TAX EXECUTIVES INSTITUTE, INC.

October 9, 2018

CC:PA:LPD:PR (REG-104397-18)
Office of Associate Chief Counsel (Income Tax and Accounting)
Attention: Elizabeth R. Binder
Internal Revenue Service
1111 Constitution Avenue N.W.
Washington, D.C. 20224

Via the Federal eRulemaking Portal

Re: Comments on REG-104397-18 (Proposed Section 168(k) Regulations)

Dear Ms. Binder:

On behalf of Tax Executives Institute Inc., I am pleased to submit the enclosed comments and recommendations concerning the newly proposed regulations under section 168(k) of the Internal Revenue Code, which was amended by Public Law 115-97 on December 22, 2017. We appreciate this opportunity to contribute our input and engage constructively with the Service in the tax reform implementation process.

The enclosed comments were prepared jointly under the aegis of the Institute's Tax Reform Task Force and Federal Tax Committee, the respective chairs of which are Emily T. Whittenburg and John P. Orr Jr. Watson M. McLeish, Tax Counsel for the Institute, coordinated their preparation. If you have questions about the enclosed comments, please contact Mr. McLeish at (202) 470-3600 or wmcleish@tei.org.

Respectfully submitted,
Tax Executives Institute, Inc.

James P. Silvestri
International President

TAX EXECUTIVES INSTITUTE, INC.

COMMENTS ON PROPOSED REGULATIONS UNDER SECTION 168(k) AS AMENDED BY PUBLIC LAW 115-97 ON DECEMBER 22, 2017

Tax Executives Institute Inc. ("TEI" or the "Institute") welcomes this opportunity to comment on the proposed regulations (REG-104397-18) under section 168 of the Internal Revenue Code,[1] which were published in the *Federal Register* on August 8, 2018.[2] The proposed regulations would provide guidance regarding the additional first-year depreciation deduction under section 168(k) and reflect changes made by Public Law 115-97, informally known as the Tax Cuts and Jobs Act (the "Act").[3]

About TEI

TEI is the preeminent association of in-house tax professionals worldwide. Our more than 7,000 members represent 2,800 of the leading companies in North and South America, Europe, and Asia. TEI represents a cross-section of the business community, and is dedicated to the development of sound tax policy, uniform and equitable enforcement of tax laws, and minimization of administration and compliance costs to the benefit of both government and taxpayers. As a professional association, 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.

TEI members are responsible for administering the tax affairs of their employers and must contend daily with provisions of the tax law relating to the operation of business enterprises, including the rules governing cost recovery for property used in a trade or business or held for the production of income through annual depreciation deductions. 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 section 168(k) regulations, and we are eager to assist the Department of the Treasury ("Treasury") and the Internal Revenue Service (the "Service") in their important, collective efforts to implement the Act.

Discussion

Section 168(k) was added to the Code by section 101 of the Job Creation and Worker Assistance Act of 2002.[4] The legislative history indicates that Congress intended section 168(k) to

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[1] Unless otherwise indicated, all references to "section" herein are to sections of the Internal Revenue Code of 1986, as amended (the "Code").

[2] Additional First Year Depreciation Deduction, 83 Fed. Reg. 39,292 (Aug. 8, 2018).

[3] Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054.

[4] Pub. L. No. 107-147, 116 Stat. 21.

encourage investment in equipment and provide an economic stimulus.[5] As originally enacted, section 168(k) allowed an additional first-year depreciation deduction equal to 30 percent of the adjusted basis of certain qualified property acquired after September 10, 2001, and before September 11, 2004, and placed in service before January 1, 2005. Subsequent amendments to section 168(k) increased the percentage of the additional first-year depreciation deduction from 30 percent to 50 percent (to 100 percent for property acquired and placed in service after September 8, 2010, and generally before January 1, 2012), extended the placed-in-service date generally through December 31, 2019, and made other changes.[6]

On December 22, 2017, the Act amended section 168(k) and related provisions to provide further changes to the additional first-year depreciation deduction. As amended by the Act, section 168(k) generally allows a 100-percent additional first-year depreciation deduction for qualified property acquired and placed in service after September 27, 2017, and before January 1, 2023. Consistent with prior amendments to section 168(k), the Act's legislative history indicates that Congress again intended to promote capital investment and stimulate economic growth through increased bonus depreciation. As explained in the report of the House Committee on Ways and Means:

> The Committee believes that providing full expensing for certain business assets lowers the cost of capital for tangible property used in a trade or business. With lower costs of capital, the Committee believes that businesses will be encouraged to purchase equipment and other assets, which will promote capital investment and provide economic growth. The Committee also believes that full expensing for certain business assets will eliminate depreciation recordkeeping requirements for such assets.[7]

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[5] *See* H.R. Rep. No. 107-251, at 20 (2001) ("The Committee believes that allowing additional first-year depreciation will accelerate purchases of equipment, promote capital investment, modernization, and growth, and will help to spur an economic recovery.").

