UNITED STATES DEPARTMENT OF THE TREASURY

INTERNAL REVENUE SERVICE

TELECONFERENCE PUBLIC HEARING ON PROPOSED REGULATIONS

"EXCISE TAX ON REPURCHASE OF CORPORATE STOCK"

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P R O C E E D I N G S

(10:00 a.m.)

MR. JONES: This is a public hearing on Proposed Regulations regarding the Excise Tax on Repurchase of Corporate Stock. The first speaker on the agenda is Josh Odintz from the American Chemistry Council. Just a reminder that each speaker is allocated a maximum of ten minutes to speak.

MR. ODINTZ: Good morning. Thank you very much for having me today. My name is Joshua Odintz, I'm a partner in Holland & Knight and I'm here on behalf of the American Chemistry Council. The ACC represents the leading companies engaged in the business of chemistry. ACC member companies apply the science of chemistry to create and manufacture innovative products, make people's lives better, healthier, and safer.

So once again, thank you for the opportunity to testify today. We applaud Treasury and IRS efforts in drafting the Proposed Regulations. However, we continue to find issue

with how while prospectively eliminating Notice 2023-2's Per Se Rule, the Proposed Regulations largely retained the notice's problematic Funding Rule an urge Treasury and the IRS to fully withdraw the same.

So first, I'll discuss the Funding Rule and the principle of purpose test how they are beyond the scope of Section 4501 and therefore should be fully withdrawn. As enacted, Section 4501(d)(1) of the statute clearly contemplates the imposition of the Section 4501 excise tax on repurchases of foreign parent stock by U.S. affiliates. It does not, however, contemplate that such a repurchase is presumed to have occurred solely by the occurrence of a payment made by such specified affiliate to the foreign parent. Under the Proposed Regulations, however, the IRS can presume that a taxpayer is seeking to avoid the excess tax simply because the IRS determines that cash payments a taxpayer makes to its U.S. foreign parent or other foreign affiliate are to be used by such parent to fund a covered

purchase under a principal purpose test. This is an extreme leap from the statutory language of Section 4501, given the fact that many publicly traded companies have long term stock buyback programs in place at the parent level. Congress did not take this approach in drafting Section 4501 and instead wrote the excess tax rules with no mention of a funding concept. We believe these legislative choices were deliberate and should be respected.

Further, the language used in the Funding Rule: funds by any means, including through distributions, debt, or capital contributions, directly or indirectly, can cover an extraordinarily broad range of ordinary course transactions. For example, a U.S. Subsidiary could have a long history, or predating the excise tax, by paying dividends of its annual earnings to its foreign parents to support the parents dividend to shareholders, or to fund a stock buyback program. Such a normal course dividend consistent with prior year practices should not be

considered as having a purpose to avoid the excise tax. However, the -7 regulations would appear to empower the IRS to take that unwarranted position because the purpose to fund a foreign parent that does the stock repurchase is treated as an automatic purpose to avoid the excise tax.

As currently proposed, the Funding Rules determination that longstanding corporate transactions that were affected for the purpose of funding a stock buyback prior to the act of the tax are now somehow being undertaken with a principal purpose to avoid the excess tax when affected to fund a stock buyback post enactment. And that's simply absurd. What is eminently evident is that the Funding Rule along with the principal purpose test is a material expansion of the reach of the excess tax under Section 4501, and it's not justified by the text -- the clear reading of the text, or policies of the statute. We urge the Treasury to withdraw the Funding Rule.

