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March 20, 2023

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

**Via online submission**

**RE: TEI Comments on Notice 2023-7**

Dear Sir or Madam:

President Biden signed the Inflation Reduction Act[1] ("IRA") into law on August 16, 2022. Among the IRA's income tax provisions is a new corporate alternative minimum tax imposing a 15 percent tax on adjusted financial statement income ("AFSI", such tax, the "CAMT"). The IRA delegates significant authority to the Secretary of the Treasury (the "Secretary") to further define AFSI, as well as other items CAMT items. Notice 2023-7 (the "Notice"), published on January 17, 2023,[2] provides interim guidance on certain time sensitive CAMT issues the Secretary intends to address in forthcoming regulations. On behalf of Tax Executives Institute, Inc. ("TEI"), I am pleased to provide comments on the CAMT and Notice to the Secretary.

<u>About TEI</u>

TEI was founded in 1944 to serve the needs of business tax professionals.[3] 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 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.

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[1] Pub. L. No. 117-169.

[2] 2023-3 I.R.B. 390.

[3] 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 Internal Revenue Code of 1986, as amended (the "Code").

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, along with their collective expertise in tax accounting for financial statement purposes, enable TEI to bring a balanced and practical perspective to the CAMT.

TEI Comments

TEI appreciates the opportunity to provide further comments on the CAMT as well as respond to the Notice. The Notice addressed many of the issues we raised in our prior letter to the Secretary regarding the CAMT.[4] Our comments and recommendations herein highlight areas and issues requiring further guidance under the CAMT and respond to some of the questions raised in the Notice.

**Underpayment Penalty Relief**

Overall, the Notice helpfully provides certainty in select areas (e.g., depreciation adjustments in computing AFSI). However, many other computational matters require additional guidance, as discussed below. As we stated in our Prior Letter, even after such guidance is finalized, taxpayers will need time to analyze its impact and to reconfigure or create new systems to accurately calculate the CAMT. Meanwhile, the CAMT is already in effect for tax years beginning after December 31, 2022, and calendar year taxpayers must make quarterly estimated tax payments accounting for any additional tax under the CAMT by the second quarter of 2023. Moreover, penalty safe harbors based on prior payments are not available to large corporate taxpayers and "applicable corporations,"[5] to which the CAMT applies, are necessarily within that category.[6]

TEI's members are the corporate employees primarily responsible for calculating estimated tax payments. Our members have considerable concerns regarding the difficulty of accurately estimating such payments, both prior to and even shortly after the promulgation of final regulatory or other guidance. Because of the amount of regulatory guidance required and forthcoming in 2023 to flesh out the CAMT's details, TEI reiterates its strong recommendation that the Secretary provide relief from interest and penalties for underpaid estimated tax payments to taxpayers who have otherwise properly calculated section 6655 liabilities without regard to the CAMT. Indeed, while speaking recently at a

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[4] TEI's prior letter regarding the CAMT (the "Prior Letter") is available at: https://www.tei.org/advocacy/submissions/tei-submits-comments-iras-corporate-alternative-minimum-tax.

[5] *See* section 59(k)(1) (defining "applicable corporation"). Unless otherwise noted, all "section" references herein are to the Internal Revenue Code of 1986 (as amended) (the "Code"), and all "§" references are to the Treasury Regulations promulgated thereunder.

[6] *See* section 6655(d)(2)(A).

public event, an Internal Revenue Service (the "Service") representative stated that CAMT guidance "is a series of big projects" and that taxpayers should prepared for "a long slog" as the Secretary works to issue guidance implementing the CAMT.[7] It is therefore reasonable to expect the Service to be provide penalty relief for underpayments caused by the challenges outlined herein. A waiver of underpayment penalties on estimated taxes has clear precedence: after passage of section 965 in late 2017, the Service issued Notice 2018-26,[8] which waived underpayment penalties for taxpayers on estimated taxes for section 965 liabilities on the basis of sound tax administrative needs as the Secretary worked to finalize guidance.[9] We believe similar relief is warranted here.