[6] *See* Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 201, 117 Stat. 752, 756–58 (increasing the additional first-year depreciation deduction to 50 percent of the adjusted basis of qualified property); Economic Stimulus Act of 2008, Pub. L. No. 110-185, § 103, 122 Stat. 613, 618–19 (extending the 50-percent additional first-year depreciation deduction through 2008); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1201, 123 Stat. 115, 333–35 (extending the 50-percent additional first-year depreciation deduction through 2009); Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 2022, 124 Stat. 2504, 2558–59 (extending the 50-percent additional first-year depreciation deduction through 2010); Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 401, 124 Stat. 3296, 3304–06 (adding section 168(k)(5) to the Code, temporarily allowing a 100-percent additional first-year depreciation deduction for certain new property through 2011); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 331, 126 Stat. 2313, 2335–37 (2013) (extending the 50-percent additional first-year depreciation deduction through 2013); Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, § 125, 128 Stat. 4010, 4016–17 (extending the 50-percent additional first-year depreciation deduction through 2014); Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 143, 129 Stat. 2242, 3056–65 (2015) (extending the 50-percent additional first-year depreciation deduction through 2017, with subsequent phase-out).

[7] H.R. Rep. No. 115-409, at 232 (2017); *accord* S. Comm. on Budget, *Reconciliation Recommendations Pursuant to H. Con. Res. 71*, S. Prt. 115-20, at 140 (Comm. Print 2017) ("The Committee believes that providing full expensing for certain

The proposed regulations, promulgated under Treasury's general authority to adopt "all needful rules and regulations" in section 7805(a),[8] address the statutory requirements that must be met for depreciable property to qualify for the additional first-year depreciation deduction under section 168(k). Specifically, the proposed regulations purport to "follow section 168(k)(2), as amended by the Act, and section 13201(h) of the Act to provide that depreciable property must meet four requirements to be qualified property."[9] Those requirements are: (i) the depreciable property must be of a specified type (i.e., property to which section 168 applies that has a recovery period of 20 years or less);[10] (ii) the original use of the depreciable property must begin with the taxpayer or used depreciable property must meet the acquisition requirements of section 168(k)(2)(E)(ii);[11] (iii) the depreciable property must be placed in service by the taxpayer before January 1, 2027;[12] and (iv) the depreciable property must be acquired by the taxpayer after September 27, 2017.[13]

I. Acquisition of Property

As amended by the Act, the additional first-year depreciation deduction in section 168(k) applies only to property that is both acquired and placed in service after September 27, 2017.[14] For these purposes, section 13201(h)(1) of the Act specifies that "property shall not be treated as acquired after the date on which a written binding contract is entered into for such acquisition."[15] The preamble to the proposed regulations refers to this as the "written binding contract rule."[16]

On their face, the acquisition requirements of the effective date in section 13201(h) of the Act are not inconsistent with those from prior amendments to section 168(k). When Congress first enacted bonus depreciation, it excluded from the definition of "qualified property" any property acquired by the taxpayer after September 10, 2001, for which a written binding contract for the acquisition was in effect before September 11, 2001.[17] Similarly, when Congress

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business assets will accelerate purchases of equipment and other assets, and promote capital investment, modernization, and growth.").

[8] Additional First Year Depreciation Deduction, 83 Fed. Reg. 39,292, 39,300 (Aug. 8, 2018).

[9] *Id.* at 39,293.

[10] I.R.C. § 168(k)(2)(A)(i)(I).

[11] I.R.C. § 168(k)(2)(A)(ii).

[12] I.R.C. § 168(k)(2)(A)(iii).

[13] Act of Dec. 22, 2017, Pub. L. No. 115-97, § 13201(h)(1)(A), 131 Stat. 2054, 2108. Unlike requirements (i) through (iii), this requirement does not appear in the Code.