Second, I'd like to talk about the choice that is put forth in the notice in the

Proposed Regulations. Both Treasury and the IRS have previously stated that the notices Per Se Rule were too broad and would be revised, and this is after Notice 2023-2. However, rather than fully withdraw the Per Se Rule, the Proposed Regulations retain this rule for repurchases from December 31st, 2022, and April 12th, 2024. In these instances, if a taxpayer wishes to avoid the notices Per Se Rule, it is required to adopt overly broad Funding Rule under the Proposed Regulations. This is something that Treasury and the IRS could not have required under the APA, Administrative Procedure Act or Section 7805. Because most of the rules under -7 were not announced in Notice 2023-2, they cannot be forced upon taxpayers to apply retroactively to pre April 13th, 2024, stock repurchases. The ACC therefore requests that the final regulations include a complete withdrawal of a Per Se Rule.

And then finally, I'd like to talk about how the principal purpose test, or the Funding Rule creates a dangerous precedent. Yet another

reason for Treasury and the IRS to withdraw the Funding Rule is that it could result in double taxation circumstances where the home jurisdiction of the applicable foreign corporation has also adopted a buyback excise tax. Since the enactment of the excise tax in 2022, other countries have taken steps to implement similar excise taxes within their own jurisdiction.

For example, in 2023, Canada formally introduced a bill establishing a 2 percent excise tax on certain repurchases of stock of specified Canadian entities. Should the Canadian stock repurchase excess tax be enacted, the current Funding Rule could be used in Canada to treat a U.S. subsidiary as funding its Canadian parent with a principal purpose to avoid the excise tax. While at the same time, the proposed Canadian repurchase tax regime could independently levy an excise tax on the Canadian parent for repurchasing its own stock. This could result in double taxation. Further, the Canadian law could be expanded to apply the funding mechanism signed to

tax stock repurchases in the United States.

The French government also said it wants to enact a share buyback tax of at least 1 percent as part of this 2025 budget. Another example worth pointing out, in 2023, the Dutch parliament also enacted a 15 percent dividend withholding tax on share buybacks in the Netherlands, set to take effect on January 1st, 2025, and could give rise to the same bad results, as noted in the example above. And the U.S. funding will provide a path for foreign countries to tax U.S. stock repurchases, and we are concerned that foreign countries could adopt a similar Funding Rule mechanism. For these reasons, the ACC respectfully requested request the complete withdrawal of the Funding Rule from the final regulations.

Thank you very much, and I'm happy to answer any questions.

MR. JONES: Thank you very much.

MS. DOBI: Thank you.

MR. JONES: Our next scheduled speaker

is Alan Pasetsky from the Global Business Alliance.

MR. PASETSKY: Good morning. My name is Alan Pasetsky and I'm here on behalf of the Global Business Alliance, GBA for short. I appreciate the opportunity to testify today regarding the Section 4501 Stock Buyback Tax Proposed Regulations. GBA proudly represents nearly 200 of the world's best known brands. They are American companies with a global heritage. International companies operating in the U.S. Invest over $5 trillion into our economy and have created nearly 8 million jobs, including 250,000 new manufacturing jobs in the past five years. GBA advocates for policies that ensure fair and non-discriminatory treatment of foreign based companies operating in the U.S. We believe that such policies are vital to enhancing american employment and bolstering U.S. economic expansion.

First, a little history. Although the stock buyback tax was intended to impose a 1 percent excise tax on stock repurchased by

publicly traded U.S. corporations, it also applies when a U.S. Affiliate actually acquires the stock of its publicly traded foreign parent. The initial guidance in 2023-2 provided a principle purpose Funding Rule and a procedural, whereby almost any ordinary course payments by a U.S. subsidiary to its foreign parenthood would have been deemed to have been undertaken to avoid the excise tax if such payments were made within two years of the buyback. Notwithstanding that the U.S. subsidiary never actually purchased any of its foreign parent shares.

The current Proposed Regs prospectively eliminate this Per Se Rule, but unfortunately they retain the principal purpose Funding Rule with a new twist. The new twist is that if any principle purpose of a funding is to fund the stock buyback, then there's a conclusive principle purpose to avoid the tax. So if a taxpayer is deemed to have a purpose of avoiding the excise tax simply because the IRS determines that a cash payment by a taxpayer makes to his foreign parent may have

been used by such parents upon the buyback. This twist negates the need to have a purpose to avoid the excise tax, which I would think would be required as part of a principal purpose test, and it authorizes the IRS to simply oppose the tax when U.S. sub makes a payment to a foreign affiliate and the foreign of parent repurchases its stock.