**Transition Issues**

The Secretary faces difficult transition issues when writing rules regarding tax attributes arising prior to the effective date of the CAMT but nevertheless impact post-CAMT years. The discussion immediately below is by no means an exhaustive list of transition issues, but rather a set of examples TEI members have begun to identify.

For example, taxpayers may have contingent loss reserves, loan loss reserves, or a number of other liabilities sitting on their pre-CAMT book balance sheets. Those liabilities would have been run through the book income statement for U.S. Generally Accepted Accounting Principles ("GAAP") purposes but would not have yet risen to deductible "events" for tax purposes. If these reserves become deductible losses for tax purposes in years in which the CAMT is in effect, they may inappropriately drive taxpayers into the CAMT as no benefit for book purposes from those losses was accounted for in a post-CAMT year (i.e., when losses are recognized for tax purposes and therefore reduce taxable income there will be no corresponding loss for book purposes as the book loss has already been taken into account). Conversely, if those loss reserves are released in a CAMT year, they will create book income for an item that is not a tax item and was never deducted for CAMT calculation purposes – again potentially driving taxpayers into the CAMT inappropriately. In both cases, this type of transition issue results in an effective duplication of a book item as there is no offsetting matching entry within the CAMT when viewed over the life of the tax.

Another transition issue area is entries that have been eliminated on a consolidated basis prior to the CAMT's effective date but may have depreciating basis or accruing income on a separate financial

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[7] *See* remarks of Marie Milnes-Vasquez, IRS Office of Associate Chief Counsel (Corporate), as quoted in 178 Tax Notes Federal 1569 (Mar. 6, 2023).

[8] 2018-16 I.R.B. 480 (Apr. 2, 2018).

[9] *See also* Notice 2013-33 (May 2, 2014) (providing that during a two-year transition period for enforcement and administration of compliance under the Foreign Account Tax Compliance Act, the Service will consider taxpayers "good fair efforts" to comply with the Act.)

statement basis. Guidance is necessary to delineate whether these entries should be eliminated on a transition basis because of the lack of a matching transaction.

More broadly, any pre-CAMT book-tax difference impacting post-CAMT taxable years may represent a transition issue that should be ameliorated via regulation or other guidance. In addition to the above, such items may include: (i) placed in service date issues for purposes of using tax depreciation instead of book depreciation (see discussion immediately below); (ii) amortization deductions under section 197 for amortizable section 197 intangible created in pre-CAMT years to the extent such items are not amortizable for book purposes; (iii) pre-CAMT net operating losses attributable to tax depreciation that may decrease AFSI; (iv) whether foreign tax credit carryforwards are available to offset the CAMT (also discussed further below); (v) amortization deductions under section 59(e) for research and experimental expenses that were elected to be deferred under that section in pre-CAMT years to the extent such items were immediately expensed for financial accounting purposes; and (vi) deferred state tax issues arising under Financial Accounting Standards Board Interpretation No. 48.

Of particular importance is whether applying section 56A(c)(13) to property placed in service in pre-CAMT years would disallow book depreciation for assets fully depreciated for tax purposes in those years when calculating AFSI. Application in this manner would be contrary to the apparent Congressional intent of section 56A(c)(13) to preserve Congress' incentive for capital investment through accelerated depreciation and would potentially harm taxpayers for making an irrevocable election prior to the existence of these rules. Further, transition questions arise with respect to any costs deducted under section 162, section 181, or any other section expressly permitting deductions in the year incurred, such as repair costs, but capitalized and depreciated in the taxpayer's applicable financial statements.