[14] *Id.* § 13201(h)(1), 131 Stat. at 2108.

[15] *Id.* (flush language).

[16] 83 Fed. Reg. at 39,297.

[17] *See* Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 101(a), 116 Stat. 21, 22–23.

increased the percentage of the bonus depreciation deduction to 50 percent in 2003, it excluded from qualified property any property acquired by the taxpayer after May 5, 2003, for which a written binding contract for the acquisition was in effect before May 6, 2003.[18]

Consistent with the above, the proposed regulations generally provide that depreciable property must be acquired by the taxpayer after September 27, 2017, or acquired by the taxpayer pursuant to a written binding contract entered into by the taxpayer after September 27, 2017.[19] The proposed regulations would also retain the existing rules in Treasury regulations section 1.168(k)-1(b)(4)(ii) defining a "binding contract."[20] Perplexingly, however, the proposed regulations would diverge significantly from existing law in several material respects, which are the subject of TEI's comments below.

A. Written Binding Contract

If a taxpayer acquires—or is considered to acquire, as discussed below—property pursuant to a written binding contract and the contract states the date on which it was entered into and a closing date, delivery date, or other similar date, the proposed regulations would treat the date on which the contract was "entered into" as the date the taxpayer "acquired" the property for purposes of section 168(k).[21] This proposed rule would represent a significant change from existing law and have a negative impact on not only the cost of previously committed capital but also the cost of tax compliance for business taxpayers.

TEI has long advocated for reducing the costs imposed on our members and their businesses by the record keeping and reporting required by the federal income tax system. The Act's 100-percent bonus depreciation allowance was intended to help address these concerns by simplifying tax accounting for depreciation. As stated above, Congress believed that full expensing for certain business assets would eliminate depreciation record-keeping requirements for such assets and thereby reduce taxpayer costs.[22] The underlying logic is straightforward: it requires less time and paperwork to write off the entire cost of a depreciable asset in its first year of use than it does to write off that cost over a longer period using allowable depreciation schedules. Adoption of the proposed rule, however, would achieve the opposite result—higher administrative and compliance costs for taxpayers.

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[18] *See* Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 201(a), 117 Stat. 752, 756; *see also* H.R. Rep. No. 115-466, at 348 (2017) (Conf. Rep.) (explaining the pre-Act law requirement that property qualifying for the additional first-year depreciation deduction "must be acquired (1) before January 1, 2020, or (2) pursuant to a binding written contract which was entered into before January 1, 2020").

[19] Prop. Treas. Reg. § 1.168(k)-2(b)(5)(ii), 83 Fed. Reg. 39,292, 39,308 (Aug. 8, 2018).

[20] 83 Fed. Reg. at 39,297.

[21] Prop. Treas. Reg. § 1.168(k)-2(b)(5)(ii), 83 Fed. Reg. at 39,308.

[22] *See* H.R. Rep. No. 115-409, at 232 (2017).

Recording and tracking the additional information required by the proposed rule would be a costly and burdensome endeavor for many taxpayers, whose current systems and processes do not account for such data. Most existing fixed asset systems do not track specific contract/purchase order data or the dates on which individual contracts/purchase orders were entered into. This information is typically contained in different systems or may be available only on paper (i.e., on the contract documents). An inordinate amount of time and resources would be required to create the special reports on an asset-by-asset basis, or each asset would need to be reviewed manually to record the necessary information. Inevitably, some depreciation calculations would need to be manually overridden to accommodate the changes to normal capitalization policy required by this effort. In short, the cost of administering and complying with the proposed rule would be impracticably high for many large business taxpayers.

The proposed rule appears to derive from a narrow interpretation of the flush language in section 13201(h)(1) of the Act, which states that "property shall not be treated as acquired after the date on which a written binding contract is entered into for such acquisition." However, similar language concerning the taxpayer's *entry into* binding contracts has appeared in prior versions of section 168(k),[23] and there is nothing in the Act's legislative history to suggest that such a narrow interpretation is required here. Accordingly, for all of the reasons articulated above, TEI respectfully requests that Treasury and the Service remove this proposed rule from the regulations.

