

March 20, 2023

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

Mr. William Paul
Principal Deputy Chief Counsel
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Mr. Brett York
Deputy Tax Legislative Counsel
Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20020

Internal Revenue Service
Electronically via the Federal eRulemaking Portal
www.regulations.gov

Re: Comments in Response to Notice 2023-7, Initial Guidance Regarding the Application of the Corporate Alternative Minimum Tax under Sections 55, 56A and 59 of the Internal Revenue Code [2023-0001-0001]

Dear Ms. Batchelder, Mr. Paul and Mr. York:

This letter is submitted on behalf of Business Roundtable, an organization whose CEO members lead American companies that directly and indirectly support tens of millions of American jobs.

We appreciate the opportunity to comment on Notice 2023-7 (“the Notice”) concerning the application of the corporate alternative minimum tax (“CAMT”).

Income of a Controlled Foreign Corporation

Issue:

Section 56A(c)(2)(C) provides that when a corporation is not included in a consolidated return with the taxpayer (e.g., a foreign controlled corporation (“CFC”)), the adjusted financial statement income (“AFSI”) of the taxpayer with respect to such other corporation shall be determined by only taking into account the dividends received from such other corporation (reduced to the extent provided by the Secretary in regulations or other guidance) and other

amounts which are includible in gross income or deductible as a loss (other than amounts required to be included under sections 951 and 951A or such other amounts as provided by the Secretary) with respect to such other corporation. In addition, Section 56A(c)(3) provides that if a taxpayer is a United States shareholder of one or more CFCs, the AFSI of such taxpayer with respect to such CFC is adjusted to take into account also such taxpayer's pro rata share of items taken into account in computing the net income or loss set forth on the applicable financial statement ("AFS") of each CFC with respect to which such taxpayer is a United States shareholder.

In the absence of further guidance, it is possible that the two rules above taken together may cause CFC income to be included twice under the CAMT. For example, if the income included in AFSI under the pro rata share inclusion rule of section 56A(c)(3) is later distributed as a dividend, it could be included a second time under the dividend inclusion rule of section 56A(c)(2)(C). Business Roundtable does not believe that Congress intended to double count the earnings from a CFC when determining the AFSI of a United States shareholder.

Recommendation:

We recommend that Treasury issue guidance under sections 56A(c)(2)(C) and 56A(c)(15) that excludes all CFC dividends from the AFSI of a recipient United States shareholder. This "CFC dividend exclusion rule" could be made permanent or, alternatively, could be communicated as an interim rule while Treasury continues to study the treatment of CFC dividends. As highlighted in the Notice, section 56A(c)(15) authorizes the Secretary to issue regulations or other guidance to provide for such adjustments to AFSI as the Secretary determines necessary to carry out the purposes of the section 56A, including adjustments to AFSI to prevent the omission or duplication of any item.

Unrealized Gains and Losses

Issue:

Questions 16, 18 and 19 of Section 9.02 of the Notice request comment on to what extent further guidance should provide adjustments to AFSI to address items included in other comprehensive income ("OCI") and the treatment of unrealized gains and losses.

Many items included in OCI relate to unrealized gains or losses, including gains or losses on debt securities available for sale, adjustments required when translating foreign currency for purposes of consolidating financial statements and gains or losses on derivative instruments that hedge the foreign currency risk of foreign subsidiaries ("net investment hedges"). Senator Ben Cardin and Senate Finance Committee Chairman Ron Wyden entered into a colloquy that

OCI would be excluded from AFSI.¹ In some cases, such as for net investment hedges, the gains or losses of items in OCI may be included in regular taxable income. If these items of OCI were excluded from AFSI but included in regular taxable income, then this would create a mismatch between income for purposes of the CAMT and regular tax.

Furthermore, the CAMT rules and subsequent guidance provide for exclusion of certain unrealized gains and losses that are excluded from regular taxable income in other situations. Section 56A(c)(2)(C) provides for an exclusion of unrealized gains and losses on certain holdings of corporate stock when a corporation is not included in a consolidated return with the taxpayer. Section 56A(c)(2)(D)(i) provides that unrealized gains and losses on partnership interests are excluded from AFSI and that, in general, the partner's AFSI is adjusted to only take into account the taxpayer's distributive share of the AFSI of the partnership. Section 56A(c)(10) provides an exclusion of unrealized gains and losses on mortgage servicing rights. Section 56A(c)(11) provides an exclusion of unrealized gains and losses on assets held by defined benefit pension plans. Notice 2023-20 provides an exclusion of unrealized gains and losses with respect to covered variable contracts and covered reinsurance agreements.

