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October 12, 2023

Internal Revenue Service
1111 Constitution Ave. N.W.
Washington, D.C. 20224

Via electronic submission

RE: TEI Comments on Notice 2023-64

Dear Sir or Madam:

President Biden signed the Inflation Reduction Act[1] ("IRA") into law on August 16, 2022. Among the IRA's income tax provisions is a new corporate alternative minimum tax imposing a 15 percent 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, as well as other CAMT items. Notice 2023-64 (the "Notice"), published on September 12, 2023, provides interim guidance on certain time sensitive CAMT issues the Secretary intends to address in forthcoming regulations.[2] On behalf of Tax Executives Institute, Inc. ("TEI"), I am pleased to provide comments on the CAMT and Notice to the Secretary.

About TEI

TEI was founded in 1944 to serve the needs of business tax professionals.[3]

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[1] Pub. L. No. 117-169.

[2] In addition to Notice 2023-64, Treasury and the IRS have also published Notice 2023-20, 2023-10 I.R.B. 523, which also provided interim guidance that taxpayers may rely on until the issuance of forthcoming proposed regulations, as well as Notice 2023-42, 2023-26 I.R.B. 1085, which provided relief from the addition to tax under § 6655 in connection with the application of the CAMT.

[3] 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). All "section" references are to the Internal Revenue Code of 1986, as amended (the "Code").

Today, the organization has 56 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 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 enable TEI to bring a balanced and practical perspective to the CAMT.

TEI Comments

TEI appreciates the opportunity to provide further comments on the CAMT as well as respond to the Notice. Our comments and recommendations herein respond to some of the questions raised in the Notice and highlight areas and issues requiring further guidance under the CAMT.

The CAMT represents a significant departure from the regular federal income tax and the alternative minimum tax in place prior to 2017 by using a taxpayer's financial statement income as a starting point for the CAMT's base. The CAMT therefore presents many financial accounting issues when defining its scope and application that are typically not addressed by the Secretary when promulgating tax regulations and other guidance. We therefore believe it is more important than usual for the U.S. Department of the Treasury ("Treasury") and the Internal Revenue Service (the "Service") to consider the views of outside stakeholders when devising guidance under the CAMT generally, and the definition of AFSI in particular.

For purposes of our comments below, when we refer to financial statement or financial accounting income, we are referring to such income as prepared under U.S. Generally Accepted Accounting Principles ("GAAP") as these rules are used by most 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.

Fair Value Accounting

The Notice requests comments on what extent unrealized marked-to-market gains and losses that are recognized in the taxpayer’s Financial Statement Income (“FSI”) should be adjusted in determining the taxpayers AFSI.[4]

Non-Consolidated Equity Investments

We reiterate the recommendation from our Prior Letter in this regard. 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. 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 taxpayers 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

[4] Section 16.02.

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.

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.[6] 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

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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.

clarify this treatment in forthcoming regulations or other guidance pursuant to the broad grant of authority in section 56A(c)(15).[7]

Other Mark-to-Market Instruments

Further, with regard to non-consolidated equity investments, we recommend regulations clarify that section 56A(c)(2)(C) should result in an adjustment to AFSI 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 (i.e., realization timing for most taxpayers other than those with mark-to-market elections or otherwise within a mark-to-market tax regime).

For other instruments (e.g., debt, debt-like securities, warrants, options) that may be marked to market either for tax and/or GAAP purposes, we believe the language of section 56(A)(c)(2)(C) is broad enough to give the Secretary the authority to provide exceptions in these other situations. Overall, it appears that mark-to-market timing differences between GAAP and tax were not the overriding harm Congress intended to ameliorate by enacting the CAMT. Thus, we recommend issuing guidance that allows an adjustment in computing 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) for such instruments. For most taxpayers, the timing would be based on recognition rather than on a mark-to-market basis. 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.

Elimination of Multiple Inclusion of Controlled Foreign Corporation Income

Section 7.02 of the Notice clarifies that a taxpayer must apply both sections 56A(c)(2)(C) and (c)(3) to determine its AFSI with respect to a CFC. The Notice further requests comments on (i) what approach(es) should be considered to address the potential duplication of income with respect to a CFC by reason of the

[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 . . . ."

application of sections 56A(c)(2)(C) and (c)(3); (ii) How would each approach address the potential duplication or omission of items from a Taxpayer's AFSI; and (iii) What would be the relative administrative and compliance burden of each approach, and how could those burdens be minimized.[8]

Previously Taxed Earnings and Profits ("PTEP") Like-Tracking System

We reiterate the recommendation from our Prior Letter that Treasury and the Service remedy this potential double inclusion by providing a full dividends-received deduction ("DRD") in calculating the dividend inclusion from a CFC under section 56A(c)(2)(C). This approach eliminates unnecessary compliance and administrative burdens.