B. Self-constructed Property

Consistent with existing law,[24] the proposed regulations would provide that if a taxpayer manufactures, constructs, or produces property for use by the taxpayer in its trade or business or for its production of income, the acquisition requirements in section 13201(h)(1) of the Act are treated as met for the property if the taxpayer begins manufacturing, constructing, or producing the property after September 27, 2017.[25] In other words, the proposed regulations would treat self-constructed property as acquired when the taxpayer begins manufacturing, constructing, or producing the property.

The proposed regulations would also provide rules similar to those in Treasury regulations section 1.168(k)-1(b)(4)(iii)(B) for determining when manufacture, construction, or production of

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[23] *See, e.g.*, Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 101(a), 116 Stat. 21, 22–23 (providing that the term "qualified property" means property, inter alia, which is "(I) acquired by the taxpayer after September 10, 2001, and before September 11, 2004, but only if no written binding contract for the acquisition was in effect before September 11, 2001, or (II) acquired by the taxpayer pursuant to a written binding contract which was entered into after September 10, 2001, and before September 11, 2004").

[24] *See* Treas. Reg. § 1.168(k)-1(b)(4)(iii)(A); *see also* H.R. Rep. No. 115-466, at 348 (2017) (Conf. Rep.) ("With respect to property that is manufactured, constructed, or produced by the taxpayer for use by the taxpayer, the taxpayer must begin the manufacture, construction, or production of the property before January 1, 2020.").

[25] *See* Prop. Treas. Reg. § 1.168(k)-2(b)(5)(iv)(A), 83 Fed. Reg. at 39,309.

property begins. Under the proposed regulations, the manufacture, construction, or production of property would begin "when physical work of a significant nature begins," which is a question of facts and circumstances.[26] The proposed regulations also provide a familiar safe harbor under which physical work of a significant nature would generally be considered to begin at the time the taxpayer incurs (in the case of an accrual basis taxpayer) or pays (in the case of a cash basis taxpayer) more than 10 percent of the total cost of the property.[27] However, this is where the proposed regulations' similarity to existing law would end.

Since Congress first enacted the additional first-year depreciation deduction in 2002, the rules under section 168(k) have consistently treated property that is manufactured, constructed, or produced for the taxpayer by another person under a contract entered into prior to such manufacture, construction, or production as self-constructed property.[28] Indeed, current Treasury regulations section 1.168(k)-1(b)(4)(iii)(A) provides, in pertinent part:

> Property that is manufactured, constructed, or produced for the taxpayer by another person under a written binding contract . . . that is entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business (or for its production of income) is considered to be manufactured, constructed, or produced by the taxpayer.

Congress has consistently recognized this treatment in both enacting and amending/extending section 168(k),[29] most recently during the Act's legislative process. Citing Treasury regulations section 1.168(k)-1(b)(4)(iii), the *Joint Explanatory Statement of the Committee of Conference* reaffirmed Congress' understanding that "[p]roperty that is manufactured, constructed, or produced for the taxpayer by another person under a contract that is entered into prior to the manufacture, construction, or production of the property is considered to be manufactured, constructed, or produced by the taxpayer."[30] As discussed below, the proposed regulations would abandon this longstanding legislative and administrative treatment.

Because of "the clear language of section 13201(h)(1) of the Act regarding written binding contracts," the proposed regulations would diverge from existing law in their treatment of an

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[26] *See* Prop. Treas. Reg. § 1.168(k)-2(b)(5)(iv)(B)(1), 83 Fed. Reg. at 39,309.

[27] *See* Prop. Treas. Reg. § 1.168(k)-2(b)(5)(iv)(B)(2), 83 Fed. Reg. at 39,309.

[28] *See, e.g.*, H.R. Rep. No. 107-251, at 20 (2001) ("Property that is manufactured, constructed, or produced for the taxpayer by another person under a contract that is entered into prior to the manufacture, construction, or production of the property is considered to be manufactured, constructed, or produced by the taxpayer.").

[29] *See, e.g.*, H.R. Rep. No. 108-94, at 23 (2003) ("Property that is manufactured, constructed, or produced for the taxpayer by another person under a contract that is entered into prior to the manufacture, construction, or production of the property is considered to be manufactured, constructed, or produced by the taxpayer."); H.R. Rep. No. 114-317, at 9 (2015) ("Property that is manufactured, constructed, or produced for the taxpayer by another person under a contract that is entered into prior to the manufacture, construction, or production of the property is considered to be manufactured, constructed, or produced by the taxpayer.").