One option to ameliorate these transition issues is to utilize the broad authority granted to the Secretary under section 56A(c)(15) and permit taxpayers to include book depreciation in AFSI for items related to section 168 property placed in service, and fully depreciated for tax purposes, prior to the effective date of section 56A, as well as for repairs and other items deducted under section 162 but capitalized for book purposes prior to such date. We note, however, that this would create a potentially difficult administrative issue to track pre- and post-effective date items under different systems for calculating AFSI and while the issue may meaningfully change the impact of the CAMT for some taxpayers, others may be unaffected or at least find the issue immaterial, making an elective method a more administrable option. One alternative would be for the Secretary to allow taxpayers either to amend elections under section 168 (or non-elections to capitalize section 162 repairs and other items) made prior in pre-CAMT years and/or to effectively fix these pre-effective date book/tax differences through an accounting method change after the statutory effective date. Taxpayers of course could leave prior elections undisturbed as well. There is precedence for this type of allowance in the wake of retroactively applicable legislation, with Rev. Proc. 2020-25 allowing taxpayers to amend, withdraw and

revoke prior section 168 elections or to affect such change through accounting method changes.[10] TEI recommends the Secretary consider similar relief for these types of transition issues.

Finally, section 59 is silent as to whether pre-CAMT foreign tax credits can be calculated as a carry-forward and used to offset a taxpayer's CAMT liability beginning in 2023.[11] These foreign tax credits could, again, be a significant balance sheet asset that taxpayers will need to record in their financial statements. TEI therefore recommends the Secretary provide guidance clarifying whether taxpayers are permitted to reduce their CAMT liability by the amount of pre-CAMT foreign tax credits generated by controlled foreign corporations ("CFCs") in which they are a U.S. shareholder. TEI recommends that guidance consider simplicity of administration in such a rule. For instance, calculating pre-CAMT carry-forwards presumably would require a hypothetical calculation of whether and to what extent such taxes would have been used in pre-CAMT taxable years. Given that section 59(k)(1)(B) already requires a re-determination of AFSI for three years prior to the effective date of the statute, taxpayers should be allowed to use that calculation as the AFSI tax base. Simplified rules could consider whether pro-rata shares of tested income (without reduction for qualified business asset investment, as defined in section 951A(d)), subpart F, and foreign tax credits could be used as a proxy for a pro-rata share of CFC AFSI in those pre-effective date periods to determine the hypothetical amount and limitation under section 59(l)(1)(A)(ii).

**Adjustments to AFSI**

*Fair Value Accounting*

The Notice requests comments on adjustments to Applicable Financial Statement Income ("AFS Income") to disregard mark-to-market unrealized gains that are otherwise included in AFSI and whether such adjustments should depend on the extent to which a taxpayer marks to market the item for regular tax purposes. We reiterate the recommendation from our Prior Letter in this regard. Specifically, with regard to non-consolidated equity investments, we recommend regulations clarify that section 56A(c)(2)(C) should result in an adjustment to AFS Income to eliminate any financial accounting mark-to-market gains or losses "with respect to" a non-consolidated corporation (consolidation being tested under section 1502 rather than GAAP) or any equity method earnings that would otherwise be included in GAAP net income, and instead follow tax timing and treatment under the Code (i.e., realization timing for most taxpayers other than those with mark-to-market elections or otherwise within a mark-to-market tax regime). [12]

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[10] 2020-19 I.R.B. (Apr. 4, 2020).

[11] Taxpayers are permitted to offset their *current* year CAMT liability by the amount of their "corporate alternative minimum tax foreign tax credit" for the current year. *See* section 55(b)(2)(A)(ii).

[12] *See also* Notice 2023-13, 2023-6 I.R.B. 454 (Feb. 3, 2023) Section 3.02 (providing that changes in value of a Covered Investment Pool for Covered Variable Contracts are excluded from AFSI under Sec. 56A(c)(2)(C) and that

For other instruments (e.g., debt, debt-like securities, warrants, options) that may be marked to market either for tax and/or GAAP purposes, we believe the language of section 56(A)(c)(2)(C) is broad enough to give the Secretary the authority to provide exceptions in these other situations. Overall, it appears that mark-to-market timing differences between GAAP and tax were not the overriding harm Congress intended to ameliorate by enacting the CAMT. Thus, we recommend issuing guidance that allows an adjustment in computing AFSI to reflect income and loss timing following the Code rather than book (inclusive of book and tax potentially matching for taxpayers that are broker dealers or otherwise on a mark-to-market accounting method for U.S. tax purposes) for such instruments. For most taxpayers, the timing would be based on recognition rather than on a mark-to-market basis. Prescriptive guidance on a particular method of subtraction from or addition to AFS Income may be too narrow to capture the diversity of practice in all accounting situations.

