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February 26, 2019

CC:PA:LPD:PR (REG-106089-18)
Internal Revenue Service
1111 Constitution Avenue N.W.
Room 5203
Washington, D.C. 20224

Via the Federal eRulemaking Portal

Re: Comments on REG-106089-18 (Proposed Section 163(j) Regulations)
Limitation on Deduction for Business Interest Expense

Dear Sir or Madam:

On behalf of Tax Executives Institute Inc., I am pleased to submit the enclosed comments and recommendations concerning the new proposed regulations under section 163(j) of the Internal Revenue Code, which were published in the *Federal Register* on December 28, 2018. 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 regarding the enclosed comments, please contact Mr. McLeish at (202) 470-3600 or wmcleish@tei.org.

Respectfully submitted,

James P. Silvestri
International President

TAX EXECUTIVES INSTITUTE, INC.

COMMENTS ON THE PROPOSED SECTION 163(j) REGULATIONS (REG-106089-18) LIMITATION ON DEDUCTION FOR BUSINESS INTEREST EXPENSE

Tax Executives Institute ("TEI") welcomes this opportunity to comment on the new proposed regulations under section 163(j) of the Internal Revenue Code (the "Code"),[1] which were published in the *Federal Register* on December 28, 2018.[2] The proposed regulations would provide rules regarding the limitation on the deduction for business interest expense after the enactment of Public Law 115-97, colloquially known as the Tax Cuts and Jobs Act (the "Act").[3]

TEI commends the Department of the Treasury ("Treasury") and the Internal Revenue Service (the "Service") for their laudable efforts to provide taxpayers with timely and comprehensive proposed guidance under section 163(j). The proposed regulations are helpful in addressing a wide range of issues pertaining to the new limitation on the deduction for business interest expense in section 163(j). There are, however, certain aspects of the proposed regulations that warrant clarifying or other changes to ensure successful implementation of the statute consistent with congressional intent. The following comments and recommendations address those aspects of the proposed regulations that are of greatest mutual concern to TEI members as they prepare to apply, and comply with, section 163(j).

About TEI

TEI is the preeminent association of in-house tax professionals worldwide, with over 7,000 members representing 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 mutual benefit of 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 companies and must contend daily with provisions of the tax law relating to the operation of business enterprises, including the new limitation on the deduction for business interest expense in section 163(j). We believe that the diversity and professional experience of our members enable TEI to bring a balanced and practical perspective to the issues raised by the proposed regulations, and we are

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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.

[2] Limitation on Deduction for Business Interest Expense, REG-106089-18, 83 Fed. Reg. 67,490 (Dec. 28, 2018).

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

eager to assist Treasury and the Service in their important, collective efforts to implement the Act.

Background

Section 163(j) was added to the Code by the Omnibus Budget Reconciliation Act of 1989,[4] through which Congress intended to prevent erosion of the U.S. tax base by means of excessive deductions for interest paid by a taxable corporation to a tax exempt (or partially tax exempt) related person.[5] Prior to its amendment by the Act, section 163(j) disallowed a deduction for "disqualified interest" paid or accrued by a corporation in a taxable year if (i) the corporation's debt-to-equity ratio exceeded 1.5 to 1.0 and (ii) the corporation's net interest expense exceeded 50 percent of its adjusted taxable income.[6] To that end, "disqualified interest" included interest paid or accrued to (A) related persons if no U.S. federal income tax was imposed on the interest, (B) unrelated persons in certain instances where a related person guaranteed the debt, and (C) a real estate investment trust ("REIT") by a taxable REIT subsidiary thereof.[7]

Effective for taxable years beginning after December 31, 2017, the Act amended section 163(j) to generally limit a taxpayer's annual deduction for business interest expense to 30 percent of the taxpayer's adjusted taxable income for the taxable year.[8] Pursuant to section 163(j)(1), as amended by the Act:

