1200 G Street, N.W., Suite 300
Washington, D.C. 20005-3814
202.638.5601
tei.org

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October 18, 2022

The Honorable Lily L. Batchelder
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Via Email

Re: Comments on the Corporate Alternative Minimum Tax

Dear Ms. Batchelder:

President Biden signed the Inflation Reduction Act[1] ("IRA") into law on August 16, 2022. Among the IRA's tax provisions is a new corporate alternative minimum tax, which imposes a 15 percent minimum tax on adjusted financial statement income ("AFSI", such tax, the "CAMT"). The IRA delegates significant authority to the Secretary of the Treasury (the "Secretary") to further define AFSI, among other things. On behalf of Tax Executives Institute, Inc. ("TEI"), I am pleased to submit these initial comments on the CAMT to the government.

About Tax Executives Institute, Inc.

TEI was founded in 1944 to serve the needs of business tax professionals.[2] Today, the organization has 57 chapters in North and South America, Europe, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 6,000 individual members represent over 2,900 of the leading companies around the world.

TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and

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1 Pub. L. No. 117-169.

2 TEI is organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the Internal Revenue Code of 1986, as amended (the "Code").

compliance costs to the benefit of both government and taxpayers. These goals can be attained only through the members' voluntary actions and their adherence to the highest standards of professional competence and integrity. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner. The diversity, professional training, and global viewpoints of our members, along with their collective expertise in tax accounting for financial statement purposes, enable TEI to bring a balanced and practical perspective to the CAMT.

TEI Comments

The CAMT represents a significant departure from the regular federal income tax and the alternative minimum tax in place prior to the enactment of the Tax Cuts & Jobs Act in 2017. Unlike the pre-2017 corporate alternative minimum tax, the CAMT uses a taxpayer's financial statement income as a starting point for the CAMT's tax base. The CAMT therefore presents many financial accounting issues when defining its scope and application that are generally irrelevant when the Secretary promulgates tax regulations and other guidance. We therefore believe it is important for the U.S. Department of the Treasury ("Treasury") and the Internal Revenue Service (the "Service") to take into account the views of outside stakeholders when devising guidance under the CAMT generally, and the definition of AFSI in particular. TEI members are pleased to offer their experience and expertise in the intersection of tax and financial accounting as you embark on these efforts.

For purposes of our comments below, when we refer to financial statement or financial accounting income, we refer to such income as prepared under U.S. Generally Accepted Accounting Principles ("GAAP") as these rules are the most common for TEI members within the United States. While we expect that most of our comments will apply equally to financial statements prepared under other accounting standards, such as International Financial Reporting Standards ("IFRS"), Treasury and the Service will need to consider differences between U.S. GAAP and IFRS (and possibly other financial accounting standards) when promulgating regulations under the CAMT.

A. Estimated Tax Payments - Relief from Interest and Penalties

The IRA's CAMT includes more than a dozen grants of regulatory authority to the Secretary to carry out the purposes of the CAMT, including filling in holes, providing exceptions, calculating AFSI, *etc*. Much of the regulatory guidance, presumably, will not be final until sometime in 2023 or even thereafter. Even after finalization, taxpayers will need time to analyze the impact of regulations and other guidance to reconfigure or potentially create new systems to accurately calculate the CAMT. Meanwhile, the CAMT takes effect for tax years beginning after December 31, 2022, and taxpayers must make quarterly estimated tax payments accounting for any additional tax under the CAMT by the second quarter of 2023 for calendar year taxpayers. Moreover, safe harbors based on prior year payments are

not available to large corporate taxpayers and "applicable corporations," to which the CAMT applies, are necessarily within that category.[3]

TEI's members are the corporate employees primarily responsible for calculating estimated tax payments and have considerable concerns regarding the difficulty of accurately estimating such payments, both prior to and shortly after the promulgation of regulatory or other guidance. Because of the amount of regulatory guidance that is required and will be forthcoming in 2023 to flesh out the details of the CAMT, TEI strongly recommends Treasury provide relief from interest and penalties for underpaid estimated tax payments to taxpayers who have otherwise properly calculated section 6655 liabilities without regard to the CAMT. This type of waiver of underpayment penalties on estimated taxes has clear precedence: after passage of section 965 in late 2017, the Service issued Notice 2018-26 (April 2, 2018), which waived underpayment penalties for taxpayers on estimated taxes for section 965 liabilities on the basis of sound tax administrative needs as the Service and Treasury worked to finalize guidance.[4] We believe similar relief is warranted here.

