CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

CAROLINE L. HARRIS
VICE PRESIDENT, TAX POLICY
AND CHIEF TAX POLICY COUNSEL
ECONOMIC POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5620

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VIA EMAIL
Internal Revenue Service
CC:PA:LPD:PR (Notice 2017–38)
Room 5205
P.O. Box 7604, Ben Franklin Station
Washington, DC 20224
Notice.Comments@irscounsel.treas.gov

RE: Notice 2017-38 on Implementation of Executive Order 13789: Identifying and Reducing Tax Regulatory Burdens

I. Introduction

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, appreciates the opportunity to provide feedback on Notice 2017-38.[1]

On April 21, 2017, President Trump issued Executive Order (EO) 13789, calling for "review [of] all significant tax regulations issued by the Department of the Treasury on or after January 1, 2016," that "(i) impose an undue financial burden on United States taxpayers; (ii) add undue complexity to the Federal tax laws; or (iii) exceed the statutory authority of the Internal Revenue Service (IRS)." Pursuant to that EO, the U.S. Chamber of Commerce urged the Treasury Department to recognize the burdens created by and take action on the regulations identified in this letter.[2]

In response to the call for additional information in Notice 2017-38, we are submitting this comment letter, which is divided as follows:

- Suggested action on regulations identified in Notice 2017-38 as meeting the criteria articulated in EO 13789; and
- Suggested action on regulations the Chamber previously identified in response to EO 13789 but not listed for action in Notice 2017-38.

As a note, these comments are the product of conversations with a very wide array of impacted U.S. Chamber members and highlight their most pertinent issues. These comments

[1] Notice 2017-38, 2017-30 I.R.B. 147 (July 24, 2017).
[2] See U.S. Chamber letter to Secretary Steven Mnuchin (May 16, 2017), *available at* https://www.uschamber.com/letter/chamber-comments-executive-order-13789.

may be considered as listing the most problematic regulations, but not all of the regulations concerning U.S. Chamber members. As such, these comments are neither exhaustive nor categorical, but instead emphasize some of the most pressing concerns as raised by Chamber members.

Further, as an additional note, while the Chamber greatly appreciates the work of the IRS and Treasury to reduce the regulatory burden on the business community, we continue to believe that all policymakers must simultaneously continue to work toward the pro-growth, comprehensive tax reform this country so desperately needs.

II. Recommendation on Regulations Identified for Action in Notice 2017-38

A. § 103[3] (REG-129067-15)

1. Description

In early 2016, Treasury and the IRS issued promulgated rules proposing a three-part test for determining whether an issuer is a political subdivision that may issue tax-exempt bonds. Taxpayers have expressed concerns that the proposed rules impose overly broad restrictions that will cause severe and unintended barriers to governmental efforts to finance infrastructure and other improvements for the public benefit.

2. Recommendation

The Chamber recommends withdrawal of these rules.

B. §§ 367(d), 482 (T.D. 9803, T.D. 9738)

1. Description

Issued in December 2016, these final rules retroactively eliminate the longstanding foreign goodwill exception under § 367. Consequently, recognition of gain may be required on the transfer of foreign goodwill and going concern value by a U.S. person to a foreign corporation in certain outbound transactions under §§ 351 and 361. These rules are highly controversial, as they are a significant departure from the Code and Congressional intent.[4]

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[3] Unless otherwise noted, all section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

[4] *See* Yoder, "Final Code Sec. 367(a) and (d) Regulations," *International Tax Journal* 3 (Jan./Feb. 2017) (noting: Code Sec. 367(a) provides a general exception for transfers of any property for use in an active trade or business outside the United States, and the list of ineligible items does not include goodwill or going concern value. Congress adopted a specific definition of ineligible intangible property which does not include goodwill or going concern value (the final regulations remove this statutory reference as no longer necessary). The intent to exclude foreign goodwill and going concern value from taxation under Code Sec.

In conjunction with review of these § 367 rules, the Chamber continues to believe there is a need to review the temporary and final transfer pricing regulations under § 482 issued in 2015. While these regulations were issued prior to 2016, they were issued in conjunction with the proposed § 367 regulations and interrelate substantively with those regulations. The § 482 regulations impose purported "clarifications" with immediate effect of controversial aggregation and "all value" requirements in pricing intracompany transactions, even though the IRS has consistently lost these positions in the courts.[5] Thus, we believe these regulations should be subject to action.

2. Recommendation

The Chamber recommends withdrawal of both the §§ 367(d) and 482 rules.

C. § 385 (T.D. 9790)

1. Description

In 2016, the Treasury Department finalized regulations interpreting a long dormant section of the Internal Revenue Code, § 385, addressing the recharacterization of debt as equity in some circumstances, purportedly to minimize erosion of the federal income tax base. While significant improvements were made in the final rules, these rules still disrupt certain normal business practices unrelated to any impression of tax avoidance or tax mismeasurement. Further, the reservation by the Treasury and the IRS of the right to finalize rules later in certain areas creates significant uncertainty, which adversely impacts business planning.