> The amount allowed as a deduction under [Chapter 1 of the Code] for any taxable year for business interest shall not exceed the sum of—
>
> (A) the business interest income of such taxpayer for such taxable year,
>
> (B) 30 percent of the adjusted taxable income of such taxpayer for such taxable year, plus
>
> (C) the floor plan financing interest of such taxpayer for such taxable year.
>
> The amount determined under subparagraph (B) shall not be less than zero.[9]

This new, expanded limitation on the deduction for business interest expense applies to all taxpayers, except for certain small businesses that meet the gross receipts test of section 448(c).[10] The amount of any business interest not allowed as a deduction for any taxable year by reason

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[4] Pub. L. No. 101-239, § 7210, 103 Stat. 2106, 2339–42.

[5] *See* H.R. Rep. No. 101-247, at 1241–42 (1989). The payment of excessive deductible interest that is tax exempt, or partially tax exempt, in the hands of a related person (i.e., a foreign person or tax-exempt U.S. entity) is referred to as "earnings stripping."

[6] *See* I.R.C. § 163(j)(2) (2016).

[7] *See* I.R.C. § 163(j)(3) (2016).

[8] Act of Dec. 22, 2017, Pub. L. No. 115-97, § 13301, 131 Stat. 2054, 2117–21.

[9] I.R.C. § 163(j)(1).

[10] I.R.C. § 163(j)(3).

of section 163(j)(1) is carried forward and treated as business interest paid or accrued in the next taxable year.[11]

The proposed regulations would withdraw proposed Treasury regulations sections 1.163(j)-1 through -10, which were issued under prior law,[12] and provide wide-ranging guidance regarding the new limitation on the deduction for business interest expense in section 163(j). Central to that guidance are the proposed definitions of "adjusted taxable income" and "interest," which are the subject of TEI's comments below.

Discussion

I. Adjusted Taxable Income

As previewed above, the new limitation on the deduction for business interest expense in section 163(j) is principally based on a percentage of the taxpayer's adjusted taxable income. For purposes of section 163(j), the statute defines the term "adjusted taxable income" to mean the taxable income of the taxpayer computed without regard to:

> (i) any item of income, gain, deduction, or loss which is not properly allocable to a trade or business,
> (ii) any business interest or business interest income,
> (iii) the amount of any net operating loss deduction under section 172,
> (iv) the amount of any deduction allowed under section 199A, and
> (v) in the case of taxable years beginning before January 1, 2022, any deduction allowable for depreciation, amortization, or depletion.[13]

This measure of income is referred to as "EBITDA," for earnings before interest, taxes, depreciation, and amortization.[14] For taxable years beginning after December 31, 2021, however, the limitation under section 163(j) becomes more restrictive; adjusted taxable income will be similar to earnings before interest and taxes (or "EBIT"), as it will no longer exclude depreciation, amortization, or depletion deductions.[15]

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[11] I.R.C. § 163(j)(2).

[12] Earnings Stripping (Section 163(j)), INTL-0870-891, 56 Fed. Reg. 27,907 (June 18, 1991), as corrected by 56 Fed. Reg. 40,285 (Aug. 14, 1991).

[13] I.R.C. § 163(j)(8)(A). Under section 163(j)(8)(B), the Secretary of the Treasury (the "Secretary") may provide other adjustments to the computation of adjusted taxable income.

[14] *See* Jane G. Gravelle & Donald J. Marples, Cong. Research Serv., R45186, *Issues in International Corporate Taxation - The 2017 Revision (P.L. 115-97)* 7 (2018).

[15] *See id.* at 9.