B. Section 56A(c)(2)(C) and (D): Interaction of the CAMT with "Fair Value" Accounting

1. General Principles

We believe the CAMT presents novel issues and potentially unintended consequences due to its reliance on financial statement income as its starting point. Financial accounting obviously differs from the Code in many respects, but there are also areas where similar transactions may be treated differently for different reporting entities under U.S. GAAP, either because of diversity of practice or because of situational differences. For instance, Treasury in crafting guidance will need to take care in understanding that U.S. GAAP income may differ with respect to investments in corporate stock which are held as consolidated for GAAP but not for tax purposes, those which are held as equity method investments for GAAP, and those which are simply minority investments under GAAP. Yet the Code generally treats all three equally. Examples such as this abound.

As a brief background, under U.S. GAAP, securities which are not "held for sale" are accounted for using either: (i) fair value accounting (generally <20% ownership); (ii) equity method accounting (20%-50% ownership); or (iii) consolidated accounting (>50% ownership). In addition, equity method investments which have a readily ascertainable fair market value (i.e., publicly traded investments) can be accounted for under a "fair value" election, meaning >20% investments can by election be marked-to-market for GAAP purposes.

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[3] *See* section 6655(d)(2)(A). All "section" references herein are to the Code and all "§" references are to the Treasury Regulations promulgated thereunder.

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

Investments (both debt and equity) which are held for sale are subject to mark-to-market accounting and the earnings from these investments are not included in "net income" but rather in "other comprehensive income," forming, in total, "comprehensive income."

2. Non-Consolidated Equity Investments

We believe the IRA's statutory language evidences Congressional intent that AFSI should not include any income "with respect to" minority stock ownership as part of AFSI other than dividends (as appropriately adjusted by the Secretary) and gross income and loss if, as, and when included under the Code. Accordingly, we recommend regulations clarify that AFSI may be properly adjusted to eliminate any financial accounting mark-to-market gains or losses "with respect to" a non-consolidated corporation (consolidation being tested under section 1502 rather than GAAP) or any equity method earnings that would otherwise be included in GAAP net income, and instead follow tax timing and treatment under the Code. Guidance is needed on how AFSI should be re-adjusted to account for any recognition of gains and losses for U.S. federal income tax purposes under the rules prescribed by the Code in accordance with each taxpayer's methods. For taxpayers that are dealers, tax may also follow mark-to-market timing, but for most taxpayer timing would be based on recognition rather than on a mark-to-market basis. We recommend the government consider in such guidance the different ways in which investments may alter financial accounting net income – prescriptive guidance on a particular method of subtraction from or addition to AFSI may be too narrow to capture the diversity of practice in all accounting situations.

In this regard, we believe Congressional intent was clear both in the statutory language as drafted in the bill as well as evidenced by changes to the original House-passed version of the CAMT in the Build Back Better Act ("BBBA"). The House BBBA provided that a taxpayer's AFSI would not include "earnings" of corporations that are not in the taxpayer's consolidated return except to the extent those earnings were received as dividends or required to be included in gross income.[5] While the reference to "earnings" in the House BBBA could have been read to exclude from AFSI only those investments accounted for under the "equity method," (where "earnings" would be included in net income) the language left ambiguity regarding whether minority investments, accounted for under the fair value method (with mark-to-market revaluations included in net income), were also disregarded in computing AFSI because the fair value method does not tie income to the "earnings" of the lower-tier corporation but rather to the value of that corporation.[6]

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[5] *See* 167 Cong. Rec. No. 201 (Daily Ed.) H6,375-6,576 at H6,540 (Nov. 18, 2021).

[6] Note that the prior version of a corporate alternative minimum tax reflected in Section 56(f) and the regulations thereunder are not instructive or precedential on the scope of Section 56A(c)(2)(C). Section 56(f)(2)(C)(ii) contained similar language but used the phrase "earnings of such other corporation" rather than the much broader phrase "with respect to" such other corporation used in the IRA.