Given the large number of exclusions from AFSI of unrealized gains and losses that are excluded from regular taxable income, not providing an exclusion from AFSI of unrealized gains and losses in other circumstances where such items are excluded from regular taxable income would distort investment decisions by providing a tax incentive to invest in assets subject to an exclusion or to invest in assets that are not subject to mark-to-market accounting for financial statement purposes. Providing an exclusion for some taxpayers and not others would distort the ownership of investment.

Recommendation:

Further guidance should provide a comprehensive exclusion from AFSI of unrealized gains and losses for book purposes to the extent the unrealized gains and losses are not included in regular taxable income. Guidance should further provide a comprehensive exclusion from AFSI for items included (or potentially included) in OCI to the extent such items are not included in regular taxable income. Section 56A(c)(15) provides authority for the Secretary to issue regulations or other guidance to provide for such adjustments to AFSI as the Secretary determines necessary to carry out the purposes of the CAMT. Section 56(e) provides authority for the Secretary to issue regulations and other guidance as necessary to carry out the purposes of the CAMT more generally.

¹ *Congressional Record*, vol. 168, no. 133 (August 6, 2022), p. S4166.

Adjustment for Accelerated Cost Recovery

Issue 1:

Section 56A(c)(13) provides that AFSI shall be reduced by 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 appropriately adjusted to disregard any amount of depreciation expense that is taken into account on the taxpayer's AFS with respect to such property. Section 56A(c)(13) further provides that AFSI shall be appropriately adjusted to take into account any other item specified by the Secretary to provide that such property is accounted for in the same manner as it is accounted for under the Internal Revenue Code. The intent of the adjustment is to preserve the tax incentive for investment provided by accelerated depreciation. Section 4.06 of the Notice provides that the depreciation adjustments under section 56A(c)(13) apply to Section 168 Property placed in service in any taxable year, including years beginning before January 1, 2023.

Section 168(k) provides a special allowance for depreciation ("bonus depreciation") as an incentive to invest in certain property. For financial statement purposes, the cost basis of such property may continue to be depreciated over time. For assets depreciated under the 100-percent allowance for bonus depreciation in pre-CAMT years, the depreciation adjustment under section 56A(c)(13) increases AFSI for book depreciation without a corresponding reduction to AFSI for tax depreciation in any year for which the CAMT is in effect. Such an adjustment would reduce the investment incentive originally provided by bonus depreciation in pre-CAMT years retroactively and counter the intended incentive to investment provided by the enactment of bonus depreciation.

Recommendation 1:

Further guidance should provide a transition rule such that the depreciation adjustment under section 56A(c)(13) does not apply to property for which any amount is allowed as a deduction by reason of section 168(k) for any taxable year beginning before January 1, 2023.

Issue 2:

Section 162 allows as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. For financial statement purposes, some of these expenses may be capitalized (e.g., as improvements or as an intangible asset) and amortized over time, such as in the case of certain repair expenses. The effect of such disparate treatment for CAMT purposes is similar to the effect that would apply in the absence of any depreciation adjustment under section 56A(c)(13) in that tax provides for a more rapid recovery of the cost of an investment than does financial accounting. Section 4.05 of the

Notice provides that if a taxpayer deducts an expenditure as a repair for Federal income tax purposes but capitalizes the expenditure as an improvement for AFS purposes, then the depreciation adjustment does not apply because the expenditure does not give rise to section 168 property.

Section 4.03(3) of the Notice provides that AFSI is adjusted to disregard covered book depreciation expense that is taken into account for AFS purposes. This adjustment has the effect of providing tax treatment of depreciation for purposes of the CAMT.

Recommendation 2:

Further guidance should provide that AFSI shall be reduced for any deduction allowed under section 162 in taxable years beginning after December 31, 2022, for which an amount is capitalized on the taxpayer's AFS with respect to such expense as basis of an asset that is Section 168 Property for regular tax purposes. AFSI shall be appropriately adjusted to disregard any amount of depreciation, amortization or similar expense that is taken into account on the taxpayer's AFS with respect to such capitalized expense. AFSI shall also be appropriately adjusted to take into account any other item specified by the Secretary to provide that such expense is accounted for in the same manner as it is accounted for under the Internal Revenue Code. Basis shall be appropriately adjusted to take into account adjustments to AFSI under this rule.