*Depreciation*

Complexity and Tax COGS Depreciation. The Notice provides guidance with respect to depreciation and book-tax differences. However, much of the guidance has unfavorable implications and introduces complexity. Adjusting AFS Income for book-tax depreciation differences is not as simple as taking the book depreciation expense accounts and the overall tax depreciation deduction to arrive at the necessary adjustment. Instead, this determination requires a much more granular look at underlying financial statement details. Additionally, it requires companies to closely track certain aspects of depreciation (such as section 168 property), which can be extremely complex and time consuming.

It would be very helpful to have, as a permitted alternative of COGS depreciation, related AFS Income adjustments that arrives at a regime similar to the methodology the Secretary provided for determining depreciation under section 163(j). For example, Treas. Reg. § 1.163(j)-1(b)(iii) indicates that for purposes of determining Adjusted Taxable Income, "amounts of depreciation, amortization, or depletion that are capitalized under section 263A during the taxable year are deemed to be included in the computation of the taxpayer's tentative taxable income for such taxable year, regardless of the period in which the capitalized amount is recovered." This differs from the guidance in Notice section 4.03 that indicates AFS Income is only adjusted in computing AFSI for Tax COGS Depreciation[13] to the extent the amount is recovered as part of cost of goods sold in computing taxable income for the tax year. We note the government has commented on the difference between the use of the word "allowed" for depreciation deductions in section 56A(c)(13) compared to depreciation deductions "allowable" in section 163(j)(8)(A)(v). We do not believe this difference reflects clear Congressional intent dictating divergent, and more complex, rules as outlined in the Notice for Tax COGS Depreciation. We believe

changes in the obligation to the holders of Covered Variable Contracts are excluded from AFSI under section 3.02 of the notice to mismatches that could significantly over or understate AFSI relative to taxable income).

13 *See* section 4.03 of the Notice which defines Tax COGS Depreciation as Tax Depreciation (as defined in section 4.02(7) of the Notice) that is capitalized to inventory under section 263A and recovered as part of cost of goods sold in computing gross income under section 61.

Treasury and the Service have the ability under the broad grant of authority in section 56A(c)(13)(b)(ii) to permit the alternative outlined above.

If the Secretary is not amenable to adopting the section 163(j) rule relative to COGS depreciation, TEI recommends clarifying that when computing Tax COGS Depreciation, any amounts of prior year Tax COGS depreciation capitalized into beginning of year inventory, and recovered as part of cost of goods sold in computing taxable income for the taxable year, reduce AFSI. This would be consistent with the Secretarial authority to provide adjustments to financial statement income in section 56A(c)(15) to prevent the omission of any item, in this case the total amount of tax depreciation capitalized to inventory (i.e., this recommendation would ensure that no amount of tax depreciation is omitted from the calculation of AFSI).

Further, section 9.01(2)(b) of the Notice requests feedback on whether taxpayers should be permitted to make appropriate adjustments to Tax COGS Depreciation under section 4.03 of the Notice by applying the method(s) of accounting under section 263A. To reduce complexity under section 56A, we recommend guidance permitting taxpayers to make appropriate adjustments by applying the method(s) of accounting under section 263A for adjustments used for regular tax purposes, as the application of such method(s) of accounting are already computed by taxpayers.

Depreciation Method Changes. The Notice does not provide guidance on the impact of changes in methods of accounting for depreciation on the computation of AFSI. To promote administrability, we recommend clarifying guidance that any section 481(a) adjustments with respect to Section 168 Property[14] be treated as an increase or decrease to Tax Depreciation[15] or Tax COGS Depreciation during the taxable year for which the 481(a) adjustment is reflected in computing taxable income. This is consistent with the rationale of section 481 for accounting method changes to avoid changes to prior-year taxable income, or as relevant here prior-year AFSI, and removes the need for taxpayers to file amended tax returns when making a change in method of accounting. Further, we also recommend clarifying guidance that for purposes of computing AFSI any section 481(a) adjustments with respect to Section 168 Property be afforded audit protection under Section 8.01 or Rev. Proc. 2015-13, consistent with audit protection afforded for regular tax purposes.