The revised language in the final version of the IRA no longer references "earnings" of the non-consolidated corporation and instead provides that AFSI "with respect to" any corporation not in consolidation with the taxpayer "shall be determined by only taking into account" dividends and other amounts included in gross income. On its face this would apply to mark-to-market adjustments made by a taxpayer with respect to a non-consolidated corporation as well as equity method earnings and earnings consolidated for GAAP (but not under the Code) that are included by the taxpayer in its net income. Thus, in enacting the IRA, we believe Congress intended to apply the IRA version of the provision more broadly than the House BBBA version to harmonize the treatment between the equity and fair value methods of accounting for CAMT purposes. We believe this is also the appropriate treatment from a tax policy perspective – it is difficult to articulate a reason why a 19% equity interest in a corporation would be taxed differently than the same equity held at 21%. Such a rule would drive non-economic behavior in taxpayers to meet ownership thresholds creating AFSI-calculation cliff effects. Nor is a rule eliminating mark-to-market accounting simply taxpayer friendly. In financial markets as they are today, taxpayers are equally if not more likely to ultimately increase rather than decrease AFSI by relying on tax rather than book. Since it is crucial to provide certainty to taxpayers with respect to this point, TEI respectfully requests Treasury and the Service clarify this treatment in forthcoming regulations or other guidance pursuant to the broad grant of authority in section 56A(c)(15).[7]

3. Other Mark-to-Market Instruments

Mark-to-market accounting may create other discrepancies between financial accounting and tax beyond adjustments for non-consolidated equity investments. We believe the language of section 56A(c)(2)(C) is broad enough to give the Secretary the authority to provide exceptions in these other mark-to-market situations. Section 56A(c)(2)(C) refers to determining AFSI "with respect to such other corporation" but does not specifically state that such determinations are limited to those related to an equity interest (for GAAP or tax purposes) in "such other corporation." Indeed, mark-to-market disparities could arise in numerous cases beyond simple equity interests in a non-consolidated corporation (or partnership), the most notable being debt and debt-like securities, warrants and options, and potentially other types of financial instruments and derivatives written "with respect to" a non-consolidated corporation.

While there is no legislative history shedding additional light on the purpose of this provision, the revision from the original House BBBA language discussed above in final IRA language suggests a statutory intent to broadly ameliorate mark-to-market issues. Similarly, a colloquy regarding "Other Comprehensive Income" appears to convey Congressional intent to exclude types of mark-to-market

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[7] Section 56A(c)(15) provides the Secretary the authority to "issue regulations or other guidance to provide for such adjustments to [AFSI] as the Secretary determines necessary to carry out the purposes of this section . . . ."

gains and losses related to financial instruments and foreign exchange.[8] Overall, it appears that mark-to-market timing differences between book and tax were not the overriding harm Congress intended to ameliorate by enacting the CAMT.

As noted, U.S. GAAP financial accounting standards require including unrealized gains and losses in financial statement income in certain circumstances beyond non-consolidated equity investments.[9] This inclusion may cause significant volatility in a corporation's financial statement earnings as financial markets fluctuate and unrealized items move from gains to losses and vice versa. This volatility can also cause duplication issues when taxpayers fall into and out of the CAMT from year to year. For instance, if a taxpayer has a $100 mark-to-market gain in 2023 with respect to equity held in Corporation X and is subject to the CAMT, the taxpayer would owe $15 of tax with respect to those gains. If the taxpayer then incurs a $100 financial statement loss in 2024 with respect to its Corporation X holdings, such taxpayer owes no CAMT and assume it does not incur a financial statement net loss overall. The taxpayer then again has $100 gain in 2025 with respect to Corporation X and is again subject to the CAMT, paying $15 yet again on the same gain, all of which has not been realized under the Code. Because a taxpayer can fall into and out of CAMT, mark-to-market gains have no natural symmetry and offset with mark-to-market losses over time. The flip side scenario could result in taxpayers taking losses repeatedly on the same instrument, without any symmetrical gain inclusion and no tax realization event.

TEI members respectfully request Treasury and the Service conduct a comprehensive review of mark-to-market book-tax differences and allow for adjustment to AFSI to reflect income and loss timing following the Code rather than book (inclusive of book and tax potentially matching for taxpayers that are broker dealers or otherwise on a mark-to-market accounting method for U.S. tax purposes). TEI also notes that a broad rule for mark-to-market instruments calculated on a U.S. tax rather than a book basis would ameliorate the myriad of transition issues arising which are similar to the lack of symmetry described above year-over-year if the CAMT regulations were to adopt a rule following book.