The preamble to the proposed regulation simply dismisses the contention that an actual purchase of foreign parent stock is required, stating that a Funding Rule is necessary to carry out the purposes of the tax, which could easily be avoided absent such a rule. Treasury officials have indicated that the Funding Rule is designed out of a concern to curb a potential abuse whereby if a U.S. affiliate had a plan to actually purchase foreign parent stock and now decided to instead make a payment to the foreign parent for it to repurchase its own stock to avoid the tax. A fatal flaw, though, with Treasury's concern is that this perceived abuse doesn't exist. U.S.

affiliates rarely ever purchased the stock of their foreign parents. GBA even surveyed its members, and in the very rare case that had occurred, it was done for the purpose of funding employee compensation, which is an excise tax exemption under Section 4501.

If the true concern is that a U.S. subsidiary that would have actually acquired its foreign parent stock and still conceived of an alternative structure to avoid the excise tax, then the regulation should target that precise concern. The current rules do not. The excise tax is not intended to apply to stock buybacks undertaken by foreign publicly traded companies. It should not be invoked simply because a foreign parent uses cash it validly receives from ordinary necessary, say, interest, royalties or other similar payments from its U.S. subsidiaries in order to execute its buyback.

Under this rule, say, a foreign parent is scheduled to do a buyback in July 1st. The excess tax would apply if it used its regular

course monthly royalty interest payments that it receives on June 30th to do the buyback. This is clearly not a result intended by the statute. Interestingly, the forming rule even causes the tax to be imposed where foreign legal restrictions would prevent a U.S. subsidiary from acquiring its parent stock. The application of an excise tax to create a fiction that could not legally exist also demonstrates that the Funding Rule goes beyond the intent of the statute. Nonetheless, Treasury simply dismissed this concern in response to comments made to the notice, which leads me to the next topic.

I would be remiss not to mention the recent local bribe on Ohio versus EPA Supreme Court decisions which will undoubtedly affect the Treasury's and IRS regulatory decisions and processes. These cases stand for the proposition that courts must engage in their own interpretation of statutes and determine their best reading. They also emphasize that governmental agencies must consider all

contemporaneous comments under the APA and provide explicit rationale for their decisions and appropriate responses to comments made. In this regard, GPA believes the Funding Rule does not represent a good reading, much less the best reading of the very clear statutory text of Section 4501.

I'd like to now provide some more basic examples to illustrate why this proposed Funding Rule ignores any avoidance of the excise tax requirement and should be revoked. Josh already talked about dividends and how a normal course post excise tax dividend, consistent with prior year's practice, could be deemed to avoid the excise tax and result in the tax being imposed. It's even unclear how a taxpayer could establish that the cash for the buyback didn't come from an ordinary course payment from the U.S.

To make this even more egregious, the dividends from the U.S. are due to be used first by the foreign parent to do the buyback, regardless of the dividends or fundings from

foreign affiliates globally. So if a foreign parent receives $10 million from the U.S. and, say, $100 million from its other affiliates, the $10 million is due to fund the buyback first, and the tax would be imposed if a $10 million buyback was done, even though 90 percent of the cash the foreign parent received came from other sources outside the U.S.

Another common and troubling scenario is where a U.S. subsidiary borrows funds from its foreign parent at arm's length to build new facilities that will employ thousands of U.S. workers. The arm's length interest payments and repayment of the loan principal by the U.S. subsidiary could result in an excise tax if the foreign parent does a buyback. When a transaction pursuant to an Advance Pricing Agreement where the IRS has officially blessed the payment as legitimate, ordinary, and arm's length, say for a plain purchase of inventory or services, could cause an imposition of the excise tax. There are thousands of ordinary course transactions that

could be swept into the successfully broad Funding Rule, all of which no purpose to avoid the excise tax.

