadth of the Funding Rule" in the Notice Comments for further discussion of concerns on double taxation and "TEI Recommendations" in the Notice Comments for further concerns on the potential double taxation of certain dividends paid to applicable foreign corporations in relevant tax treaty countries that are treated as fundings under the Funding Rule.

[20] See "Congressional Intent and Overbreadth of the Funding Rule" and "TEI Recommendations" in the Notice Comments.

[21] See "TEI Recommendations," recommendations 1-4, in the Notice Comments. Recommendations 2 and 3 in the Notice Comments are at odds with language added to the Funding Rule in the Proposed Regulations. While historic practice and arrangements existing prior to the existence of the Excise Tax are evidence that those transactions were not undertaken with a principal purpose of avoiding the Excise Tax, they are not evidence that those transactions were not undertaken with a principal purpose of funding a covered transaction. As there generally are real business reasons for these historic practices and arrangements, we do not agree that a principal purpose of funding a stock repurchase is the same as a principal purpose of avoiding the Excise Tax. For example, it generally is preferable for a parent to buy back its own stock, rather than have a subsidiary purchase the stock. In fact, in many jurisdictions, there are rules that prevent subsidiaries from owning stock in the parent corporation. Furthermore, as discussed herein, it is common for the parent to have access to a cash pool with co-mingled funds from the U.S. and other countries, with no mechanism for determining which cash was used for which activity of the parent. Therefore, we continue to request that historic practice and existing arrangements be taken into account when determining what constitutes a funding that implicates the Funding Rule. Recommendation 4 requests a carve-out for dividends between an applicable specified affiliate and an applicable foreign corporation that is a member of a relevant treaty country.

[22] See "TEI Recommendations," recommendation 1, in the Notice Comments.

only be a costly and burdensome tracking exercise but, in some cases, an exercise in futility. For example, in the case of cash pooling arrangements, there would be no ability to prove that cash used for a stock repurchase was not the cash from the U.S. rather than from a foreign subsidiary. Therefore, TEI believes that the inclusion of these arrangements in the Funding Rule is of particular concern and requires Government intervention to prevent problematic results.

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TEI appreciates the opportunity to comment on the Proposed Regulations and appreciates the Government's consideration of our comments in this letter as well as the reconsideration of our comments on the Notice, in as much as they still apply to the Proposed Regulations. TEI's comments were prepared under the aegis of its Federal Tax Committee, whose chair is Julia Lagun. Should you have any questions regarding TEI's comments, please do not hesitate to contact Julia Lagun at jlagun@comerica.com or TEI tax counsel Kelly Madigan at kmadigan@tei.org or (202) 470-3600.

Respectfully submitted,

Sandhya Edupuganty

Sandhya Edupuganty
International President
TAX EXECUTIVES INSTITUTE

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Appendix: TEI Comments on Notice 2023-2

Connect. Engage. Impact.

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March 20, 2023

Internal Revenue Service
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Via electronic submission

RE: TEI Comments on Notice 2023-2

Dear Sir or Madam:

President Biden signed the Inflation Reduction Act[1] ("IRA") into law on August 16, 2022. Among the IRA's tax provisions is a one percent excise tax imposed on the fair market value of certain corporate stock repurchases in new section 4501 (the "Excise Tax").[2] Section 4501 grants the U.S. Department of the Treasury ("Treasury") the authority to promulgate regulations or other guidance "necessary or appropriate to carry out, and to prevent the avoidance of, the purposes of" section 4501, among other things. The Internal Revenue Service (the "IRS") published Notice 2023-2 (the "Notice") in the Federal Register on January 17, 2023.[3] The Notice announces that Treasury and the IRS intend to issue proposed regulations, provides interim guidance until the publication of such regulations, and requests comments on the rules described in the Notice. On behalf of Tax Executives Institute, Inc. ("TEI"), I am pleased to present TEI's comments on the Notice and the Excise Tax.

About Tax Executives Institute, Inc.

TEI was founded in 1944 to serve the needs of business tax professionals.[4] Today, the organization has 56 chapters in North and South America, Europe, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient

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1 Pub. L. No. 117-169.

2 All "section" references are to the Internal Revenue Code of 1986, as amended (the "Code").

3 2023-3 I.R.B. 374.

4 TEI is organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the Code.

administration of the tax laws, at all levels of government. Our nearly 6,000 individual members represent over 2,900 of the leading companies around the world.

TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the benefit of both government and taxpayers. These goals can be attained only through the members' voluntary actions and their adherence to the highest standards of professional competence and integrity. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner. The diversity, professional training, and global viewpoints of our members enable TEI to bring a balanced and practical perspective to issues related to the Excise Tax.

