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August 12, 2019

Lafayette "Chip" G. Harter III  
Deputy Assistant Secretary (International Tax Affairs)  
U.S. Department of the Treasury

Douglas L. Poms  
International Tax Counsel  
U.S. Department of the Treasury

**Via email**

**RE: Additional Comments of Tax Executives Institute, Inc. on the Proposed Base Erosion and Anti-Abuse Tax Regulations**

Dear Messrs. Harter and Poms:

On December 21, 2018, the Internal Revenue Service (the Service) and the U.S. Department of the Treasury (the Treasury) published proposed regulations (the Proposed Regulations)<sup>1</sup> under new section 59A.<sup>2</sup> Section 59A imposes a liability on the base-erosion minimum tax amount (as defined) of certain taxpayers.<sup>3</sup> Section 59A was enacted as part of Public Law 115-97,<sup>4</sup> colloquially known as the "Tax Cuts & Jobs Act" (the Act). The Service and Treasury (collectively, the Government) requested public comments regarding the Proposed Regulations no later than February 19, 2019.

<sup>1</sup> REG-104259-18, 83 Fed. Reg. 65,956. (Dec. 21, 2018).

<sup>2</sup> Unless otherwise indicated, all "section" references are to the Internal Revenue Code of 1986, as amended (the Code) and all "§" references are to the Treasury regulations promulgated thereunder.

<sup>3</sup> The tax imposed by section 59A is hereinafter referred to as the "BEAT."

<sup>4</sup> Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054.

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In response to the Government's request, Tax Executives Institute, Inc. (TEI), submitted detailed comments on February 19, 2019 (the February Comments).<sup>5</sup> TEI has continued to analyze the Proposed Regulations in light of the evolving business operations of TEI members in the nearly six months since filing our February Comments. As a result of that analysis, we provide below our brief supplemental comments on the Proposed Regulations.<sup>6</sup>

### **TEI Background**

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 57 chapters in North and South America, Europe, and Asia. Our more than 7,000 individual members represent over 2,800 of the leading companies around the world. TEI members are responsible for administering the tax affairs of their companies and must contend daily with provisions of the tax law relating to the operation of business enterprises, including the new BEAT regime and many other aspects of the Act. We believe that the diversity and professional experience of our members enables TEI to bring a balanced and practical perspective to the issues raised by the Proposed Regulations, and we are eager to assist the Government in its important effort to effectively and efficiently implement the Act.

### **TEI Comments**

TEI recommended in our February Comments that the Government permit taxpayers to use the "recomputation" method when calculating their BEAT liabilities as an alternative to the Proposed Regulations' "add-back" method.<sup>7</sup> We recommended the recomputation method because it would enable taxpayers with pre-TCJA (i.e., pre-2018) net operating losses (NOLs) to preserve the full benefit of those losses when calculating their BEAT liability, even though the recomputation method would introduce additional complexity when compared to the add-back method.

Since filing our February Comments, an alternative method for preserving the full benefit of pre-TCJA NOLs has been proposed. This method (which has been labeled as the "proxy-method") would preserve the benefit of pre-TCJA NOLs much in the same way as the recomputation method, without introducing some of the recomputation method's complexity.

The proxy-method would simply increase a taxpayer's "regular tax liability" by 11%<sup>8</sup> of the taxpayer's pre-2018 NOLs utilized in computing the taxpayer's regular tax liability. That is, if a taxpayer had pre-TCJA NOLs of \$400, its regular tax liability would be increased by the product of 11% and \$400, or \$44 (the proxy-tax), which would reduce the taxpayer's BEAT liability by the same amount (i.e., \$44).<sup>9</sup>

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<sup>5</sup> TEI's February Comments are available at [https://www.tei.org/sites/default/files/advocacy\\_pdfs/TEI-Comments-Proposed-BEAT-Regulations-FINAL-to-IRS-19Feb2019.pdf](https://www.tei.org/sites/default/files/advocacy_pdfs/TEI-Comments-Proposed-BEAT-Regulations-FINAL-to-IRS-19Feb2019.pdf).

<sup>6</sup> TEI recognizes that the deadline for commenting on the Proposed Regulations has long since passed and thus appreciates any consideration the Government may give to this letter.

<sup>7</sup> See February Comments at 12-13.

<sup>8</sup> 11% is equal to the difference between the regular tax rate and the BEAT tax rate.

<sup>9</sup> For a more detailed example of how the proxy-method would put taxpayers on an equal footing, see the comments filed at <https://www.regulations.gov/document?D=IRS-2019-0002-0072>.

This approach would put taxpayers with the same amount of taxable income (before taking into account pre-2018 NOLs) and base eroding payments in a particular taxable year on an equal footing as a taxpayer with pre-TCJA NOLs.

In addition, the proxy-method (as well as the recomputation method) is supported by the Act's effective date provisions, which only take into account base eroding payments made in taxable years after the Act's enactment.<sup>10</sup> Further, the proxy-method is consistent with the principle that new tax legislation should apply on a prospective basis, especially when the new policy relates to major changes in longstanding principles of taxation, such as the preservation of NOL carryovers.

For these reasons, TEI recommends the Government permit taxpayers to use the proxy-method, as a modified alternative to the add-back method and as an alternative to the recomputation method, when computing their BEAT tax liability.

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TEI commends the Government in its efforts to promulgate regulatory guidance under the Act on a timely basis, it has been a monumental undertaking. Should you have any questions regarding our supplemental comments, please do not hesitate to contact Emily Whittenburg, Chair of TEI's Tax Reform Task Force, at [Emily.Whittenburg@shell.com](mailto:Emily.Whittenburg@shell.com) or 832.337.0827; or Benjamin R. Shreck of the Institute's legal staff at [bshreck@tei.org](mailto:bshreck@tei.org) or 202.464.8353.

Respectfully submitted,  
TAX EXECUTIVES INSTITUTE



Katrina H. Welch  
*International President*

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<sup>10</sup> See, e.g., Section 14401(e) of the Act, not codified, providing that "The amendments made by this section shall apply to base erosion payments (as defined in IRC sec. 59A(d) of the Internal Revenue Code of 1986, as added by this section) paid or accrued in taxable years beginning after December 31, 2017."