While the preamble to the regulation states that the elimination of the Per Se Rule from the initial notice satisfy taxpayer concerns, this is clearly not the case. GBA disagrees that the Funding Rule, including the principal purpose test with the new twist I explained earlier, is necessary to accomplish the intent of the statute and produces ridiculous unintended results. And consequently, GBA requests to buy back regulations eliminate the Funding Rule.

In the event Treasury and IRS declined to revoke the Funding Rule, however, the principal purpose test should at least be revised to take into account the taxpayers actual intent to avoid the excise tax, as opposed to dealing existence of a bad intent. We provided a simple modification in our comment letter to accomplish this that's consistent with other anti-abuse rules and would exempt ordinary course transactions. I cannot

emphasize enough that any remaining anti-avoidance rule must part your transactions with a principal purpose to avoid the tax, not a purpose to avoid a funding, and not require proving a negative fact to demonstrate that principal purpose.

There were also other issues with the Funding Rule that should be carefully considered, such as the interaction with tax and non-tax treaties. Although the tax was enacted as an excise tax, it effectively acts like a withholding tax on outbound payments by the U.S. subsidiary. Assuming subsidiary declares a dividend without any knowledge of how the cash will be deployed by the foreign parent, and there's a treaty between the foreign parent country and the U.S. Subsidiary country provides for 0 percent on dividends. If the payment is made and an excise tax is deemed to apply because it links the dividend to the repurchase, there will be a 1 percent excise tax even though this contradicts the treaty, which mandates a 0 percent withholding tax on dividends. The preamble asserts the

Funding Rule doesn't apply because it's an excise tax on a domestic subsidiary, but in fact it's a withholding tax substitute on the U.S. payments. The Treasury also doesn't adequately address our concerns regarding relevant non-income tax treaties that, on their face, apply to excise taxes, which we discussed in our comment letter.

GBA reiterates the comments just made in prior testimony that the taxpayer should not have to choose between applying the for Per Se Rule and the overly broad Funding Rule for repurchases between the effective date and April 12th. And we also have concerns about issuing the recent procedural regulations on July 23rd to require companies to pay in by October 31st because the Funding Rule does not give enough guidance or time to properly compute the tax. Also, we would like the netting rule revised, if possible, for payments where stock is issued to an employee or an affiliate where a public corporation, domestic and foreign affiliates should be allowed to receive the stock, not just the covered company

itself.

So, in conclusion, GBA strongly represents removal of the Funding Rule and the regulations. It is necessary to prevent this overreach, a tremendous burden on taxpayers and the IRS to navigate this ill focused principle purpose test touching everyday, ordinary transactions. Sometimes we need to take a step back and remember the big picture. Treasury shouldn't just consider whether it could impose the Funding Rule, but should consider the additional question of whether it should. Based upon the reasons enumerated today, I think that answer is abundantly clear.

Thank you very much for your time today.

MR. JONES: Thank you. Our next speaker is Joshua Odintz, representing the Northern Lights Coalition.

MR. ODINTZ: Good morning again. I'm still Joshua Odintz from Holland & Knight. Now I'm here on behalf of the Northern Lights Coalition and ad hoc Coalition of Domestic and

Foreign Headquartered Businesses. The Coalition is concerned about one part of the Proposed Regulations, the Funding Rules. The Coalition's comment letters address many reasons why the Per Se Rule and the Funding Rule, collectively, the Funding Rules, should be withdrawn.

My testimony will highlight a few of the key points raised in the comment letter and a new issue that arose after the submission of the last comment letter. I will cover the following four topics on my testimony: First, the legislative history of Section 4501; second, the interaction of tax and trade treaties with the Proposed Regulations; third, the choice between applying the notice for early adoption of the Proposed Regulations; and fourth, statutory interpretation in light of the Loper Bright relentless decisions by the Supreme Court.

