

May 12, 2016

The Honorable Jacob Lew
United States Treasury Secretary
U.S. Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

Re: Proposed Regulations under Section 385 (Reg.-108060-15)

Dear Secretary Lew:

The undersigned associations, representing thousands of global and domestic businesses in the United States across many industries, have serious concerns about the potential impact of the proposed debt-equity regulations under Internal Revenue Code section 385 (the “proposed 385 regulations”), released by the Treasury Department on April 4, 2016. The proposed guidance, which overturns long-standing tax principles and well-established case law and regulations, will significantly increase the cost of doing business in the United States, and create further obstacles to much needed investment, job creation and economic growth.

Because of the significant and disruptive impact of the proposed 385 regulations on critical business operations of a wide swath of employers in the United States, we respectfully request that, at a minimum, Treasury:

- Change the effective date for the proposed debt-equity recharacterization rule from applying to debt instruments that are issued on or after April 4, 2016, and instead apply the rule to debt instruments that are issued on or after the date that is 90 days after the proposed regulations are finalized;
- Extend the public comment period from July 7, 2016, to October 5, 2016, at the earliest; and
- Dedicate adequate time and resources for a thorough review and analysis of the public comments on the proposal rather than seeking to finalize the regulations on an arbitrarily rapid timeline.

Broad Impact of the Proposed Regulations

Based on Treasury’s April 4 press release, the proposed 385 regulations are designed “to further reduce the benefits of and limit the number of corporate tax inversions, including by addressing earnings stripping.” Nonetheless, even a cursory review of these regulations clearly indicates that they go far beyond cross-border mergers and apply to a wide range of ordinary business transactions by global and domestic companies both in and outside the United States.

Indeed, the proposed 385 regulations affect all aspects of both a company’s capital structure and the funding of its ordinary operations and fundamentally alter the U.S. tax rules on intercompany debt by overturning the well-established facts and circumstances analysis used by the courts and the Internal Revenue Service (IRS) to determine whether an instrument is debt or equity. Whether an instrument is debt or equity has significant, collateral consequences to business operations that go well beyond the interest deduction on the instrument and include the legal classification of an entity, eligibility for withholding tax exemptions under tax treaties

and the ability to file a consolidated tax return. These issues present a severe impediment to the use of intercompany financing for even normal operations and will significantly increase the cost of capital and limit the amount of capital available to invest in the United States.

Businesses Need Adequate Time for Analysis

Given the magnitude of these proposed changes, companies still are in the initial stages of assessing the many ways the proposed 385 regulations will impact their business operations and their U.S. and foreign tax positions. In particular, businesses need additional time to analyze the proposed rules relating to specified transactions, including the 72-month funding period rule, the new documentation requirements and the bifurcation rules, as well as how each business will be able to effectively administer those sets of rules.

Companies' analyses and business planning are further complicated by the retroactive April 4, 2016, proposed effective date for the rules allowing Treasury to recast related-party debt as equity. In order to understand the broad effects that these proposed rules will have, corporate tax departments must confer with their corporate treasury counterparts located across the globe. In addition, because of this retroactive effective date, companies have to plan and conduct their operations as if the proposed regulations were effective currently, at the same time as they try to analyze and understand the proposed rules. Moreover, with the proposed April 4 effective date and the potential for existing debt to experience a "significant modification," even current finance structures of many businesses are at risk.

More than 30 days after the regulations were released, the companies represented by our organizations believe that they have only begun to identify the potential impact the proposed 385 regulations will have on their business operations and on a wide range of transactions including, but not limited to, implications for standard corporate cash management techniques, including cash pooling; potential double taxation as a result of the loss of foreign tax credits; determinations of control between related parties under I.R.C. section 368(c) in connection with various tax free transactions; the qualification of a reorganization or spin-off; determinations of deemed debt issuances in connection with the acquisition of related party indebtedness; whether a company continues to be a member of the U.S. consolidated return group; and allocations of partnership items to partners under I.R.C. section 704. As these analyses continue, we expect our members to identify other basic and routine transactions that are potentially impacted.

Moreover, since the proposed regulations were not included in Treasury's updated 2015-2016 Priority Guidance Plan, released February 5, 2016, businesses did not have any advance notice of this far-reaching proposal.

Consequently, we strongly urge Treasury, at a minimum, to change the effective date of the proposed debt-equity recharacterization rule from applying to debt instruments issued on or after April 4, 2016, and instead apply the rule to debt instruments on or after the date that is 90 days after the regulations are finalized and extend the comment period until at least October 5, 2016.

Extensive and Thorough Review by Treasury is Critical

As outlined above, the proposed 385 regulations will have a significant, negative impact on the cost of capital for investment, business operations and planning at global and domestic businesses throughout the U.S. economy, which will slow job creation. Our organizations are

extremely concerned by Treasury's plan to "move swiftly to finalize" the proposed regulations. We believe that it is premature for Treasury to discuss fast-tracking the regulations even before it has reviewed public comments and held a hearing on the proposal.

Overturing more than half a century of jurisprudence by adopting a rule that is inconsistent with how the IRS and taxpayers analyze an instrument (looking at the substance of the instrument, as opposed to the proposed rules that disregard substance in favor of form), should not be rushed. There are numerous technical issues with the proposed regulations, and it is incumbent upon the Treasury and IRS to adequately consider the interaction of these proposed rules with other parts of the Internal Revenue Code.

Given the impact on jobs, investment and economic growth, it is critically important that Treasury dedicate adequate time and resources for a thorough review and analysis of the public comments on the proposal and the potential impact of the proposed regulations before moving forward on any final rules.

Thank you in advance for your consideration of our requests. We look forward to meeting with you and your staff to discuss our concerns.

Sincerely,

Advanced Medical Technology Association
American Chemistry Council
American Forest & Paper Association
American Petroleum Institute
Association of Global Automakers
Business Roundtable
CTIA
Distilled Spirits Council
Financial Executives International
Information Technology Industry Council
National Association of Manufacturers
National Foreign Trade Council
National Retail Federation
Organization for International Investment
Retail Industry Leaders Association
S Corporation Association
Securities Industry and Financial Markets Association
Semiconductor Industry Association
Software Finance and Tax Executives Council
Trans-Atlantic Business Council
U.S. Chamber of Commerce
United States Council for International Business
United States Telecom Association

cc: The Honorable Penny Pritzker, Secretary, U.S. Department of Commerce
The Honorable Mark Mazur, Assistant Secretary for Tax Policy, U.S. Department of the Treasury
Mr. Robert Stack, Deputy Assistant Secretary for International Tax Affairs, U.S. Department of the Treasury