For taxable years beginning before January 1, 2022, section 163(j)(8) defines adjusted taxable income as the taxable income of the taxpayer computed without regard to, inter alia, "any deduction allowable for depreciation, amortization, or depletion."[16] The Act's legislative history elaborates on this provision, explaining that "[a]ny deduction allowable for depreciation, amortization, or depletion includes any deduction allowable for any amount treated as depreciation, amortization, or depletion under present law."[17]

In the preamble to the proposed regulations, Treasury and the Service purport to "clarify" that an amount incurred as depreciation, amortization, or depletion, but capitalized to inventory under section 263A and included in cost of goods sold, is not a deduction for depreciation, amortization, or depletion for purposes of section 163(j).[18] This clarification would be codified by proposed Treasury regulations section 1.163(j)-1(b)(1)(iii), which provides that, for purposes of section 163(j)(8), "[d]epreciation, amortization, or depletion expense that is capitalized to inventory under section 263A is not a depreciation, amortization, or depletion deduction."[19] TEI believes that this interpretation of adjusted taxable income, as defined in section 163(j)(8) for taxable years beginning before January 1, 2022, is inappropriate for the reasons set forth below.

a. Legal Considerations

TEI respectfully asserts that the government's focus on the phrase "any deduction allowable" in section 163(j)(8)(A)(v) is incongruous to the extent that it precludes depreciation, amortization, or depletion expense capitalized to inventory under section 263A from being added back to taxable income (or EBITDA) in taxable years beginning before January 1, 2022. Instead, we believe the phrase "any deduction allowable" in section 163(j)(8)(A)(v) should be interpreted to refer to items that reduce gross income—whether included in cost of goods sold or deducted from gross income in the technical sense.

Treasury and the Service have interpreted the meaning of an "allowable deduction" in the context of section 263A on several previous occasions. A chief counsel advice memorandum issued in December 2008, and cited on the Service's website as AM 2008-012, provides an instructive example.[20] In that memorandum, the Service addressed the treatment of environmental remediation costs and worker compensation costs allocated to inventory under section 263A and included in cost of goods. At issue was whether such costs were "allowable as a deduction" within the meaning of section 172(f)(1)(B)(i), as then in effect, which defined a special liability loss. In a thoughtful analysis, the Service determined that:

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[16] I.R.C. § 163(j)(8)(A)(v).

[17] H.R. Rep. No. 115-466, at 387 n.689 (2017) (Conf. Rep.).

[18] Preamble to REG-106089-18, 83 Fed. Reg. 67,490, 67,492 (Dec. 28, 2018).

[19] Prop. Treas. Reg. § 1.163(j)-1(b)(1)(iii), 83 Fed. Reg. 67,490, 67,538 (Dec. 28, 2018).

[20] I.R.S. A.M. 2008-012 (Dec. 9, 2008).

> In our view, Congress used the phrase "allowable as a deduction" in § 172(f)(1)(B)(i) to mean amounts that may be taken into account in computing taxable income. Congress did not mean to distinguish "deductions" from "cost of goods sold." For example, amounts such as fines and penalties that are nondeductible by reason of § 162(f) cannot qualify as specified liability losses. This interpretation is consistent with § 263A. Section 1.263A-1(c)(2)(1) prohibits taxpayers from treating as inventoriable costs amounts that may not be taken into account in computing taxable income for any taxable year. . . .
>
> Unlike fines and penalties disallowed by § 162(f), . . . environmental remediation costs and workers compensation payments, though not deductible by a manufacturer under § 162(a), are "allowable" deductions that can be taken into account in computing taxable income under the Code. *As "allowable" deductions*, environmental remediation costs and workers compensation payments are *both* (1) eligible to be allocated to inventory to the extent required by § 263A, *and* (2) eligible for treatment as a specified liability loss to the extent the other requirements of § 172(f) are met.[21]

In *CBS Corp. v. United States*,[22] the U.S. Court of Federal Claims relied on the Ninth Circuit's interpretation of the term "allowable" in section 1016(a)(2) to mean a deduction that is permitted, and not otherwise forbidden, by the Code.[23] Section 1016(a)(2) provides that the basis of property for purposes of computing gain or loss shall be adjusted for the depreciation allowed as a deduction in computing taxable income, but such adjustment shall not be less than the amount allowable. The depreciation "allowed" generally is the amount that results in a tax benefit.[24] If one were to apply the rationale that an item excluded from income as part of cost of goods sold is not a "deduction," then, taken to a literal extreme, no depreciation allocated to cost of goods sold would reduce basis under section 1016(a)(2) because such depreciation is an exclusion in computing gross income and not a "deduction" in computing taxable income.