TEI Comments

The Excise Tax is equal to "1 percent of the fair market value of any stock of [a covered] corporation which is repurchased by such corporation during the taxable year."[5] A "covered corporation" is "any domestic corporation the stock of which is traded on an established securities market (within the meaning of section 7704(b)(1))" or what are generally referred to in common parlance as "publicly traded corporations."[6] Stock repurchases occurring after December 31, 2022, are subject to the Excise Tax.[7]

The simple language of the Excise Tax left taxpayers with numerous questions related to the calculation and remittance of the tax, as well as the tax's effective date. TEI commends the IRS for its efforts in timely addressing many of these issues. However, the Notice also raises some new concerns, particularly for multinational companies. Accordingly, this letter is divided into two sections: (1) general comments in response to issues presented by the Excise Tax and the Notice and (2) comments on the funding rule (the "Funding Rule") and the related per se rule (the Per Se Rule") that are introduced in the Notice.

General Comments

Fair Market Value

The Excise Tax initially raised concerns regarding the definition of "fair market value." TEI appreciates the flexibility provided in the Notice, which accepts four different methods for determining the fair market value of repurchased stock (and issued stock for purposes of the netting rule) based on market price. TEI also appreciates the use of the fair market value determined under section 83 for stock issued or provided to an employee.

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5 Section 4501(a).

6 Section 4501(b).

7 Pub. L. 117–169, title I, section 10201(d), Aug. 16, 2022, 136 Stat. 1831.

Remittance of the Excise Tax

The Notice additionally addresses concerns regarding the remittance of the Excise Tax. TEI agrees that the correct approach is to report the tax once per year on a revised Form 720. While the one percent tax on stock repurchases is styled as an excise tax under subtitle D of the Code ("Miscellaneous Excise Taxes"), it differs from most other excise taxes because it is imposed on the "net" stock repurchases over the course of a taxable year. Quarterly reporting would require a refund mechanism as there may be a net stock repurchase in a particular quarter, but a net stock issuance for a taxable year. Therefore, the planned approach in the Notice for annual reporting will streamline the reporting process significantly.

Preferred Stock

Section 4501(f) authorizes guidance "necessary or appropriate to carry out, and to prevent the avoidance of, the purposes of this section, including . . . To address special classes of stock and preferred stock." The Notice defines "stock" as any instrument issued by a corporation that is stock or treated as stock for Federal tax purposes at the time of issuance, regardless of whether the instrument is traded on an established securities market. The Notice further confirms through Example 1 that a redemption of mandatorily redeemable preferred stock is subject to the Excise Tax. However, the Notice requests comments on whether special rules should be provided for redeemable preferred stock or other special classes of stock or debt (including debt with features that allow the debt, whether by the issuer, the holder, or otherwise, to be converted into stock). TEI recommends generally exempting from the Excise Tax redemptions of non-convertible preferred stock that is limited and preferred as to dividends and that does not participate in corporate growth to any significant extent.[8] Such redemptions are economically similar to the repayment of debt as they only affect the earnings per share of the outstanding stock to the extent they reduce preferred dividends payable in a manner similar to the effect on earnings per share from a reduction of interest payable after a debt repayment. Therefore, exempting repurchases of non-convertible preferred stock from the Excise Tax is not contrary to the underlying policy of the tax as such stock has different properties than common stock and other preferred stock.

As discussed above, TEI believes that future guidance should exclude repurchases of non-participating, non-convertible preferred stock from the Excise Tax. However, if repurchases of such preferred stock are not generally excluded from the Excise Tax, TEI alternatively requests transitional relief for repurchases of such preferred stock issued prior to the enactment of section 4501.

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[8] See section 1504(a)(4)(B) and (D) (without regard to section 1504(a)(4)(A) and (C)). Treasury and the IRS also should consider whether repurchases of stock that satisfies section 1504(a)(4)(B) but that is convertible into another class of non-participating, non-convertible preferred stock should be exempted from the Excise Tax.

Consistent with this recommendation, Example 1 should be modified to illustrate that mandatorily redeemable preferred stock should not be subject to the Excise Tax.

Comments on the Funding Rule and the Per Se Rule

The Notice, however, does more than provide clarity on the important questions discussed above; it introduces the Funding Rule and the related Per Se Rule that not only exceed the plain language of the statute but attack transactions far beyond those intended to fall within the scope of the statute as well. The Funding Rule and Per Se Rule are overly broad and pose significant, unintended burdens on multinational taxpayers. The remainder of this letter will focus on this important issue, as it is paramount to many TEI members.