[30] H.R. Rep. No. 115-466, at 348 (2017) (Conf. Rep.).

entire class of self-constructed property.[31] Pursuant to the proposed regulations, property that is manufactured, constructed, or produced for the taxpayer by another person under a written binding contract that is entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business, or for its production of income, is considered to be "acquired pursuant to a written binding contract."[32] This proposed conversion of otherwise self-constructed property would be highly problematic for the reasons set forth below.

i. The Proposed Regulations Misinterpret Congressional Intent

Treasury's narrow interpretation of section 13201(h)(1) of the Act disregards relevant principles of statutory construction and is inconsistent with Congress' intent in amending section 168(k). Under the canon of prior-construction, also known as the presumption of ratification, Congress is presumptively aware of an existing regulatory definition of a term and is presumed to ratify that definition when adopting the same term in subsequent legislation.[33]

As discussed above, both Congress and Treasury have consistently treated property that is manufactured, constructed, or produced for the taxpayer by another person under a contract entered into prior to such manufacture, construction, or production as self-constructed property.[34] From 2002 to 2015, Congress amended section 168(k) twelve times but never changed the treatment of self-constructed property thereunder. Furthermore, nowhere in the Act or its legislative history did Congress evidence an intent to change its longstanding interpretation of that term. It follows, therefore, that Congress's repetition of such a well-established term carries the implication that Congress intended "self-constructed property" to be construed in accordance with the pre-existing regulatory interpretation in Treasury regulations section 1.168(k)-1(b)(4)(iii).

ii. The Proposed Regulations Would Undermine the Policy Objectives of the Act

The Act's legislative history makes clear that Congress intended to promote capital investment and stimulate economic growth through increased bonus depreciation. Congress amended section 168(k) to accelerate purchases of equipment and other assets, and promote capital investment, modernization, and growth. Treasury and the Service should interpret the Act in a manner that is consistent with these underlying policy objectives.

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[31] 83 Fed. Reg. at 39,297.

[32] Prop. Treas. Reg. § 1.168(k)-2(b)(5)(ii), 83 Fed. Reg. at 39,308.

[33] *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Grove City College v. Bell*, 465 U.S. 555, 588 (1984) (providing that "existing administrative regulations" are a "principal indicator of the accepted interpretation" of new legislation).

[34] *See supra* notes 28–30 and accompanying text.

Arguably, only an interpretation that encourages taxpayers to purchase equipment and other assets by lowering the cost of capital for tangible property used in a trade or business would serve the policy objectives of the Act. However, Treasury's proposed interpretation of the acquisition requirements in section 13201(h)(1) of the Act would, in many cases, have the opposite effect.

For qualified property acquired by taxpayers before September 28, 2017, but placed in service by the taxpayer after September 27, 2017, pre-Act bonus depreciation rates continue to apply under the phase-down rules of new section 168(k)(8)—generally, 50 percent if placed in service before the end of 2017, 40 percent if placed in service in 2018, and 30 percent if placed in service in 2019. Thus, by converting an entire class of otherwise self-constructed property into property "acquired pursuant to a written binding contract," the proposed regulations would effectively increase the cost of previously committed capital—investments that taxpayers had expected to qualify for at least 50-percent bonus depreciation based on Congress' custom of repeatedly extending section 168(k), without exception, since 2008. Furthermore, subjecting such property to the proposed written binding contract rule would reduce the amount of taxpayer capital available for post-September 27, 2017, asset acquisitions—the very activity that Congress sought to promote. Coupled with the increased administrative and compliance costs described above, these non-stimulative economic effects of the proposed regulations would significantly undermine the policy objectives of the Act.

iii. TEI's Recommendation

In view of the above, TEI respectfully urges Treasury and the Service to revise the proposed regulations in a manner consistent with existing law and the policy objectives of the Act.