Finally, in Action on Decision 1977-77, the Service determined that a decision of the U.S. Tax Court in *B.C. Cook & Sons v. Commissioner*[25] applied an "overly-literal interpretation of the word

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[21] I.R.S. A.M. 2008-012, at 4–5 (Dec. 9, 2008) (emphasis added). *Accord* I.R.S. C.C.A. 200931007 (Mar. 11, 2009) (concluding that Congress used the phrase "allowable as a deduction" in section 172(f)(1)(B)(i) to mean amounts that may be taken into account in computing taxable income, and that Congress did not mean to distinguish "deductions" from "cost of goods sold").

[22] 105 Fed. Cl. 74 (2012).

[23] 105 Fed. Cl. at 78. The court also analyzed the holdings in *Perrin v. United States*, 444 U.S. 37, 42 (1979), *Flood v. United States*, 33 F.3d 1174, 1177 (9th Cir. 1994), *Sharp v. United States*, 14 F.3d 583, 587–88 (Fed. Cir. 1993), and *Petrich v. Comm'r*, 40 T.C.M. (CCH) 303, 306 (1980), *aff'd*, 676 F.2d 712 (9th Cir. 1982), to support its definition of the term "allowable." *Id.*

[24] *See* Treas. Reg. § 1.1016-3(e).

[25] 65 T.C. 422 (1975), *non acq.*, 1977-2 C.B. 2, *aff'd*, 584 F.2d 53 (5th Cir. 1978).

'deduction'" as used in section 1312(2).[26] The Service concluded that "[t]he term 'deduction' in [section] 1312(2) should be interpreted to refer to items which reduce gross income whether included in the cost of goods sold or deducted from gross income in the technical sense."[27]

b. Policy Considerations

Beyond the legal precedents cited above, there are significant policy considerations that weigh against the Service's interpretation in proposed Treasury regulations section 1.163(j)-1(b)(1)(iii). Congress did not enact section 163(j) in a vacuum, and we believe the Service's proposed interpretation would contravene congressional intent in several critical respects.

Although not reduced to writing in the Act's legislative history, it is widely recognized that Congress's work in this area was informed by, and is closely aligned with, the international standards resulting from Action 4 of the OECD/G20 *Action Plan on Base Erosion and Profit Shifting*.[28] The final report on Action 4 recommended an approach based on a fixed ratio rule, which generally limits an entity's net deductions for interest to a percentage—between 10 and 30 percent—of its earnings before interest, taxes, depreciation, and amortization (EBITDA), as measured under relevant tax principles.[29] In support of this recommendation, the OECD reported that:

> EBITDA is the most common measure of earnings currently used by countries with earnings-based tests. By excluding the two major non-cash costs in a typical income statement (depreciation of fixed assets and amortisation of intangible assets), EBITDA is a guide to the ability of an entity to meet its obligations to pay interest. It is also a measure of earnings which is often used by lenders in deciding how much interest expense an entity can reasonably afford to bear.[30]

This description of EBITDA as the preferred measure of earnings is also consistent with the proposed Treasury regulations issued under prior law, which define adjusted taxable income to include certain adjustments beyond those set forth in the statutory text of former section 163(j).

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[26] I.R.S. A.O.D. 1977-77 (Apr. 4, 1977).

[27] *Id.*

[28] *See, e.g.*, Robert Goulder, *Tax Reform and Interest Expense: Did Congress Get It Right?*, 89 Tax Notes Int'l 105, 105 (Jan. 1, 2018); Benjamin M. Willis & Carlos Perez Gautrin, *Will the Final Debt-Equity Regulations Follow the Executive's Orders?*, 162 Tax Notes 651, 653 (Feb. 11, 2019).