While we recommend a full DRD, we understand that the government is also considering a tracking approach. TEI believes that a PTEP-like tracking system (similar to Option 1 as recommended by Tax Law Center at NYU Law in its December 2022 letter to Treasury and the Service[9]) is the most desirable one. Under this approach, a taxpayer is required to track its CFCs' US GAAP earnings that were previously included in the AFSI of an applicable corporation ("PIAFSI"). For purposes of section 56A(c)(2)(C), PIAFSI are distributed before other earnings and excluded from the amount of "dividends received". Additionally, in determining the CAMT gain on a disposition of the CFC stock, a taxpayer shall adjust its stock basis with respect to PIAFSI in the manner as described under sections 961(a), (b) and(c) by treating PIAFSI as PTEP. Such approach, which has been tested by the Service and taxpayers, would help reduce uncertainty and the compliance burden, compared with any novel options. Treasury should also clarify that the pre-2023 earnings are completely excluded from the amount of "dividends received" (essentially a 100% DRD treatment) and will not subject to this PIAFSI tracking.

Foreign Tax Credit for Taxes Imposed on PIAFSI

TEI also recommends allowing taxpayers to claim as a CAMT foreign tax credit ("FTC") a foreign income tax imposed on PIAFSI provided that this foreign income tax would be a CAMT FTC if imposed on an AFSI.

Foreign Tax Credit for Contested Taxes

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[8] Section 16.02 (3).

[9] The Tax Law Center, NYU Law, "*Additional Recommendations for Guidance on the Corporate Alternative Minimum Tax*", December, December 6th 2022.

The Notice clarifies a few CAMT FTC issues but does not address the unique feature of a contested tax. Pursuant to Treas. Reg. § 1.905-1(d)(3), a contested foreign tax does not accrue until the year the contest is resolved. Therefore, an accrual method taxpayer generally cannot claim an FTC for a contested foreign tax before the contest is resolved. However, Treas. Reg. § 1.905-1(d)(4) allows a taxpayer to elect a provisional credit for contested taxes remitted before accrual if certain conditions are met. Under section 59(I)(1), a foreign income tax must be accrued (for an accrual method taxpayer) for federal income tax purposes in order to be a CAMT FTC.

We recommend Treasury and the IRS clarify that, when a taxpayer elects a provisional credit for contested taxes, the taxpayer can also claim a CAMT FTC for the contested taxes. Treasury provided the provisional credit relief for the regular tax liability because "the Treasury Department and the IRS recognize that a taxpayer may be placed in a difficult position if it pays the contested tax to the foreign country (which it may do, for example, to toll the accrual of interest owed to the foreign country) but cannot be made whole until the contest is resolved, possibly years later".[10] We believe this policy rationale also applies to the CAMT tax liability.

Depreciation Method Changes

The IRS requested comments on how a change in treatment of an item that involves the proper time for taking such item into account for AFSI purposes be treated for AFSI purposes when such change is not otherwise treated as a change in method of accounting for Regular Tax purposes because it does not affect taxable income (AFSI only change). We recommend that the Treasury Department and the IRS provide guidance indicating that rules similar to those in sections 446 and 481 should apply, as well as the method change procedures in Rev. Proc. 2015-13 apply, insofar as the list of items provided within the list of automatic method changes in Rev. Proc. 2023-24 likewise apply for a change in the treatment of an item that involves the proper time for taking such item into account for AFSI purposes. Further, we recommend that taxpayers receive audit protection when requesting voluntary accounting method changes for the AFSI only changes, consistent with the rules in Rev. Proc. 2015-13.

[10] See REG-101657-20.

AFSI Computation for Foreign Parented Entities

We also reiterate our recommendation that future guidance clarify that foreign parented entities preparing financial statements under IFRS may take a "bottom-up" approach (i.e., start with U.S. consolidated reporting or another reasonable method) when determining AFSI, rather than a "top-down" approach (i.e., start with global audited IFRS financial statements and then carve out certain adjustments to arrive at the U.S. consolidated group's financial statements). The reference to section 451(b)(3) in the statute and the Notice result in the presumption that a "top-down" approach is required, which is significantly more burdensome, complex, and challenging for both taxpayers and the IRS.

Furthermore, the AFSI computation for foreign parented entities with insurance subsidiaries poses additional challenges for taxpayers. This can result in situations where the insurance companies have NAIC audited financial statements, and the foreign parent files IFRS consolidated financial statements. As the NAIC and IFRS rules result in significant income differences (as a result of differences with regard to mark-to-market treatment and the treatment of unrealized gains and losses, among other things), there is a great disparity in regular taxable income and AFSI. IFRS 17 also requires the recognition of income when services are delivered, and this change in timing can cause PTI to be taxed again or not taxed at all. The AFSI priority rules in the Notice appear to place the IFRS statements above the NAIC statements. We request such taxpayers be able to use the NAIC audited financial statements even if they are part of a group that files IFRS consolidated financial statements, which would eliminate this inequitable disparity.

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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 Federal Tax Committee, whose chair is Julia Lagun. Should you have any questions regarding TEI's comments, please do not hesitate to contact TEI tax counsels Kelly Madigan at 202.470.3600 or kmadigan@tei.org or Benjamin Shreck at bshreck@tei.org or 202.464.8353.

Respectfully submitted,

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