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May 17, 2018

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Re: Corporate Tax Reform Implementation Issues and Guidance Priorities

Dear Mr. Jacobs and Ms. Milnes-Vasquez:

On behalf of Tax Executives Institute Inc., thank you for inviting our Executive Director, Eli J. Dicker, and Tax Counsel, Watson M. McLeish, to participate in your roundtable discussion with other stakeholder organizations on April 4. As the preeminent association of in-house tax professionals worldwide, with more than 7,000 members representing a cross-section of the business community, TEI is dedicated to supporting the development and effective implementation of sound tax policy, promoting the uniform and equitable enforcement of the tax laws, and reducing the cost and burden of administration and compliance to the benefit of taxpayers and government alike.

TEI members are responsible for administering the tax affairs of their companies and must contend daily with the provisions of the tax law relating to the operation of business enterprises, including those introduced or amended by Public Law 115-97—of which there are many. We believe the diversity and professional experience of our members enables TEI to bring a balanced and practical perspective to the corporate tax issues raised by Public Law 115-97, and we are eager to assist Treasury and the Service in your important, collective efforts to implement the new law.

As discussed on April 4, the Institute's legal staff has been working with a diverse, cross-industry group of senior TEI members to distill a

responsive list of corporate tax guidance priorities in the wake of comprehensive tax reform. The enclosed list is intended to elevate those corporate income tax issues that are of greatest mutual concern to our members as they work to apply and comply with the provisions of Public Law 115-97. Where appropriate, the enclosed list also includes TEI's recommendations for addressing certain issues raised therein. TEI greatly appreciates this opportunity to contribute its input and engage constructively with the Service in the tax reform implementation process.

The enclosed comments were developed under the aegis of TEI's Tax Reform Task Force. Watson M. McLeish, Tax Counsel for the Institute, coordinated their preparation. Should you have questions about TEI's comments, please contact Mr. McLeish at (202) 470-3600 or wmcleish@tei.org.

Respectfully submitted,
Tax Executives Institute, Inc.

Robert L. Howren
International President

Enclosure

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Tax Executives Institute, Inc.
Corporate Tax Reform Implementation Issues and Guidance Priorities
May 17, 2018

COST RECOVERY AND ACCOUNTING METHODS		
Provision	**Subject**	**TEI Comments and Recommendations**
Section 13201 of the Act; section 168(k) of the Code	Temporary 100-percent Expensing for Certain Business Assets	The new bonus depreciation rules in Public Law 115-97 (the “Act”)[1] permit 100-percent bonus depreciation (expensing) for certain tangible assets that are acquired and placed in service after September 27, 2017, and before January 1, 2023. Under new section 168(k)(8) of the Internal Revenue Code (the “Code”), however, prior law bonus depreciation rates would generally apply for assets that were acquired before September 28, 2017, and placed in service thereafter—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. • It is unclear how to apply the new bonus depreciation rules, and in particular this “acquisition” rule, to self-constructed assets where the construction began before September 28, 2017. • Guidance confirming that the 10-percent safe harbor in Treasury regulations section 1.168(k)-1(b)(4)(iii)(B)(2) continues to apply under the phase-down rules of new section 168(k)(8) would also be helpful.

[1] An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. Law No. 115-97, 131 Stat. ____.

Sections 13201 and 13204 of the Act; section 168 of the Code	Temporary 100-percent Expensing for Certain Business Assets; Applicable Recovery Period for Real 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." Due to an apparent 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. • Remedial administrative guidance is requested pending the enactment of a legislative technical correction. • TEI notes a growing sense of urgency among members for such guidance given that the dichotomy between 100-percent expensing and 2.564-percent depreciation (1/39th if placed in service in January 2018) could have a significant impact on 2018 estimated tax payments.
Section 13221 of the Act; section 451 of the Code	Certain Special Rules for Taxable Year of Inclusion	The *2016–2017 Priority Guidance Plan* contained the following Tax Accounting project that does not appear in the *2017–2018 Priority Guidance Plan*: 8. Regulations under § 451 regarding advance payments received for goods and services, including amounts received in exchange for the sale or issuance of gift cards, trading stamps, and loyalty points that can be redeemed for goods or services. TEI invites the Service to comment on how new section 451(b) and (c) of the Code may impact the income tax accounting for such items and the impact, if any, of the reference to "special methods of accounting" in the *Joint Explanatory Statement of the Committee of Conference*.[2]

[2] *See* H.R. Rep. No. 115-466, at 428 n.874 (2017) (Conf. Rep.) ("The Committee intends that the financial statement conformity requirement added to section 451 not be construed as preventing the use of special methods of accounting provided elsewhere in the Code, other than part V of subchapter P (special rules for bonds and other debt instruments) excluding items of gross income in connection with a mortgage servicing contract.").