*Mergers & Acquisitions ("M&A")*

As reflected by the guidance in the Notice, M&A transactions add a deep layer of complexity to the computation of AFSI and the CAMT requiring a tremendous amount of detailed tracking for acquisitions and non-recognition transactions. Given the acquisitive nature of many businesses, it would be helpful to alleviate some of these complexities. Notice section 3.03(2), "Corresponding adjustments to basis of transferred property on an AFS", references property transferred in a Covered Nonrecognition Transaction described in Notice section 3.03(1)(a). Section 3.03(2) of the Notice states that any financial

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14 As defined in section 4.02(5) of the Notice.

15 As defined in section 4.02(6) of the Notice

accounting gain or loss resulting from the application of standards used to prepare the AFS of a Party to a Covered Nonrecognition Transaction is not taken into account in computing AFSI of the party receiving the transferred property. We recommend that to the extent the Covered Nonrecognition Transaction occurred before the effective date of the CAMT, such that any accounting gain/loss is not relevant for the computation of AFSI (i.e., before 1/1/2023), corresponding adjustments under Notice section 3.03(2) should not be required. If the Government disagrees, we recommend that to the extent any Covered Nonrecognition Transaction occurred before the relevant period for determining AFSI for purposes of the applicable corporation determination (i.e., 1/1/2020), that corresponding adjustments under Notice section 3.03(2) should not be required.

*Partnership AFS Income*

Section 59(k)(1)(D) provides that for purposes of determining applicable corporation status, AFS Income of a partnership treated as a single employer with a corporation is treated as AFS Income of such corporation without regard to the distributive share rule under section 56A(c)(2)(D)(i). The Notice clarified the distributive share rule is turned off for scoping purposes for all circumstances, including where the partnership is not treated as a single employer with the corporation. We believe Treasury should have taken a narrower approach by turning off the distributive share rule only for partnerships that are treated as a single employer with the corporation. Treasury should consider applying the distributive share rule for both scoping and CAMT liability for partnerships that are not treated as a single employer with the corporation to have one consistent approach for AFS Income and AFSI determinations as well as the avoidance of the inclusion of more than the corporation's economic share of financial statement income of a partnership for scoping purposes where the corporation does not control the partnership.

The Notice indicates that a partnership's AFS Income is based on the partnership's applicable financial statement ("AFS"), but there is no clarity whether such statements are based on book or tax. Partnership interests may often be accounted for book purposes under consolidation and equity methods. Practically speaking, information provided to partners can take the form of GAAP-based (book) financial statements (audited or unaudited) and/or tax-based financial statements. Companies may also utilize other sources for book purposes to facilitate timely financial reporting, since the partnership's financials may not be readily available. This process can become very complex within multi-tiered partnerships. As a result, a partner's distributive share is often not readily calculable based on the information received.

It is unclear whether guidance on the computation of AFSI related to partnership income intends to include only the current distributive share of partnership income per tax-based financial information while companies, in recording current and deferred tax expenses for book purposes on a timely basis, must often refer to a combination of sources to arrive at the most reasonable estimate. With this in mind, we recommend that final guidance include an option to apply either the book-based (GAAP) or the tax-based financial information provided to the partner. Due to the individual reporting capabilities of each partnership in supplying information on a timely basis, such an option should be allowed on a partnership-by-partnership basis.

*Basis Adjustments Arising from Covered Nonrecognition Transactions*

The Notice suggests that transactions occurring before 2023 will need to be adjusted under section 56A(c), as applicable, to compute AFSI and basis for scoping and CAMT liability purposes. The Government has flexibility under section 56A(c) to provide additional rules to simplify the determination of basis for AFSI purposes for periods prior to 2023 to mitigate the uncertainty and administration of the CAMT. The determination of basis is a complex analysis under the regular income tax rules. The CAMT adds a requirement for tracking a different basis for CAMT purposes. To promote administrability and certainty, the Government should consider allowing taxpayers, at their election, to use financial statement basis prior to 2023 with AFS Income adjustments for transactions occurring during the three-year period prior to 2023.

