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Proposed Reinstatement of Superfund Taxes Would Reintroduce Three Excise Taxes to the Petroleum and Chemicals Industries at Double the Rates

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Remember when a variety of excise taxes on the petroleum and chemicals industries funded the Superfund? They may be returning.

If proposals in the so-called Bipartisan Infrastructure Funding Bill (as passed the Senate) and the Build Back Better Act reconciliation bill (as approved by the House Budget Committee) are enacted in their current forms, three excise taxes will be reinstated next year, more than 25 years after the taxes expired. These proposals would reintroduce excise taxes that fund the Hazardous Substance Superfund ("Superfund"), which funds the cleanup of hazardous waste sites.[1]

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[2] established the Superfund, which historically was funded by three separate but interrelated excise taxes applicable to crude oil and petroleum products, chemicals, and hazardous substances (collectively, "Superfund excise taxes"). The proposed extensions and modifications of these Superfund excise taxes have been estimated by the staff of the Joint Committee on Taxation ("JCT") to increase revenues by

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1 The House Budget Committee approved the Build Back Better Act, A bill to provide for reconciliation pursuant to title II of the Concurrent Resolution on the Budget for Fiscal Year 2022, S. Con. Res. 14, on September 25, 2021. The House has not yet considered the bill and it is possible the House Rules Committee might make modifications. The Senate also has not yet considered the proposed legislation and might make changes.

2 42. U.S.C. § 9601 *et seq.*

approximately $52.9 billion over a 10-year period, with the largest revenue source expected to be the reinstatement of the Superfund excise tax on crude oil and petroleum products.

Historical Superfund Excise Taxes

Superfund Excise Tax on Petroleum Products

From 1980 to 1995, an excise tax ("Petroleum Superfund Tax") was imposed at 9.7 cents per barrel on:

— Crude oil received at a U.S. refinery

— Imported petroleum products entered into the United States for consumption, use, or warehousing

— Any domestically produced crude oil that is used (other than on the premises where produced for extracting oil or natural gas) in or exported from the United States if, before such use or exportation, no taxes were imposed on the crude oil[3]

The Petroleum Superfund Tax applied to the operator of the U.S. refinery, the person importing the product for consumption, use, or warehousing, or the person using or exporting the crude.[4]

Notably, the statutory definition of crude oil included crude oil condensates and natural gasoline. Similarly, the definition of petroleum product included crude oil but was silent with respect to other products.

In addition to the Petroleum Superfund Tax, the "Oil Spill Tax" was imposed on crude oil and imported petroleum products. The Oil Spill Tax remains in effect and currently applies at a rate of nine cents per barrel.

Superfund Excise Tax on Chemicals

From 1980 to 1995, an excise tax ("Chemicals Superfund Tax") was imposed on the sale or use by the manufacturer, producer, or importer of 42 specified feedstock chemicals. The tax applied to both feedstock chemicals manufactured or produced in the United States, and those imported into the United States for consumption, use, or warehousing.[5]

The highest tax rate applied to certain petrochemicals to the extent they were not used or sold for a qualified fuel use: acetylene, benzene, butane, butylene, butadiene, ethylene, naphthalene, propylene, toluene and xylene. A qualified fuel use was any use in the manufacture or production of any motor

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[3] In addition, each barrel of covered crude oil and petroleum products is subject to the nine-cent oil spill liability tax.

[4] Section 4611(a)-(d). Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended (the "Code") or the applicable regulations promulgated pursuant to the Code (the "regulations").

[5] Sections 4661-62.

fuel, diesel fuel, aviation fuel, or jet fuel, or any use as such a fuel. The tax rate varied by chemical from $0.22 to $4.87 per ton.[6]

Numerous exceptions and special rules applied to the Chemicals Superfund Tax, including those for methane or butane used as a fuel, certain substances used in the production of fertilizer or animal feed, substances used in the production of motor fuel, and substances having a transitory presence during refining and certain intermediate hydrocarbon streams, among others.[7]

Superfund Excise Tax on Hazardous Substances

From 1987 to 1995, an excise tax ("Hazardous Substances Tax") was imposed on certain hazardous substances sold or used by an importer. The importer was the party entering the taxable substance into the United States for consumption, use, or warehousing.[8]

The Hazardous Substances Tax applied to a list of 50 taxable substances, as well as other substances— if taxable chemicals (as defined for purposes of the Chemicals Superfund Tax) constituted more than 50 percent of the weight (or more than 50 percent of the value) of the materials used to produce the substances, and as determined by the Secretary of the Treasury, in consultation with the Administrator of the Environmental Protection Agency and the Commissioner of Customs.[9] Between 1990 and 2000, the list of taxable substances was administratively extended to approximately 100 additional substances.