The Rules

The Notice provides that an applicable specified affiliate is treated as acquiring stock of an applicable foreign corporation if the applicable specified affiliate funds, by any means, the acquisition or repurchase of the stock of the applicable foreign corporation by the applicable foreign corporation or a specified affiliate that is not also an applicable specified affiliate, and the funding is undertaken for a principal purpose of avoiding the Excise Tax (the Funding Rule).[9] The Notice further provides that a principal purpose is deemed to exist if there is a funding (other than through distributions) by an applicable specified affiliate and the funded entity acquires or repurchases stock of the applicable foreign corporation within two years of the funding (the Per Se Rule).

Congressional Intent and Overbreadth of the Funding Rule

The Funding Rule primarily appears to be concerned with multinationals circumventing the Excise Tax through repurchases in situations when the foreign parent is a controlled foreign corporation or when the foreign parent has supplanted a U.S. parent corporation through an inversion. However, in the case of any foreign parent corporation with U.S. subsidiaries, the Funding Rule has the potential to impose an extraterritorial tax on such corporations, a result that seems inconsistent with congressional intent and the purposes of section 4501.[10] This arguably violates certain U.S. treaties with other countries that are aimed at preventing double taxation as the Excise Tax will tax transactions that already are taxed in the country of origin. Furthermore, it sets a bad precedent that other countries may follow. It effectively taxes foreign corporations on their non-U.S. profits—an approach that other countries, in turn, could decide to adopt with regard to repurchases of the stock of U.S. corporations with foreign affiliates.

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[9] An "applicable specified affiliate" is a specified affiliate that is not a foreign corporation or a foreign partnership (unless the partnership has a domestic entity as a direct or indirect partner). A "specified affiliate" is, with regard to a corporation, (i) any corporation more than 50 percent of the stock of which is owned (by vote or by value), directly or indirectly, by the corporation, and (ii) any partnership more than 50 percent of the capital interests or profits interests of which is held, directly or indirectly, by the corporation.

[10] Congress has indicated that a U.S. excise tax should not operate as an indirect tax on foreign companies through its rejection of a prior version of the statute that would have imposed a narrower tax on foreign companies than the Funding Rule does. *See* Stock Buyback Accountability Act (Sep. 10. 2021), available at https://www.brown.senate.gov/imo/media/doc/stock_buy_back_accountability_act_bill_text.pdf.

Additionally, it violates the arm's length principle that is an important tenet of tax policy and that recurs throughout the Code.[11] Under the Funding Rule, ordinary course business transactions between an applicable foreign parent or a specified affiliate and an applicable specified affiliate will not be at arm's length if the payment is treated as a funding that subjects the related stock repurchase to the Excise Tax under the Per Se Rule.

A primary purpose of section 4501 is to incentivize corporations to invest in their workers, rather than enriching wealthy shareholders and top executives.[12] However, the broad language of the Funding Rule captures significant ordinary course business transactions necessary to the operation of multinational companies that have no direct relationship to the enrichment of such parties at the expense of employees. The Per Se Rule effectively has the potential to subject any repurchase of the stock of a foreign corporation to the Excise Tax if such corporation has U.S. operations and standard business operations of a multinational company. Cash pooling arrangements, interest and principal repayments on debt, currency translation, payments for intercompany services, and royalty and inventory payments, among numerous other ordinary course business transactions, all will be deemed to be undertaken for a principal purpose of avoiding the Excise Tax under the Per Se Rule to the extent of stock repurchases within two years of such activities, provided those transactions are between the applicable foreign corporation or a specified affiliate and the applicable specified affiliate. As these transactions are routine and occur throughout the year, there consistently will be funding transactions that will be treated as being undertaken for a principal purpose of avoiding the Excise Tax that would subject the stock repurchases within the relevant timeframe to the Excise Tax.

Furthermore, in the case of applicable foreign corporations with numerous subsidiaries, stock repurchases deemed made by the applicable foreign corporation or a specified affiliate due to the Per Se Rule raise questions regarding which applicable specified affiliate (or affiliates) is responsible for a particular stock repurchase, whether more than one applicable specified affiliate could be treated as funding the same stock repurchase resulting in taxation of the same stock repurchase more than once, and whether a portion of the funding for each stock repurchase should be attributed to other affiliated corporations that are not applicable specified affiliates if those affiliates also provide funds to the applicable foreign corporation or specified affiliate.