C. Dividends-Received Deduction Under Section 243

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

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[8] *See*, *e.g.*, 168 Cong. Rec. S4,166 (daily ed. Aug. 6, 2022) (colloquy between Sen. Cardin and Sen. Wyden stating that for purposes of the CAMT "Other Comprehensive Income" is not included in a taxpayer's financial statement income).

[9] *See*, *e.g.*, FASB Accounting Standards Codification Topic 815: Derivatives and Hedging.

therefore would ultimately result in the duplication of taxation via the CAMT on income where the dividends-received deduction was intended to prevent or reduce that outcome.

Fortunately, Congress anticipated this issue by granting the Secretary the authority to promulgate regulations to reduce the amount of dividends received from a non-consolidated corporation in the payee corporation's income.[10] TEI recommends the Secretary exercise this authority by permitting corporations to reduce their AFSI by the amount of the dividends received deduction permitted by section 243 to prevent this duplication of income. This is also consistent with the IRA's grant of regulatory authority to the Secretary to implement adjustments to applicable financial statement income "to prevent the omission or duplication of any item . . . ."[11]

D. Issues Related to Property under Sections 167 and 168

Section 56A(c)(13) provides that AFSI shall be reduced by tax depreciation deductions allowed under section 167 with respect to property to which section 168 applies to the extent of the amount allowed as deductions in computing taxable income for the taxable year (and by disregarding book depreciation expense). This provision raises several questions regarding its scope.

First, section 263A requires that a portion of tax depreciation associated with product sales to customers (i.e., sales of inventory) to be recovered through cost of goods sold ("COGS"). Items that fall under the scope of section 263A can include items for which a section 167 deduction is "allowed" and which otherwise qualify as section 168 tangible property.[12] Section 56A(c)(13) includes a grant of regulatory authority "to take into account any other item specified by the Secretary in order to provide that such [section 168] property is accounted for in the same manner as it is accounted for under" the Code. TEI respectfully requests Treasury and the Service clarify that these items should fall within the scope of the 56A(c)(13) adjustment to AFSI. We view section 263A capitalization as one of the primary items Congress intended to fall under the authority granted to the Secretary in section 56A(c)(13)(B).[13] Similar issues arise with respect to repairs, installation services, and other expenses that may be deductible under section 162 or otherwise but capitalized for book purposes, and if capitalized for tax would give rise to basis within section 168 tangible property.

Second, there is a lack of clarity regarding film costs. Section 168(f)(3) states section 168 property does not include "any motion picture film or video tape." However, section 168(k)(2)(A)(i)(IV) allows

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[10] *See* Section 56A(c)(2)(C).

[11] Section 56A(c)(15)(A).

[12] *See* Treas. Reg. § 1.263A-1(c)(4).

[13] Such treatment would also be consistent with Treas. Reg § 1.163(j)-1(b)(1)(iii), under which the statute references "depreciation" as an adjustment to "adjusted taxable income" and for which the regulation clarifies that both tax and book depreciation adjustments are inclusive of any amounts recovered through COGS regardless of any amounts capitalized under section 263A.

bonus depreciation for a "qualified film or television production" (as defined in section 181). TEI recommends Treasury and the Service adopt guidance to clarify that an AFSI adjustment should be made for depreciation claimed under section 168(k)(2)(A)(i)(IV) for a qualified film or television production.