C. Components of Self-constructed Property

The proposed regulations would provide rules similar to those in Treasury regulations section 1.168(k)-1(b)(4)(iii)(C) for a contract to acquire, or for the manufacture, construction, or production of, a component of a larger self-constructed property. If applied in conjunction with the proposed written binding contract rule,[35] however, these rules would pose serious administrative and compliance challenges to many large business taxpayers.

i. The Proposed Regulations Would Increase Tax Administration and Compliance Costs

With respect to acquired components of self-constructed property, the proposed regulations would provide that if a binding contract to acquire a component was entered into before September 28, 2017, the component does not qualify for the additional first-year depreciation

[35] *See supra* notes 21–23 and accompanying text.

deduction.[36] Many large business taxpayers acquire thousands, or even hundreds of thousands, of components each year. Current tax accounting and compliance software generally integrates with financial accounting ERP asset acquisition systems with respect to the costs and placed-in-service dates of fixed assets on an automated basis.[37] As noted above, however, most existing fixed asset systems do not track specific contract or purchase order data, or the dates on which individual contracts or purchase orders were entered into. This information is typically contained in different systems or may be available only on paper (e.g., on the contract documents). As a result, many taxpayers would be forced to develop sophisticated new systems and processes, as well as hire and train additional staff, to record and track the written binding contract date for each acquired component. To many TEI members and the businesses they support, this represents an inordinately expensive and onerous burden.

ii. The Proposed Regulations Raise Impracticability Concerns for Many Taxpayers

Consider the case of large business taxpayers engaged in industrial and commercial processes, such as manufacturing, power generation, mining, warehousing, distribution, automated materials handling, or other similar activities, which undertake large-scale construction projects throughout the year—projects that often take more than one year to complete. It would be exceptionally difficult, if not impracticable, for such taxpayers to perform the requisite in-depth analysis of their construction-in-process records to identify and track written binding contract dates on a component-by-component basis.

Due to the sheer volume of acquired components and the complexity of self-constructed assets, the proposed regulations would impose especially harsh administrative and compliance costs on these taxpayers—potentially precluding them from claiming the Act's 100-percent bonus depreciation deduction for significant asset acquisitions and expansions of processing facilities. TEI does not believe that this was the intent of Congress, which sought to encourage these capital investments and eliminate depreciation record-keeping requirements associated therewith.[38]

iii. TEI's Recommendation

Given the explicit policy objectives of Congress in amending section 168(k) under the Act, TEI strongly recommends that Treasury and the Service incorporate the component election and related provisions of Revenue Procedure 2011-26,[39] described below, into the final regulations or other published guidance.

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[36] Prop. Treas. Reg. § 1.168(k)-2(b)(5)(iv)(C)(*1*), 83 Fed. Reg. at 39,309.

[37] "ERP" is an abbreviation for enterprise resource planning. ERP software helps enterprises to use integrated solutions for business management and automate the functions of various departments.

[38] *See* H.R. Rep. No. 115-409, at 232 (2017).

[39] 2011-16 I.R.B. 664.

In December 2010, Congress passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010,[40] which amended section 168(k) by adding section 168(k)(5) to the Code. That provision allowed a then-unprecedented 100-percent additional first-year depreciation deduction for qualified property acquired by a taxpayer after September 8, 2010, and before January 1, 2012, and placed in service by the taxpayer before January 1, 2012.[41] While there is no official legislative history on the statute, it is widely recognized that Congress intended the immediate recovery of costs for qualifying property to encourage investment and, in connection with the other tax cuts and provisions in the legislation, otherwise stimulate economic growth.[42]

In March 2011, the Service issued Revenue Procedure 2011-26 to provide guidance under new section 168(k)(5) clarifying when 100-percent bonus depreciation was available and providing additional rules and exceptions. "Because of the policies underlying the enactment of an unprecedented 100-percent additional first year depreciation provision,"[43] the revenue procedure provided a limited exception to the self-constructed property rules in Treasury regulations section 1.168(k)-1(b)(4)(iii) for certain components of a larger self-constructed property (hereinafter, the "component election"):

> If before September 9, 2010, a taxpayer begins the manufacture, construction, or production of the larger self-constructed property that is qualified property for use in its trade or business or for its production of income, but this larger self-constructed property meets the requirements of [then-section 168(k)(2)(A)(ii) (original use) and (iv) (placed-in-service date)], *the taxpayer may elect to treat any acquired or self-constructed component of that larger self-constructed property as being eligible for the 100-percent additional first year depreciation deduction* if the component is qualified property and is acquired or self-constructed by the taxpayer after September 8, 2010, and before January 1, 2012.[44]

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[40] Pub. L. No. 111-312, 124 Stat. 3296.

[41] *Id.* § 401(b), 124 Stat. at 3304. The legislation also amended section 168(k)(2) to extend the 50-percent first-year additional depreciation deduction for qualified property placed in service after December 31, 2011, and before January 1, 2013. *Id.* § 401(a), 124 Stat. at 3304.