So first, let's turn on legislative history. Congress crafted Section 4501 in a way that had, and was intended to have, a limited applicability to foreign parenting groups. Except

for groups that inverted after September 20, 2021, the only way the excess tax can be triggered with respect to a foreign parented group is if a U.S. Affiliate purchases foreign parent stock from a third party. Congress initially considered, but rejected a proposal that might have applied more broadly to foreign parenthood groups with U.S. subsidiaries. A draft Senate bill from Chairman Wyden September 21, included a provision to impose the excise tax on foreign parenthood groups based on a pro rata portion of the U.S. affiliates gross receipts to the group's overall gross receipts. In 2021, the Senate Committee on Finance considered concerns that such attacks would operate as an indirect tax on foreign activities, similar to the tax at issue in Vodafone in India.

Congress deliberately chose to not to adopt this broad provision and instead enacted the narrow provisions that are contained in Section 4501(d)(1), taxing only the acquisition of foreign parent stock by a specified U.S. affiliate of that foreign parent. A broader rule applicable to

inverted groups was included, but the rest of the universe of foreign parenting groups is not included unless a U.S. Subsidiary directly purchased parent company stock. Based on what Congress did and did not enact, it is clear that Congress intended that Section 4501 would have very limited applicability to non-inverted foreign parented groups.

The statutory regime was not an accident. There are obvious reasons, based on concerns about complexity as well as potential retaliation against U.S.-parented multinational groups, to limit the tax to domestic parent acquisitions or direct acquisitions by U.S. Subsidiaries of a U.S. parent.

Second, I'd like to cover tax and trade treaties. As described in our comment letter, the Proposed Regulations conflict with income tax treaties. The preamble takes issue at this point and argues that the excise tax is not covered by an income tax treaty because it is an excise tax. The Proposed Regulations operate as a disguise

withholding tax. As applied, the Proposed Regulations would add an additional 100 basis points of tax on dividends, interest, royalties, and other cross-border payments in conflict with U.S. treaty obligations. Further, U.S. income tax treaties apply to excise taxes where one party that the treaty discriminates against the residents of the other party. The Proposed Regulations would apply significant burdens on the U.S. subsidiaries of foreign corporations to determine the purpose and use of every cross-border payment, a burden which is not placed on domestic corporations. U.S. headquarters groups would not be subject to such burdens.

Our comment letter also highlights that the principal purpose test in the Per Se Rule conflict with friendship, commerce, and navigation treaties, or FCNs, with our closest and oldest allies and with a broad range of bilateral investment treaties, known as BITs, with countries with which we -- with which we wish to maintain and improve a close relationship or improve our

relationships.

I'd like to highlight the Netherlands FCN. The treaty prohibits restrictions on payments, remittances, or transfers of funds or of financial instruments between the U.S. and the Netherlands and their several territories, or to third countries. Taxes, income taxes, or specific -- or I'm sorry -- taxes are specifically included as exchange restrictions. Income taxes subject to bilateral tax treaties are reserved by the US. Excise taxes are not reserved by the U.S., and there is no other exception. The United States agreement exception -- the United States agreement not to tax payments except to the extent necessary to maintain or restore U.S. monetary reserves. Thus, if the NPR claims to stop buyback tax is exempt from dual tax treaties, it ipso facto falls out of the reserve power of the FCN treaties with respect to income taxes and is then subject to the restrictions on taxes on payments. The NPRM principle purpose test and the Per Se Rule applied only to payments and are therefore precisely

described in the FCN treaties with the provisions comparable to Articles 11 and 12 of the Netherlands FCN.