TEI Recommendations

As an initial matter, TEI recommends that Treasury and the IRS exclude the Funding Rule from future guidance. However, if such a rule is retained, TEI recommends the following modifications to the

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[11] For example, section 482 will apply to adjust transactions to clearly reflect income when a transaction is determined not to have been at arm's length.

[12] "Stock buybacks are currently heavily favored by the tax code, despite their skewed benefits for the very top…Our bill simply ends the preferential treatment and encourages mega-corporations to invest in their workers." *See* Brown, Wyden Unveil Major New Legislation to Tax Stock Buybacks (Sep. 10, 2021), available at https://www.brown.senate.gov/newsroom/press/release/brown-wyden-tax-stock-buybacks.

Funding Rule: (1) the Funding Rule should include a carve-out for ordinary course business transactions and Treasury functions; (2) arrangements that existed prior to the enactment of section 4501 should be excluded from the Funding Rule as they could not have been undertaken for a principal purpose of avoiding the Excise Tax; (3) transactions consistent with historic practice should be excluded from the Funding Rule as such practice implies that those transactions are not undertaken for a principal purpose of avoiding the Excise Tax; (4) dividends between an applicable specified affiliate and an applicable foreign corporation that is a member of a relevant treaty country should be excluded from the Funding Rule; and (5) the Per Se Rule either should be excluded entirely from the Funding Rule or converted to a rebuttable presumption.

As discussed above, the Funding Rule, as a result of the Per Se Rule, treats numerous ordinary course business transactions and arrangements as fundings of stock repurchases that have no relationship to such repurchases. For example, when an applicable specified affiliate pays principal or interest on debt held by an applicable foreign corporation, the applicable specified affiliate should not be treated as funding the applicable foreign corporation when, in fact, the applicable foreign corporation actually funded the applicable specified affiliate. If the Per Se Rule is retained, TEI recommends that future guidance exclude ordinary course business transactions from the rule. However, even if the Per Se Rule is eliminated or converted to a rebuttable presumption, TEI recommends that future guidance identify ordinary course business transactions that generally are not undertaken for a principal purpose of avoiding the Excise Tax to assist taxpayers and to provide clarity to the rule. Tracking such transactions for purposes of either rule is unduly burdensome for taxpayers. Furthermore, there is no policy reason or statutory basis to justify the application of the Excise Tax to otherwise exempt stock repurchases merely because of the existence of ordinary course business transactions between related corporations.

Similarly, transactions that were put into place prior to the Excise Tax or that are consistent with the historic practice of a company should be expressly excluded from the Funding Rule because it is apparent that such transactions were not undertaken for a principal purpose of avoiding the Excise Tax. For example, payments of principal and interest on a loan that was put into place prior to the enactment of the Excise Tax should be excluded as potential funding transactions because the loan was put into place before Excise Tax avoidance could have been a motivation. Moreover, if a corporation has a history of entering into yearly service agreements with a particular affiliate, payments pursuant to a subsequent year's service agreement entered into after the enactment of the Excise Tax should not result in such payments being characterized as fundings. The service agreement history prior the enactment of the Excise Tax indicates that avoidance is not a principal purpose of the arrangement.

Under the Funding Rule, a dividend paid by an applicable specified affiliate to an applicable foreign corporation could result in the imposition of an Excise Tax on a stock repurchase. In situations in which the applicable foreign corporation is resident in a country with a tax treaty with the U.S., the imposition of the Excise Tax essentially could result in double taxation of the dividend and, therefore, a

violation of the treaty. TEI recommends that future guidance clarify that a dividend that is excluded from U.S. taxation under a treaty is excluded from treatment as a funding under the Funding Rule.

Finally, the Per Se Rule should be excluded from future guidance entirely as it is inflexible, unforgiving, and unable to take into account business realities of multinational companies. Furthermore, as outlined above, it has the potential to tax numerous stock repurchases with no real nexus to the United States. The "principal purpose" test already included in the Funding Rule is sufficient to police transactions intended to circumvent the Excise Tax through foreign affiliates. However, if a version of the Per Se Rule is retained, it should be recharacterized as a rebuttable presumption which provides more flexibility to consider situations that should be excluded from the Excise Tax because they fall beyond the purposes of the statute.

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TEI appreciates the opportunity to comment on the Notice. TEI's comments were prepared under the aegis of its Federal Tax Committee, whose chair is Julia Lagun. Should you have any questions regarding TEI's comments, please do not hesitate to contact Julia Lagun at jlagun@comerica.com or TEI tax counsel Kelly Madigan at kmadigan@tei.org or (202) 470-3600.

Respectfully submitted,

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