[29] *See* Staff of J. Comm. on Tax'n, 114th Cong., *Background, Summary, and Implications of the OECD/G20 Base Erosion and Profit Shifting Project*, JCX-139-15, at 16 (Nov. 30, 2015).

[30] Org. for Econ. Cooperation & Dev. [OECD], *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 – 2016 Update: Inclusive Framework on BEPS* para. 78, at 48 (2017).

The preamble to those regulations explains that the purpose of these adjustments is to modify taxable income to more closely reflect the cash flow of the corporation.[31]

In view of the above, TEI contends that the same policy reasons for using EBITDA as a metric in finance, as well as under former section 163(j), apply equally in measuring income for purposes of the new limitation on the deduction for business interest expense in section 163(j). Moreover, TEI believes that all of the adjustments to taxable income under section 163(j)(8) should ensure that the section 163(j) limitation is applied evenly across different types of taxpayers in a manner consistent with congressional intent. That intent is evidenced by the revenue estimates prepared by the Staff of the Joint Committee on Taxation comparing the provisions of H.R. 1 as passed by the House of Representatives on November 16, 2017, as amended by the Senate on December 2, 2017, and as reported by the Committee of Conference on December 15, 2017:

- The House version, which aligned with the OECD recommendation to use 30 percent of EBITDA, a gauge for cash flow, was estimated to raise $171.7 billion over the 10-year budget window of 2018 through 2027.[32]

- The Senate version, which was based on 30 percent of EBIT, a measure of operating income, would have raised considerably more—$307.5 billion—over the same 10-year period.[33]

- The Conference Report, as reflected in the statutory language of 163(j)(8), quoted above, is estimated to raise a total of $253.4 billion—$65.4 billion (25.8 percent) through 2021, followed by $188.1 billion (74.2 percent) in years 2022 through 2027.[34]

Any interpretation that prohibits manufacturers or distributors from treating depreciation, amortization, or depletion expense that is capitalized to inventory under section 263A as a "deduction" for purposes of section 163(j)(8)(A)(v) would effectively limit the application of that provision to service providers and other taxpayers not subject to section 263A. That limitation would result because manufacturers and distributors, among other similarly situated taxpayers, are much more likely to incur such expenses than are service providers. An informal survey of concerned TEI members working in those capital-intensive industries bears this out: 89 percent or more of their companies' 2017 depreciation, amortization, or depletion expenses were capitalized to inventory under section 263A and included in cost of goods sold.

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[31] Preamble to INTL-0870-891, 56 Fed. Reg. 27,907, 27,908–09 (June 18, 1991). For example, those regulations provided that cash expended with respect to amounts permanently disallowed as deductions under sections 265 and 279 are subtracted in computing adjusted taxable income, since such expenditures have reduced the amount of available cash to service loans. *Id.*

[32] Staff of the J. Comm. on Tax'n, 115th Cong., *Comparison of the Revenue Provisions Contained in H.R.1, The 'Tax Cuts And Jobs Act,' as Passed by the House of Representatives, and as Amended by the Senate*, JCX-65-17 (Dec. 11, 2017).

[33] *Id.*

[34] Staff of the J. Comm. on Tax'n, 115th Cong, *Estimated Budget Effects of the Conference Agreement for H.R.1, The 'Tax Cuts And Jobs Act,'* JCX-67-17, at 3 (Dec. 18, 2017).