E. Non-U.S. Corporation Issues

1. Dividends Received from Controlled Foreign Corporations ("CFCs")

As a result of the interaction of section 56A(c)(2)(C) and (c)(3), items of income and loss with respect to a CFC may be included in AFSI twice: first under (c)(3) through a pro rata share of the AFSI of a CFC, and then again under (c)(2)(C) when distributed as a dividend. Since 2017, the U.S. international tax system has operated under a "participation exemption" regime for CFC dividends, providing for a dividends-received deduction for the foreign-source portion of such CFC dividends under section 245A. Nothing in section 56A indicates that Congress intended to override the single-level taxation of CFC earnings through a pro-rata inclusion regime and, in fact, the statutory construction evidences Congress' intent to allow for its preservation. Section 56A(c)(2)(C) specifically provides authority to the Secretary to reduce dividend inclusions and section 56A(c)(15)(A) directs the Secretary to issue regulations to prevent double inclusions of an item in AFSI. Former Treas. Reg. § 1.56-1(d)(4)(v) also considered this type of issue and provided that amounts of previously taxed earnings and profits were not included as dividends under the prior corporate alternative minimum tax regime. TEI recommends Treasury and the Service remedy this potential double inclusion of the pro-rata share of CFC income under section 56A(c)(3) by providing a full dividends-received deduction in calculating the inclusion under section 56A(c)(2)(C).

2. Income of a Foreign Corporation Doing Business in the United States

Under section 56A(c)(4), a foreign corporation's AFSI is determined under "the principles of section 882." Section 882 provides, in general, that a foreign corporation is taxable on its income "effectively connected with the conduct of a trade or business within the United States" ("ECI"). A foreign corporation's ECI is generally determined under the rules of section 864(c), subject to certain limitations, including the application of section 894. Under section 894, the provisions of the Code are applied with "due regard" to the provisions of any applicable U.S. income tax treaty.

TEI recommends the Secretary provide guidance, similar to former Treas. Reg. § 1.56-1(b)(6)(ii)(B), stating that for purposes of section 56A(c)(4), AFSI will be determined without regard to any amount attributable to an item that is exempt from U.S. taxable income under section 894 of the

Code, or any similar provisions. This approach is consistent with the approach taken in the application of the base erosion and anti-abuse tax rules under section 59A.[14]

3. Foreign Tax Credits

The IRA amends section 59 by adding new section 59(l), allowing foreign tax credits to reduce the amount of CAMT owed by the "pro-rata" share of foreign taxes paid or accrued by each CFC of which an applicable corporation (as defined) is a U.S. shareholder. In essence, new section 59(l) provides an alternative regime for foreign tax credits related to "global intangible low-taxed income" (GILTI) income and subpart F income but based on AFSI principles. While FTCs generated by CFCs are generally not allowed a carry-forward within GILTI, new section 59(l)(2) allows for a five-year carryforward of these taxes in calculating the CAMT. Section 59 is silent, however, on whether the carry-forward amount exists even if a taxpayer does not pay the CAMT in a particular year. In other words, if a taxpayer has excess foreign tax credits under this rule but ultimately pays regular tax, does the taxpayer have an excess "carry-forward" account on an "as if paid" basis? Clarification on this point is necessary as a credit account could be a significant balance sheet asset that would be required to be calculated under GAAP.

F. Financial Statement Consolidating Entry Issues

As with the calculation of U.S. consolidated group taxable income (i.e., income inclusive of a group of corporations as defined by section 1504), all multinational corporations subject to the CAMT must eliminate certain intercompany transactions when calculating net income (and comprehensive income) as reported on their consolidated financial statements (i.e., all income of the parent company and its subsidiaries as defined by U.S. GAAP).

Section 56A(a) defines AFSI by referencing a taxpayer's applicable financial statement under section 451(b)(3), but also calls for inclusion of the pro rata share of CFC income using the AFSI of "each such" CFC in section 56A(c)(3)(A). Section 56A does not, however, explain how to account for elimination adjustments in AFSI when computing consolidated financial statement income and that eliminate the effect of many transactions between a U.S. group and its CFC subsidiaries.

In addition, certain intercompany transactions give rise to items of taxable income or loss but will never impact AFSI due to U.S. GAAP accounting rules pertaining to transactions amongst members of a controlled group. This is not accomplished by way of an elimination item for U.S. GAAP purposes, but the accounting impact is similar. In certain cases, transactions involving the sale of intangibles between members of such a group will not generate AFSI that is comparable to any amount of taxable income recognized in connection with such a transaction.

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[14] *See* Treas. Reg. § 1.59A-3(b)(3)(iii), (4)(i)(E) and (4)(v).

