

SUBMITTED VIA WWW.REGULATIONS.GOV

June 10, 2022

Stephanie Bland
Branch Chief
Office of Associate Chief Counsel
(Passthroughs & Special Industries)
IRS Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on Notice 2021-66; Superfund

Dear Ms. Bland:

TFI represents companies that are engaged in all aspects of the fertilizer supply chain in the United States. Our industry is essential to ensuring that farmers receive the nutrients they need to enrich the soil and, in turn, grow the crops that feed our nation and the world. Fertilizer is a key ingredient in feeding a growing global population, which is expected to surpass 9.5 billion people by 2050. Half of all food grown around the world today is made possible through the use of fertilizer, hence its importance to farmers and food production.

We appreciate the opportunity to provide comments on the Superfund chemical tax, as solicited by IRS Notice 2021-66.¹ Although we recognize our comments are being provided outside of the comment window deadline, please appreciate that Congress did not give taxpayers such time to implement the Superfund chemical tax and many of our members are still working through implementation.

Such implementation is made more difficult given the lack of guidance from the Internal Revenue Service (IRS), also a function of the short effective date provided by the statute. While Notice 2021-66 and Notice 2022-15 were certainly helpful guidance, there is much more interpretative guidance needed to ensure taxpayers can successfully meet their tax

¹ 2021-52 I.R.B. 901 (Dec. 27, 2021).

obligations. One such topic requiring further guidance is further described below, although it is by no means the only topic on which IRS guidance is required.

In enacting and reinstating the Superfund chemical tax, important exceptions exist. One important exemption for our members is found in 26 U.S.C. § 4662(b)(2), namely that no tax shall be imposed when particular taxable chemicals (nitric acid, sulfuric acid, ammonia, or methane used produce ammonia) are used to produce a qualified fertilizer substance. This statutory exception is critical to ensure that American farmers can continue to offer affordable food to feed our country, particularly during these challenging times where inflation is at an all-time high and food prices have increased by close to 9% over the last year.

The statute states that a qualified fertilizer substance is any substance: "(i) used in a qualified fertilizer use by the manufacturer, producer, or importer, (ii) sold for use by any purchaser in a qualified fertilizer use, or (iii) sold for resale by any purchaser for use, *or resale for ultimate use*, in a qualified fertilizer use." (Emphasis added.) We believe that under this statutory language, so long as *ultimate use* of the taxable chemical is for the production of fertilizer or for the direct application as fertilizers --- and can be documented sufficiently --- no tax should be imposed. We seek IRS guidance confirming this as the proper interpretation and establishing the related documentation requirements.

In 1983, the IRS issued proposed regulations on this exemption. These proposed regulations were later withdrawn. The proposed regulations state that no tax shall be imposed only if the taxpayer (manufacturer, producer, importer), purchaser, or second purchaser uses the taxable chemical in a qualified use. That is, the exemption applies only when there is one intervening sale. In addition, under the proposed regulations, only the taxpayer (i.e., the manufacturer, producer, importer) can claim the refund or the credit when the exemption applies.

Importantly, the statutory language of Section 4662(b)(2), when the proposed regulations were promulgated, was different in key respects in comparison to how the statute now reads:²

1980:

(B) Qualified substance.-For purposes of this section, the term 'qualified substance' means any substance —

- (i) used in a qualified use by the manufacturer, producer, or importer,
- (ii) sold for use by the purchaser in a qualified use, or
- (iii) *sold for resale by the purchaser to a second purchaser for use by such second purchaser in a qualified use.*

² See The Deficit Reduction Act of 1984, PL 98-369, Sec. 1019, 98 Stat 494 (1984).

Change made in 1984 and current law:

(B) Qualified fertilizer substance.-For purposes of this section, the term “qualified fertilizer substance” means any substance –

- (i) used in a qualified fertilizer use by the manufacturer, producer, or importer,
- (ii) sold for use by any purchaser in a qualified fertilizer use, or
- (iii) *sold for resale by any purchaser for use, or resale for ultimate use, in a qualified fertilizer use.*

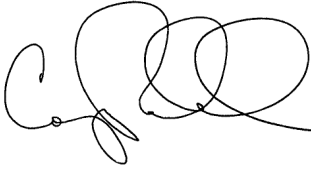
Based on the change in statutory change, our members are unable to rely even on the withdrawn 1983 proposed regulation. Accordingly, we seek guidance clarifying that the exemption applies so long as the ultimate use is for a qualified fertilizer (regardless of the number of intervening sales), and the prescribed documentation is maintained, no tax applies.

In addition, we seek guidance on the procedural requirements on claiming a refund or a credit. Under 26 U.S.C. § 4662(d)(2) the person who uses the particular taxable chemical as a qualified fertilizer substance can seek a refund or credit "under regulations prescribed by the Secretary." We believe that regulations or other guidance must make clear that the person ultimately using the particular taxable chemical in a qualified fertilizer use has the ability to make a claim for refund or credit even if it did not pay the tax otherwise owed under 26 U.S.C. § 4661(a). This result is mandated by Section 4662(d)(2)(B), and confirmation concerning any additional procedural requirements is critical. Similarly, guidance is needed on the procedural requirements related to exports. Like Section 4662(d)(2), the statutory language allowing exporters to claim a refund or credit, rather than the taxpayer, require the IRS to issue regulations.³

As is more true today than was the case when the Superfund chemical tax was last effective, supply chains for taxable chemicals and fertilizers are more complex but technology has advanced such that accurate reliable tracking of ultimate use is available and can be documented. For all of these reasons we respectfully request that the IRS issue additional guidance. We appreciate the opportunity to provide this feedback. We look forward to working with you to address these and other issues as we work through implementation. Thank you for your time and attention.

³ See Section 4662(e) ("The Secretary shall provide, in regulations, the circumstances under which a credit for refund (without interest) of the tax under section 4661 shall be allowed....").

Sincerely,

A handwritten signature in black ink, consisting of a series of loops and a final horizontal stroke.

Corey Rosenbusch
President & CEO
The Fertilizer Institute

Cc:

Charles P. Rettig, Commissioner, Office of the Commissioner, Internal Revenue Service,
U.S. Department of the Treasury

Lily Batchelder, Assistant Secretary, Office of Tax Policy, U.S. Department of the Treasury

Michael J. Desmond, Chief Counsel, Office of the Chief Counsel, Internal Revenue
Service, U.S. Department of the Treasury