TEI respectfully contends that if Congress had intended the phrase "any deduction allowable" in section 163(j)(8)(A)(v) to limit the application of that provision as described above, it would have stated so explicitly.[35] We see nothing in the Act's legislative history indicating that Congress intended to exclude manufacturers, distributors, or others from the addback for depreciation, amortization, and depletion deductions in section 163(j)(8)(A)(v). Conversely, the legislative record evidences a clear congressional intent to promote capital investment and stimulate economic growth through increased bonus depreciation under section 168(k), among other incentives.[36] Proposed Treasury regulations section 1.163(j)-1(b)(1)(iii) would frustrate that congressional intent by arbitrarily denying taxpayers in capital-intensive industries, such as manufacturers and distributors, the benefit of section 163(j)(8)(A)(v) in taxable years beginning before January 1, 2022.

c. TEI's Recommendation

Consistent with the foregoing, TEI respectfully recommends that Treasury and the Service withdraw proposed Treasury regulations section 1.163(j)-1(b)(1)(iii) and clarify in final regulations that depreciation, amortization, or depletion expense capitalized to inventory under section 263A is, in fact, a depreciation, amortization, or depletion deduction for purposes of section 163(j)(8)(A)(v).

II. Interest

For purposes of the new limitation on the deduction for business interest expense in section 163(j), the proposed regulations would define "interest" expansively to include certain amounts that are closely related to interest and that affect the economic yield or cost of funds of a transaction involving interest, but which may not be compensation for the use or forbearance of money on a stand-alone basis.[37] In addition, the proposed regulations contain an antiavoidance rule that would treat as interest expense for purposes of section 163(j) "[a]ny expense or loss, to the extent deductible, incurred by a taxpayer in a transaction or series of integrated or related transactions in which the taxpayer secures the use of funds for a period of time . . . if such expense or loss is predominantly incurred in consideration of the time value of money."[38]

TEI appreciates Treasury and the Service's efforts to provide clarity to taxpayers regarding which specific transactions and types of transactions would generate interest subject to the

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[35] *Cf.* I.R.S. A.M. 2008-012, at 5 (Dec. 9, 2008) (similarly concluding that if Congress had intended the phrase "allowable as a deduction" in section 172(f)(1)(B)(i) to exclude manufacturers and others subject to section 263A, it would have stated so explicitly).

[36] *See, e.g.*, H.R. Rep. No. 115-409, at 232 (2017); S. Comm. on Budget, *Reconciliation Recommendations Pursuant to H. Con. Res. 71*, S. Prt. 115-20, at 140 (Comm. Print 2017).

[37] *See* Prop. Treas. Reg. § 1.163(j)-1(b)(20)(i)–(iii), 83 Fed. Reg. at 67,539–40.

[38] Prop. Treas. Reg. § 1.163(j)-1(b)(20)(iv), 83 Fed. Reg. at 67,540.

section 163(j) limitation. At the same time, however, we respectfully—and fundamentally—disagree with the assertion in the preamble that the proposed guidance would lower compliance and administrative costs relative to providing no definition at all. Rather, TEI believes that the expansive definition of interest in the proposed regulations would introduce a new layer of complexity to the income tax compliance (and audit) process for many companies, along with the additional costs and uncertainty appurtenant thereto. The following comments address these concerns and recommend an alternative approach.

a. Questionable Authority

Proposed Treasury regulations section 1.163(j)-1(b)(20), which would define "interest" for purposes of section 163(j), was promulgated under the Secretary's general, interpretative authority in section 7805(a) to "prescribe all needful rules and regulations" for the enforcement of the Code.[39] As such, we note that the Secretary's authority to issue interpretative regulations under section 7805(a) is not the power to make law; rather, it is the power to carry into effect the will of Congress as expressed in the statute under which the regulations are prescribed.[40]

The preamble to the proposed regulations explains that they would "reduce taxpayer burden by adopting definitions of interest that have already been developed and administered in the regulations," and cites the interest expense allocation and apportionment regulations (Temp. Treas. Reg. § 1.861-9T) and subpart F regulations (Treas. Reg. § 1.954-2) as support.[41] TEI notes, however, that each of those regulations was issued pursuant to a specific statutory grant of authority (i.e., under section 864(e)(7) in the interest allocation/apportionment context, and under section 954(c)(1)(E) for interest equivalents in the subpart F context). There is no comparable grant of authority under section 163(j) for the issuance of regulations expanding the scope of "interest" by treating amounts that are "functionally similar" or "closely related" to interest as interest income or expense. Furthermore, we see nothing in the Act's legislative history indicating that Congress intended—or even contemplated—such an expansionary interpretation of interest for purposes of section 163(j).