As of this writing there has not been sufficient time to study and understand the full range of CAMT consolidation issues.[15] TEI recommends Treasury and the Service ensure forthcoming guidance does not have unintended consequences in the computation of CAMT because of the diversity of financial accounting rules regarding common control transaction types, as well as the diversity of practice in performing eliminations to reach consolidated book net income. TEI also recommends that such guidance take into account simplicity and administrability in reducing adjustments to financial statement books and records to reach AFSI. Our members are uniquely situated to identify the range of practical questions that will arise in this area and are willing to assist Treasury and the Service via further discussion.

G. Non-recognition Transactions

Section 56A(c)(15)(B) provides the Secretary with the authority to promulgate regulations making adjustments to AFSI to carry out the principles of subchapters C and K relating to corporate liquidations, organizations and reorganizations, as well as for partnership contributions and distributions.[16] These Code provisions permit certain corporate and partnership transactions that would otherwise be taxable under general principles of the Code to qualify for non-recognition (i.e., tax-free) treatment if certain conditions are met. Thus, a taxpayer may contribute appreciated property to a corporation or partnership without recognizing the gain inherent in the property that would otherwise be taxable in the absence of these provisions. The financial statement treatment of such transactions, however, may differ significantly.

Treasury and the Service have already received comments regarding the urgent need for guidance in this area of non-recognition transactions, particularly where a transaction produces gain for financial statement purposes.[17] TEI agrees with the need for guidance in this area, especially to the extent the CAMT may inhibit mergers, acquisitions, and divisions by imposing a tax on what have historically been tax-free transactions. In addition to split-offs, other relevant transactions may include contributions of appreciated property to joint ventures qualifying under section 721 or section 351 for non-recognition but due to "discontinued operations" rules or other operative GAAP rules, create financial statement gain or loss. Similarly, a partnership may create AFSI when distributing an underlying business or in partial redemption, but taxation under subchapter K would depend upon and be limited to outside basis and other factors related to a partner's distributive share. TEI agrees with other commentators who have

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[15] Similar issues may arise, for instance, with respect to interests in partnerships that are consolidated for GAAP purposes.

[16] The Code sections encompassed by this grant of regulatory authority are sections 331 to 346, 351 to 368, and 721 to 755.

[17] *See*, *e.g.*, Letter to Assistant Secretary for Tax Policy Lily Batchelder *et*. *al*. from Karen Gilbreath Sowell *et*. *al*. regarding *Corporate Alternative Minimum Tax – Impact on Tax-Free Divisive Transactions* (August 18, 2022) (expressing the need for immediate guidance under the CAMT for non-taxable "split-off" transactions under section 355 that result in gain for financial statement purposes) (published a 2022 TNTF 160-28).

noted that relief for these transactions was clearly intended by Congress, but it is not self-executing, requiring guidance from the Secretary. TEI joins in asking for regulatory and potentially sub-regulatory guidance to allow for the continued non-taxable treatment of these business transactions.

H. Transition Issues

There are difficult transition issues Treasury will face when writing rules regarding tax attributes arising prior to the effective date of the CAMT and impacting CAMT years. The discussion herein is by no means an exhaustive list but rather a set of examples as TEI members have only begun to identify such issues.

For instance, there may be contingent loss reserves, loan loss reserves, or a number of other liabilities sitting on a pre-CAMT book balance sheet – and thus have been run through the book income statement for GAAP purposes but have not yet risen to deductible "events" for tax purposes. If these reserves become deductible losses for tax purposes in years in which the CAMT is in effect, they may inappropriately drive taxpayers into the CAMT as no benefit for book purposes from those losses was accounted for in a CAMT year (i.e., when losses are recognized for tax purposes and therefore reduce taxable income there will be no corresponding loss for book purposes as the book loss has already been accounted for). Conversely, if those loss reserves are released in a CAMT year, they will create book income for an item that is not a tax item and was never deducted for CAMT calculation purposes – again potentially inappropriately driving taxpayers into the CAMT. In both cases, this type of transition issue results in an effective duplication of a book item as there is no offsetting matching entry within the CAMT when looked at over the life of the tax. Another transition issue area may be entries which have been eliminated on a consolidated basis prior to the CAMT's effective date but may have depreciating basis or accruing income on a separate financial statement basis. Guidance is necessary delineating whether these entries should be eliminated on a transition basis because of the lack of a matching transaction.