*Dividends-Received Deduction Under Section 243*

Section 243 provides a deduction for dividends received by corporations from certain domestic corporations when computing the payee corporation's taxable income under the Code. The deduction is intended to reduce the potential multiple layers of taxation of such dividends: once as income of the payor corporation, once in the hands of the payee corporation, and finally in the hands of the ultimate shareholder when paid as a dividend to that shareholder by the payee corporation. Corporations do not receive a dividends-received deduction, however, when determining net income for financial accounting purposes. This results in a permanent difference between financial accounting and taxable income, and therefore would ultimately result in the duplication of taxation via the CAMT on income where the dividends-received deduction was intended to prevent or reduce that outcome.

Fortunately, Congress anticipated this issue by granting the Secretary the authority to promulgate regulations to reduce the amount of dividends received from a non-consolidated corporation in the payee corporation's income.[16] TEI recommends the Secretary exercise this authority by permitting corporations to reduce their AFS Income by the amount of the dividends received deduction permitted by section 243 in the computation of AFSI to prevent this duplication of income. This is also consistent with the IRA's grant of regulatory authority to the Secretary to implement adjustments to applicable financial statement income "to prevent the omission or duplication of any item . . . ."[17]

*Eliminate Multiple Inclusion of Controlled Foreign Corporation Income*

If a U.S. shareholder utilizes the equity method and includes the book income of a CFC in its AFS, then application of section 56A(c)(3)(A), Adjustments to Take Into Account Certain Items of Foreign Income, would result in multiple inclusion of the book income of the CFC. Similarly, if tiered CFCs utilize the equity method and include the book income of the lower tier controlled foreign corporations in their AFS, then application of Section 56A(c)(3)(A) would result in multiple inclusion of the b0ook

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16 *See* Section 56A(c)(2)(C).

17 Section 56A(c)(15)(A).

income of the tiered CFCs. TEI recommends the Secretary make adjustments to AFS Income to eliminate this double counting.

**AFS Income Computation for Foreign Parented Entities**

For foreign parented entities preparing financial statements under International Financial Reporting Standards ("IFRS"), it is critical to have additional guidance on the determination of AFS Income. The CAMT and Notice both refer to section 451(b)(3) to determine a corporation's AFS. Based on current interpretations of this reference, presumably taxpayers are required to take a "top-down" approach (i.e., start with global audited IFRS financial statements and then carve out certain adjustments to arrive at the U.S. consolidated group's financial statements) instead of the more practical "bottom-up" approach (i.e., start with U.S. consolidated reporting or another reasonable method). The "top-down" approach poses several challenges, including:

1. A foreign parent may not be willing to share the global information necessary to perform the calculation of U.S. AFS Income in accordance with the CAMT and Notice. Even if the foreign parent is willing to share such information, such sharing would be burdensome.

2. The "top-down" approach is complex and can be extremely time consuming. A large amount of global information would need to be unraveled, which would likely result in the same information that taxpayers may already have by using the "bottom-up" approach.

3. Geographical presentation prepared by a foreign parent is not always the same as the information needed for a U.S. consolidated group under the CAMT.

For these reasons, we recommend that the Secretary permit taxpayers to use the "bottom-up" approach at their election.

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TEI appreciates the opportunity to comment on the CAMT and Notice. TEI's comments were prepared under the aegis of its Tax Reform Task Force, whose chair is Jason Weinstein. Should you have any questions regarding TEI's comments, please do not hesitate to contact Mr. Weinstein at jwein@amazon.com, or Benjamin Shreck of TEI's legal staff at bshreck@tei.org or 202.464.8353.

Respectfully submitted,

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TAX EXECUTIVES INSTITUTE