No adjustment shall be made in the case of any deduction allowed under section 162 in any taxable year beginning before January 1, 2023, with respect to which an expense is taken into account on the taxpayer's AFS for a taxable year beginning after December 31, 2022.

Extraordinary Items for Purposes of Determining an Applicable Corporation

Issue:

Section 59(k) provides that, for purposes of the CAMT, an applicable corporation with respect to any taxable year, is any corporation that meets the average annual AFSI test for one or more taxable years that are prior to such taxable year and ending after December 31, 2021. A corporation meets the average annual AFSI test for a taxable year if the average AFSI of such corporation for the 3-taxable-year period ending with such taxable year exceeds \$1 billion. A special rule applies if a corporation is a member of a foreign-parented multinational group. AFSI for any taxable year of less than 12 months shall be annualized by multiplying the AFSI for the short period by 12 and dividing the result by the number of months in the short period.

Section 59(k)(1)(C) provides that the term "applicable corporation" shall not include any corporation that otherwise meets the requirements of an applicable corporation if (1) such corporation (a) has a change in ownership or (b) has a specified number (to be determined by

the Secretary and which shall, as appropriate, take into account the facts and circumstances of the taxpayer) of consecutive years, including the most recent taxable year, in which the corporation does not meet the average annual AFSI test, and (2) the Secretary determines that it would not be appropriate to continue to treat such corporation as an applicable corporation.

AFSI may include an item that is extraordinary in nature such as the sale of a business line or other nonrecurring transaction (“extraordinary item”). Inclusion of an extraordinary item may be distortive if it does not reflect the true, recurring financial results derived by the corporation from its ongoing business operations. For example, when there is a sale of a business, the discontinued operations will no longer be reflected on the AFS of the taxpayer going forward. Without such a sale, it is possible that a company would not have breached the threshold necessary to meet the average annual AFSI test for an applicable corporation. In such a case, the CAMT would inappropriately apply to a company that is not in fact above the threshold because on a go-forward basis, the operations triggering the threshold have been discontinued, and in the absence of the sale the company would not have been above the threshold.

Recommendation:

Treasury should exercise its authority to adjust AFSI to disregard any extraordinary item in the determination of a company’s status as an applicable corporation. One way that Treasury could effectuate this result would be to exercise authority under Section 59(k)(1)(C) to determine that the specified number of years is two years (e.g., 2022 and 2023) if during the three-year period there was an extraordinary item (e.g., gain or loss from the sale of a business) without which the threshold would not have been met (“the two-year rule”). In such cases, it would not be appropriate to continue to treat the corporation as an applicable corporation.

Guidance should provide that AFSI for any short period shall be adjusted to disregard any extraordinary item prior to annualization. Regulations recognize situations in which the inclusion of an extraordinary item could be distortive and appropriately exclude such an item from income: when allocating items between the aggregate group period and pregroup period for purposes of the base erosion and anti-abuse tax under Treas. Reg. section 1.59A-2(c)(4)(iii), when prorating income when a corporation leaves a consolidated group under Treas. Reg. section 1.1502-76(b)(2)(ii), and when annualizing income for purposes of estimated tax payments under Treas. Reg. section 1.6655-1(f)(2)(ii).

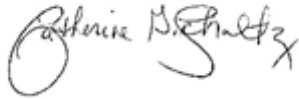
In addition to the definitions under the above regulations, an extraordinary item could be identified by the Accounting Standards Codification (“ASC”) that governs discontinued operations, ASC 205-20. The guidelines to that reference define discontinued operations as a disposal that represents a strategic shift that has or will have a major effect on an entity’s operations and financial results.

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Business Roundtable appreciates the opportunity to comment on the Notice to highlight the issues on which guidance is needed. We have not attempted to provide comprehensive comments, but we have focused on a few areas of broad concern. We would be happy to discuss these comments or any other matters you may find helpful. Please contact Catherine Schultz, Vice President of Tax and Fiscal Policy at cschultz@brt.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine B. Schultz". The signature is fluid and cursive, with the first name "Catherine" being more prominent than the last name "Schultz".

Catherine Schultz
Vice President of Tax and Fiscal Policy
Business Roundtable
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