More broadly, any pre-CAMT book-tax difference impacting post-CAMT taxable years would potentially represent a transition issue that should be ameliorated via regulation or other guidance. In addition to the above, such items may include: (i) placed in service date issues for purposes of using tax depreciation instead of book depreciation (see discussion immediately below); (ii) amortization deductions under section 197 for amortizable section 197 intangible created before the IRA's effective date to the extent such items are not amortizable for book purposes; (iii) pre-IRA NOLs attributable to tax depreciation that may decrease AFSI (elective relief discussed below); (iv) whether foreign tax credit carryforwards are available to offset the CAMT (discussed below); and (v) amortization deductions under section 59(e) for research and experimental expenses that were elected to be deferred under the section before the IRA's effective date to the extent such items were immediately expensed for financial accounting purposes.

Of particular importance is whether applying section 56A(c)(13) to property placed in service prior to the effective date of the CAMT would disallow book depreciation for assets fully depreciated for tax purposes prior to the enactment of the CAMT when calculating AFSI. Application in this manner

would be contrary to the apparent Congressional intent with section 56A(c)(13) to preserve Congress' incentive for capital investment through acceleration of depreciation deductions and would potentially harm taxpayers for making an irrevocable election prior to the existence of these rules. Further, transition questions arise with respect to any costs deducted under section 162, section 181, or any other Code section expressly permitting deductions in the year incurred, such as repair costs, but capitalized and depreciated in the taxpayer's applicable financial statements.

One option to ameliorate these transition issues is to utilize the broad authority granted to the Secretary under section 56A(c)(15) and allow for book depreciation to be included in AFSI for items that are related to section 168 property placed in service, and fully depreciated for tax purposes, prior to the effective date of section 56A, as well as for repairs and other items deducted under section 162 but capitalized for book purposes prior to the effective date of the statute. We note, however, that this would create a potentially difficult administrative issue to track pre- and post-effective date items under different systems for calculating AFSI and while the issue may meaningfully change the impact of the CAMT for some taxpayers, others may be unaffected or at least find the issue immaterial, making an elective method a more administrable option. One alternative would be for Treasury to allow taxpayers either to amend prior elections under section 168 (or non-elections to capitalize section 162 repairs and other items) that were made prior to the existence of the statute and/or to effectively fix these pre-effective date book/tax differences through an accounting method change after the statutory effective date. Taxpayers of course could leave prior elections undisturbed as well. There is precedence for this type of allowance in the wake of retroactively applicable legislation, with Rev. Proc. 2020-25 allowing taxpayers to amend, withdraw and revoke prior section 168 elections or to affect such change through accounting method changes.[18] TEI recommends Treasury and IRS consider similar relief for these types of transition issues.

Finally, section 59 is silent as to whether pre-IRA foreign tax credits can be calculated as a carry-forward and used to offset a taxpayer's CAMT liability beginning in 2023.[19] These foreign tax credits could, again, be a significant balance sheet asset that taxpayers will need to record in their financial statements and TEI therefore recommends Treasury and the Service provide guidance clarifying whether taxpayers are permitted to reduce their CAMT liability by the amount of pre-IRA foreign tax credits generated at CFCs in which they are a U.S. shareholder. TEI recommends that guidance consider simplicity of administration in such a rule. For instance, calculating pre-IRA carry-forwards presumably would require a hypothetical calculation of whether and to what extent such taxes would have been used in pre-effective date taxable years. Given that section 59(k)(1)(B) already requires a re-determination of AFSI for three years prior to the effective date of the statute, taxpayers should be allowed to use that calculation as the AFSI tax base. Simplified rules could consider whether pro-rata shares of tested income

[18] 2020-19 I.R.B. (Apr. 4, 2020).

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

(without reduction for qualified business asset investment, as defined in section 951A(d)), subpart F, and foreign tax credits could be used as a proxy for a pro-rata share of CFC AFSI in those pre-effective date periods to determine the hypothetical amount and limitation under section 59(l)(1)(A)(ii).

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

Respectfully submitted,

Wayne G. Monfries
International President
TAX EXECUTIVES INSTITUTE

Copies: Krishna Vallabhaneni, Tax Legislative Counsel, U.S. Department of the Treasury
Brett York, Deputy Tax Legislative Counsel, U.S. Department of the Treasury
William M. Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service
Scott Vance, Associate Chief Counsel (Income Tax and Accounting), Internal Revenue Service