b. Unintended Consequences

TEI notes that the proposed antiavoidance rule could potentially turn almost any payment that is even remotely related to debt financing into interest expense for purposes of section 163(j). For example, one TEI member voiced concern that external legal costs and certain financial institution fees, to the extent capitalized as debt-issuance costs, could, as amortized, be treated as interest expense under the proposed regulations, despite not satisfying the "if" element—that such expense or loss be predominantly incurred in consideration of the time value of money.

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[39] Preamble to REG-106089-18, 83 Fed. Reg. at 67,533.

[40] *See, e.g.*, *Swallows Holding, Ltd. v. Comm'r*, 126 T.C. 96, 129 (2006) (citing *Manhattan Gen Equip. Co. v. Comm'r*, 297 U.S. 129, 134–35 (1936)), *rev'd*, 515 F.3d 162 (3d Cir. 2008).

[41] Preamble to REG-106089-18, 83 Fed. Reg. at 67,495.

The amortization of such costs should not be treated as interest. Similar concerns exist with respect to internal legal costs, such as the salaries and wages of employees who work on securing debt financing, which also should not be treated as interest expense.

Another TEI member relayed that his company is a frequent user of supply chain finance arrangements, whereby they offer customers extended payment terms in exchange for entering into a three-party transaction (i.e., between the company, the customer, and a third-party bank) to factor their receivables. For financial reporting purposes, the company accounts for the factoring discount (if exercised) as a reduction in sales, not as interest. The "discount" on the factored receivable could potentially be treated as interest expense under the proposed regulations, which would be problematic for the member's company and perhaps other companies that use similar arrangements. It might also reduce the attractiveness of such arrangements to banks, which would be unhelpful.

c. Increased Administrative and Compliance Costs

If the expansive definition of interest in the proposed regulations were to be finalized in its current form, many taxpayers would be required to develop new systems and processes to analyze and track amounts that previously did not constitute interest for federal income tax purposes. Furthermore, many TEI members have raised concerns about the potential for asymmetrical or disparate treatment of certain items under the proposed regulations, whereby an expense item would be treated as interest expense but the corresponding income item would not be treated as interest income. Such disparities would only exacerbate the compliance burden for affected taxpayers by requiring them to track multiple characterizations of the same item for federal income tax purposes.

d. TEI's Recommendation

In view of the above, TEI respectfully recommends that Treasury and the Service withdraw proposed Treasury regulations section 1.163(j)-1(b)(20) and revert to the generally accepted definition of interest for federal income tax purposes, "compensation for the use or forbearance of money," as articulated by the Supreme Court of the United States.[42]

III. Application of Section 163(j) to Partnerships

With respect to partnerships, the new limitation on the deduction for business interest expense in section 163(j) is applied at the partnership level; that is, interest expense deductions are taken into account in determining the income of the partnership. To prevent double counting, special rules provide for the determination of the taxable income of each partner in the partnership. Similarly, to allow for additional interest expense deduction by a partner in the case of an excess amount of unused adjusted taxable income limitation of the partnership, special rules apply.

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[42] *Deputy v. DuPont*, 308 U.S. 488, 498 (1940).

In cases where an ultimate corporate parent effectively owns 100 percent of a partnership, or where section 52(b) applies to prevent the partnership from availing itself of the small business exception in section 448(c), requiring a separate partnership-level calculation creates an unnecessary administrative burden and the risk of double counting income is low. Accordingly, TEI respectfully renews its request that Treasury and the Service provide for an approach in such cases whereby the section 163(j) limitation could apply at the consolidated corporate level, where both interest expense and income would be counted only once.[43]

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[43] *See* 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.