BUSINESS-RELATED EXCLUSIONS AND DEDUCTIONS		
Provision	**Subject**	**TEI Comments and Recommendations**
Section 13301 of the Act; section 163(j) of the Code	Limitation on Deduction for Interest	The Act amends section 163(j) of the Code 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. For partnerships, the limitation is applied at the partnership level; that is, interest 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 deduction by a partner in the case of an excess amount of unused adjusted taxable income limitation of the partnership, special rules apply. • In cases where the ultimate corporate parent effectively owns 100 percent of a partnership, requiring a separate partnership-level calculation creates an unnecessary administrative burden and the risk of double counting income is low. • TEI invites the Service to consider an approach in such cases whereby the limitation could apply at the consolidated corporate level, where both interest expense and income would be counted only once.
Section 13301 of the Act; section 163(j) of the Code	Limitation on Deduction for Interest	The business interest expense limitation in section 163(j), as amended by the Act, applies to "taxpayer[s]," however the statute does not clearly address whether it applies to controlled foreign corporations or passive foreign investment companies. • Taxpayers have not historically thought about interest expense limitation rules in the context of such foreign corporations. • Guidance is needed to confirm whether amended section 163(j) applies to controlled foreign corporations and passive foreign investment companies, and, if so, the manner in which it applies. ✓ For example, if amended section 163(j) applies to controlled foreign corporations, it could be relevant to calculate a controlled foreign corporation's tested income under new section 951A, relating to global intangible low-taxed income.

Section 13301 of the Act; section 163(j) of the Code	Limitation on Deduction for Interest	As discussed above, the business interest expense limitation in section 163(j) is based upon a percentage of the taxpayer's adjusted taxable income. For purposes of section 163(j), the term "adjusted taxable income" means the taxable income of the taxpayer computed without regard to the items listed in section 163(j)(8)(A). • It is unclear precisely how this limitation should apply in conjunction with the limitation in section 246(b), which generally limits the aggregate amount of a corporation's dividends-received deductions under sections 243(a)(1) and 245, and its deduction under section 250, to 50 percent of the corporation's taxable income, computed with certain adjustments. • Because each of these deduction limitations is based upon taxable income, computed after taking the other into account, guidance is needed regarding their proper interaction in cases where both apply.
Section 13301 of the Act; section 163(j) of the Code	Limitation on Deduction for Interest	The Act excepts certain regulated public utilities from the amended section 163(j) limitation on the deductibility of business interest. Specifically, the limitation does not apply to businesses that furnish or sell, inter alia, the transportation of gas or steam by pipeline if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof. Many taxpayers engaged in this transportation business also conduct a variety of nonregulated businesses whereby the overall debt of such businesses is issued at the top-tier, holding company level. • The Act contains no guidance as to how such debt should be allocated for purposes of determining the exception or the limitation. • TEI recommends that the Service consider issuing guidance that allows taxpayers to allocate interest expense on any reasonable basis, such as revenue and gross asset value.

Sections 13301 and 14401 of the Act; sections 163(j) and 59A of the Code	Limitation on Deduction for Interest; Tax on Base Erosion Payments of Taxpayers with Substantial Gross Receipts	In Notice 2018-28,[3] the Service and Treasury announced their intention to issue proposed regulations addressing the interaction of section 163(j) with section 59A, relating to the tax on base erosion payments of taxpayers with substantial gross receipts. Pursuant to the notice, those regulations will provide that "business interest carried forward from a taxable year beginning before January 1, 2018, will be subject to section 59A in the same manner as interest paid or accrued in a taxable year beginning after December 31, 2017." This means that the regulations would effectively recharacterize pre-Act interest expenses as base erosion payments in the taxable year(s) to which they are carried forward, notwithstanding that such expenses were actually paid or accrued under prior law—before Congress enacted the base erosion and anti-abuse tax. • TEI views this approach as inconsistent with principles of sound tax policy;[4] it would amount to a retroactive, taxpayer-unfavorable application of the newly enacted base erosion and anti-abuse tax to preexisting tax attributes. • Furthermore, TEI notes that Congress adopted the base erosion and anti-abuse tax as one of several new guardrails to facilitate the Act's historic shift toward a territorial system of taxation. Applying this newly enacted base erosion and anti-abuse tax to pre-tax reform attributes would do nothing to further its intended policy aim. • TEI recommends that the Service reconsider its initial view regarding the interaction of section 163(j) with section 59A with respect to business interest carried forward from pre-Act taxable years.