[42] *See, e.g.*, Jeremiah Coder, *Official Explains Rationales for Bonus Depreciation Guidance*, 131 Tax Notes 14 (Apr. 4, 2011) (quoting a Treasury official as saying that the 100-percent bonus depreciation provisions were meant to help create jobs and investment in the economy, and noting that the unprecedented nature of the provision serves the policy rationale of providing a strong incentive for jobs and encouraging investment); *see also* Staff of J. Comm. Tax'n, 111th Cong., *General Explanation of Tax Legislation Enacted in the 111th Congress*, pt. 2, at 39 (Comm. Print 2011) ("Congress believes that allowing additional first-year depreciation will accelerate purchases of equipment and other assets, and promote capital investment, modernization, and growth.").

[43] Rev. Proc. 2011-26, § 2.04, 2011-16 I.R.B. at 664–65. Then, as now, those policy objectives were to promote capital investment and stimulate economic growth through increased bonus depreciation. *See supra* notes 5–7 and accompanying text.

[44] Rev. Proc. 2011-26, § 3.02(2)(b), 2011-16 I.R.B. at 666 (emphasis added).

The taxpayer was allowed to make this election for one or more such components. Furthermore, in applying Treasury regulations section 1.168(k)-1(b)(4)(iii)(C)(*1*) for purposes of section 168(k)(5), the revenue procedure provided that a qualifying acquired component was *not* required to be acquired pursuant to a written binding contract to satisfy the acquisition requirement of then-section 168(k)(2)(A)(iii).[45]

Revenue Procedure 2011-26 provided clear guidance to taxpayers under section 168(k)(5) that was consistent with Congress's intent to promote capital investment and stimulate economic growth through increased bonus depreciation. The component election was well-conceived and administratively feasible, and it afforded an important measure of certainty to business taxpayers contemplating new investments. Incorporating the component election and related provisions of Revenue Procedure 2011-26 into the final regulations or other published guidance under section 168(k) would have a similarly productive effect today. In addition to representing sound tax policy, the rules and mechanics of the revenue procedure are familiar to taxpayers and the Service alike, and they are already compatible with most businesses' existing tax compliance systems and processes. Consistent with the Trump administration's dual mandate to reduce regulatory burdens and provide timely guidance to taxpayers, TEI strongly encourages Treasury and the Service to (re)adopt this well-established approach.

II. Description of Qualified Property

The Act eliminated the separate definitions of qualified leasehold improvement, qualified restaurant, and qualified retail improvement property, and redefined "qualified improvement property" to mean "any improvement to an interior portion of a building which is nonresidential real property if such improvement is placed in service after the date such building was first placed in service."[46] Due to an acknowledged scrivener's error, however, the Act failed to include this newly consolidated category of qualified improvement property within the definition of "qualified property" eligible for 100-percent bonus depreciation.[47]

TEI respectfully renews its call for Treasury and the Service to promulgate remedial administrative guidance—regulatory or otherwise—pending the enactment of a legislative technical correction.[48]

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[45] *Id.* § 3.02(2)(a), 2011-16 I.R.B. at 665–66.

[46] *See* Act of Dec. 22, 2017, Pub. L. No. 115-97, § 13204, 131 Stat. 2054, 2109–11.

[47] *See, e.g.*, Letter from U.S. Senate Comm. on Fin. to Steven T. Mnuchin, Sec'y of the Treasury, & David J. Kautter, Assistant Sec'y of the Treasury for Tax Policy and Acting Comm'r of the Internal Revenue Serv. (Aug. 16, 2018), https://www.finance.senate.gov/imo/media/doc/8.16.18%20Member%20Letter%20-%20Techincal%20Corrections.pdf.

[48] *See, e.g.*, Letter from Robert L. Howren, Int'l President, Tax Exec. Inst., to Kevin M. Jacobs, Senior Technician Reviewer, Branch 4, Office of Assoc. Chief Counsel (Corporate), & Marie C. Milnes-Vasquez, Special Counsel to the Assoc. Chief Counsel (Corporate), Internal Rev. Service (May 17, 2018), https://www.tei.org/sites/default/files/advocacy_pdfs/TEI%20Corporate%20Tax%20Reform%20Implementation%20Issues%20and%20Guidance%20Priorities_FINAL_5.17.18.pdf.