The cream off the top rule of the NPRM also violates the Netherlands FCN because it treats all fundings as originating first in the United States and is not a reasonable allocation or apportionment of the amount of funding arising from U.S. sources. There is nothing in the legislative history that indicates Congress intended to tax -- to override its tax FCN and bit treaty obligations, Congress must provide clear and manifest intent to abrogate or modify a treaty by a leader statute. I referred to Whitney versus Robertson and Posadas versus National Citibank. Such clear and manifest intent is lacking. In fact, the legislative history makes no reference to income tax, FCN, or BIT treaties. Congress, not Treasury, has the authority to override treaty obligations. Congress has not done so, and the Funding Rules cannot conflict with our treaty obligations.

In the interest of time, I'll just point out, as I've already pointed out in a prior comment for a different client, that the notice -- sorry -- the Proposed Regulations forced the Hobson's Choice between alternative regimes, specifically the Per Se Rule and the principal purpose test, and so the taxpayer is required to either obey a withdrawn Per Se Rule in the future or apply the apply the -7 rules retroactively. And the Proposed Regulations try to impose new regulation -- new consequences, and legal duties to conduct -- to conduct before the date of publication of its regulations. And we believe this is an end run around the APA of Section 7805(b).

Finally, I'd like to cover Loper & Bright and relentless. After the Coalition filed its comment letter to the NPRM, the Supreme Court overturned the Chevron Doctrine and Loper Bright on relentless. We think the rules regarding foreign parented groups and NPRM were very likely invalid under the Chevron Doctrine, and they're

now even more like -- they're now more likely to be held invalid under post Chevron Doctrines. After Chevron, a court and interpreting a vague statute must ascertain the best meaning. Any other meeting of the statute by an agency is impermissible. Section 4501(d)(1) is not of the statute and is extremely limited in its applicability to foreign parenting groups. In the case of a foreign parent, the excise tax applies to the stock repurchase of foreign parented stock by a U.S. affiliate and to certain foreign parented groups that averted after a particular date. Congress chose not to go further than that.

Congress provided authority for Treasury to issue regulations, including the application of rules under subsection d. Treasury also has general authority to prevent the avoidance of the statute. However, Congress did not provide authority to Treasury to rewrite the statute to broaden its impact to include transactions previously deliberately excluded from the new excise tax. The Funding Rules do not reflect the

best meaning of addressing avoidance of the statute. As previously described by our comment letters, the Per Se Rules would apply to every cross-border transaction between the U.S. Subsidiary and its foreign parent other than the distribution. The preamble in the NPRM concedes that the Per Se Rule is overly broad and applicable to non-avoidance transactions. The Proposed Regulations principal purpose test also goes well beyond avoidance transactions by deeming certain unrelated ordinary business transactions as tax avoidance. The plain reading of the statute and the best interpretation of the grant of authority do not support the conversion of ordinary business transactions into tax avoidance schemes.

Thank you for the opportunity to testify. I welcome any questions.

MS. DOBI: Thank you. So if there's anyone who wants to speak via teleconference, they may do so. The AT&T operator could allow anyone who would like to speak or unmute them if they'd

like to testify or offer comments. We're happy to hear those as well.

OPERATOR: And this is the operator. If they wish to speak, we would need them to press one, then zero.

MS. DOBI: Is there -- I take it no one wants to speak or offer comments.

OPERATOR: We have no one queuing up wishing to speak at this time.

MS. DOBI: Okay, thank you.

MR. JONES: So with that, I think this hearing is concluded. Thank you.

MS. DOBI: Thank you.

(Whereupon, at 10:29 a.m., the PROCEEDINGS were adjourned.)

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CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

I, Stephanie Kern, notary public in and for the District of Columbia, do hereby certify that the forgoing PROCEEDING was duly recorded and thereafter reduced to print under my direction; that the witnesses were sworn to tell the truth under penalty of perjury; that said transcript is a true record of the testimony given by witnesses; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was called; and, furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

(Signature and Seal on File)

Notary Public, in and for the District of Columbia