[3] 2018-16 I.R.B. 492.

[4] *See, e.g.*, J.D. Foster, *Sound Tax Policy vs. Retroactivity* (Aug. 16, 1997), https://taxfoundation.org/sound-tax-policy-vs-retroactivity ("Changes in the tax law should never be applied retroactively except to relieve a class of taxpayers from an extraordinary and unwarranted tax burden.").

Section 13302 of the Act; section 172 of the Code	Modification of Net Operating Loss Deduction	The Act amends section 172(a) of the Code to limit the net operating loss deduction to 80 percent of taxable income (computed without regard to the deduction) for losses arising in taxable years beginning after December 31, 2017. • In the absence of a statutory ordering rule that specifies which deduction takes priority, guidance is needed to address potential complications posed by other Code sections that also limit deductions based on the taxpayer's taxable income (e.g., section 170(b)(2)).
Section 13302 of the Act; section 172 of the Code	Modification of Net Operating Loss Deduction	The Act also generally repeals the two-year net operating loss carryback provision in former section 172(b)(1)(A) of the Code. The *Joint Explanatory Statement of the Committee of Conference* provides that the House bill, Senate amendment, and conference agreement all intended for the provision to "appl[y] to losses arising in taxable years beginning after December 31, 2017." The language in section 13302(e)(2) of the Act, however, provides that subsection (b) "shall apply to net operating losses arising in taxable years *ending* after December 31, 2017." (Emphasis added.) This appears to be a scrivener's error that warrants a technical correction. • Remedial administrative guidance is requested pending the enactment of a legislative technical correction.

Section 385 of the Code; sections 1.385-2 and -3 of the Treasury regulations	Treatment of Certain Interests in Corporations as Stock or Indebtedness	TEI commends Treasury and the Service for their important efforts to, consistent with the policies stated in Executive Orders 13777 and 13789,[5] reduce regulatory burdens and complexity for taxpayers by repealing or amending existing tax regulations that meet the criteria set forth in the executive orders. In particular, TEI applauds the government's approach with respect to the final and temporary regulations under section 385 concerning the treatment of certain interests in corporations as stock or indebtedness for federal income tax purposes. • Late last year, it was reported that Treasury intends to issue a notice of proposed rulemaking to revoke the section 385 documentation regulations (Treas. Reg. § 1.385-2) in their entirety.[6] ✓ TEI encourages Treasury and the Service to prioritize the issuance of this notice of proposed rulemaking to provide much-needed certainty to affected taxpayers and their stakeholders. • Together, the Act's anti-base erosion and anti-earnings stripping measures—codified in sections 59A and 163(j) of the Code, respectively—significantly mitigate, if not eliminate, the need for the final and temporary distribution regulations under section 385 (Treas. Reg. §§ 1.385-3 and -3T). ✓ TEI respectfully reasserts its recommendation of last fall that Treasury and the Service revoke and thoroughly reassess the section 385 distribution regulations in consultation with affected taxpayers from across industry lines.[7]

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[5] Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017); Exec. Order No. 13,789, 82 Fed. Reg. 19,317 (Apr. 26, 2017).

[6] *E.g.*, Emily L. Foster, *Trier Says 'Meeting of the Minds' Needed to Make Tax Reform Work*, 157 Tax Notes 600 (Oct. 30, 2017).

[7] *TEI Submits Comments to the IRS in Response to Notice 2017-38 on the Final and Temporary Section 385 Regulations*, 69 Tax Executive 103, 105–06 (Nov.–Dec. 2017).