The Hazardous Substances Tax was imposed at the rate that would have been applicable to the taxable chemicals used to produce the taxable substances, as if the taxable substance had been produced in the United States. In the alternative, the tax was imposed at a rate of five percent of the appraised value of the substance if the importer failed to furnish sufficient information to the Secretary of the Treasury to determine the amount of the tax.[10]

Exemptions applied for hazardous substances sold for use or used as fuel, in the production of fertilizer, or in the production of animal feed.[11]

Proposed Reinstatement of the Superfund Excise Taxes

Petroleum Superfund Tax

The proposed Build Back Better Act considered by the House Budget Committee would, if enacted, reinstate the Petroleum Superfund Tax, at a rate of 16.4 cents per barrel—double the prior rate. The Petroleum Superfund Tax is proposed to be indexed for inflation beginning in calendar year 2023. The

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[6] *Id.*

[7] Section 4662(b).

[8] Sections 4671-72.

[9] Section 4672(a).

[10] Section 4671(b)(2).

[11] Section 4671(d).

tax would apply after December 31, 2021, until January 1, 2032. The JCT estimated that the proposal would increase revenues by approximately $38.4 billion over a 10-year period.

Chemicals Superfund Tax and Hazardous Substances Tax

The Bipartisan Infrastructure Funding Bill, which has passed the Senate but has not yet been voted on by the House, would reinstate the Chemicals Superfund Tax and the Hazardous Substances Tax at twice the prior rates. The proposed rates vary from $0.44 to $9.74 per ton.

The Bipartisan Infrastructure Funding Bill also proposes to double the tax rate imposed on taxable substances from 5 to 10 percent if the importer fails to furnish sufficient information to the Secretary of Treasury to determine the amount of the Hazardous Substance Tax.

In addition, the threshold for the IRS to add a substance to the list of taxable substances would be lowered to a determination that taxable chemicals constitute more than 20 percent of the weight (or more than 20 percent of the value) of the materials used to produce the substance. The proposal directs the Secretary of the Treasury to publish an initial list of taxable substances.

If enacted, the Bipartisan Infrastructure Funding Bill Superfund excise tax proposals would take effect on July 1, 2022, and be effective until January 1, 2032. The JCT estimates that these proposals would increase revenues by approximately $14.5 billion over a 10-year period.

KPMG Observations

If the current proposals were enacted, companies in the petroleum and chemicals industries generally would have to compute and pay Superfund excise taxes on crude oil and petroleum products, certain chemicals, and imported hazardous substances. This additional excise tax compliance would affect multiple stakeholders in each company, from procurement to tax, environmental regulatory to IT, and leadership to customer relations. Further, given current supply chain disruptions in the industries, it is worth considering how to minimize potential internal disruption and maximize administrative efficiency.

The IRS and Treasury issued proposed regulations in 1983 addressing the administration of the Petroleum Superfund Tax and the Chemicals Superfund Tax. These regulations were withdrawn after the expiration of the Superfund excise taxes in 1995. Additional IRS guidance was issued in various notices relating to the Hazardous Substances Tax. Non-precedential letter rulings and technical advice memoranda were issued to specific taxpayers on a number of Superfund excise tax issues. Because the published guidance is limited—if the Superfund taxes were reinstated—companies would need to consider what guidance is needed from Treasury and the IRS to administer the tax fairly and efficiently.

Companies would face additional compliance requirements if the taxes were reinstated. Unlike income taxes, the Superfund excise taxes would be reported on a quarterly basis, using Form 720, *Quarterly Federal Excise Tax Return*, and Form 6627, *Environmental Excise Taxes*. Deposits of tax would be required on a semi-monthly basis.

Current litigation might also affect application of Superfund-related taxes. In particular, in 2021, a U.S. district court held that the Oil Spill Tax violates the Export Clause of the Constitution when imposed on domestically produced crude oil that is exported from the United States.[12] The United States has appealed this opinion to the 5th Circuit. Affected companies should consider how this litigation would affect business activities, especially in light of the more than doubling of taxes proposed under the Petroleum Superfund Tax.

If the Superfund excise taxes are reinstated, the effective dates could be relatively soon. Companies may want to consider conducting a preliminary readiness assessment to prepare and plan for that possibility.

Preliminary Readiness Assessment Considerations

- Identify affected stakeholders (IT, tax, finance, accounting, procurement, sales, customs, etc.)
- Assess the impact of Superfund excise tax reinstatement, including:
  - Forecasting impact to business
  - Regulatory compliance and required internal controls
  - Technology updates and changes
  - Customer communications and contracting issues
  - Additional operating expense (e.g., headcount increase) and capital expense (e.g., IT infrastructure implementation/redesign) consideration and planning
  - Overall supply chain considerations

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[12] Trafigura Trading, LLC v. United States, No. 4:19-cv-00170 (S.D. Tex. Jan. 7, 2021).