2. Recommendation

The Chamber strongly recommends withdrawal of these rules. At a minimum, the Chamber urges Treasury and the IRS to address the following concerns:

- <u>Documentation requirements for intercompany transactions</u>:

The final rules require businesses to apply the same level of documentation and due diligence upon the granting and maintaining of intercompany indebtedness as would be required from a third party lender. This does not take into account the specific relationship between a company and its affiliates and places an undue financial and compliance burden on the taxpayer. Any documentation requirement should be proportional to the circumstances and the respective risks and rewards of the specific loan relationship and recognize that a lower level of debt risk monitoring is required when entities, regardless of form, are part of the same affiliated group.

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367 is unequivocally expressed in the legislative history as reflected in temporary regulations for over 30 years.).

[5] In *Veritas v. Comm'r*, 133 T.C. 297 (2009), and more recently in *Medtronic, Inc. v. Comm'r*, T.C. Memo 2016-112, and *Amazon.Com, Inc. v. Comm'r*, 148 T.C. No. 8, Docket No. 31197-12, (March 23, 2017).

The documentation rule is extended to cover ordinary course transactions that would not generally be considered by businesses to be debt instruments, including:

- Cash pooling and similar arrangements;
- Trade payables; and
- Working capital debt financing.

The extension of documentation requirements to cover these ordinary course transactions results in excessive complexity and imposes an undue financial and administrative burden upon taxpayers and therefore the documentation rule should be amended to remove these ordinary course transactions from its scope. While the Chamber appreciates the delay in the effective date of the documentation rules, we continue to believe that additional modifications are necessary. [6]

- Uncertainty stemming from reserved regulations:

The Treasury and IRS reserved the right to finalize rules both relating to bifurcation as well as foreign issuers. The Chamber urges that the bifurcation rule be dropped entirely. Likewise, Treasury should confirm that the scope of § 385 will not be extended to debt instruments issued by foreign entities, as this would result in excessive complexity and will impose an undue financial and administrative burden upon taxpayers.

- Effective Date:

The retroactive application of regulations raises serious equity and efficiency concerns. As a general matter, regulations should only have prospective effect. Retroactive regulations create economic uncertainty and can lead to unjust results. While the documentation rules effective date has been delayed, other operative provisions of the § 385 regulations apply to distributions made on or after April 5, 2016 -- the date the regulations were issued in proposed form.[7] If the § 385 regulations are to be retained, they should be made to apply to distributions made after the date the final regulations were issued (*i.e.*, October 13, 2016).

- E&P Exception:

The final regulations provide an exception for distributions that do not exceed earnings and profits ("E&P") accumulated in taxable years ending after April 4, 2016.[8] This exception arbitrarily distinguishes between E&P that arose in the 2016 tax year and E&P from prior years. This distinction is inconsistent with the treatment of E&P for other purposes of the tax rules. This distinction also leads to very different tax results based on income timing rules. For these reasons, corporations should be allowed to freely distribute E&P regardless of when it was accumulated. At a minimum, the § 385 regulations should be modified to provide one year of "transition relief." Specifically, E&P accumulated in the immediately preceding taxable year

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[6] See Notice 2017-36, 2017-33 I.R.B. __ (Aug. 14, 2017).
[7] See the general rule and the funding rule of Reg. § 1.385-3.
[8] Reg. § 1.385-3(c)(1).

(i.e., the most recent taxable year ending before April 4, 2016) should be added to the post-April 4, 2016 E&P amount that can be distributed without triggering the operative provisions of the § 385 regulations.

- Borrowing Between U.S. Affiliates that are Members of Separate Consolidated Groups:

The absence of an exclusion for borrowing transactions between U.S. affiliates that are members of separate consolidated groups is problematic. For example, a company that has two primary U.S. consolidated group tax filings, a cash sweep and borrowing operations between the two groups fall within the scope of the regulations, even though it involves transactions between related U.S. entities. If the regulation is not repealed, an exception should be considered for U.S. to U.S. transactions, regardless of whether they are in the same consolidated entity. Furthermore, an election should be provided to allow taxpayers the option to apply -2 documentation requirements, including the financial metrics, at the consolidated group level.

- Prohibited Transaction Rules:

The regulations require automatic recast of a U.S. debt instrument as equity, if it is used (directly or indirectly) to fund: 1) distributions; 2) affiliate stock acquisitions; or 3) certain affiliate assets reorganizations. Under these rules if a taxpayer borrows money (either 36 months prior to or after such transaction), it is presumed to have used such borrowings to indirectly fund such transactions. Certain exceptions are provided, the most relevant of which is: 1) annual distributions or acquisitions that do not exceed the sum of: the issuers post-January 1, 2016 consolidated earnings and profits; 2) certain capital contributions made to the borrower ("Capital Contribution Reduction"); and 3) an annual exception amount of $50 million. Ideally, the prohibited transaction rules should be repealed or at a minimum delayed like the documentation rules. If the entire regulation is not repealed the exemption amount of the exception should be raised to a more significant amount (e.g., $500 million).

D. §§ 707 and 752 (T.D.s 9787 and 9788)

1. Description

In October 2016, Treasury and the IRS released guidance for partnerships, addressing disguised sales and allocation of liabilities and introducing new restrictions on leveraged partnership transactions. T.D. 9788 promulgated temporary and final regulations that treat all partnership liabilities as nonrecourse liabilities solely for disguised sale purposes and are allocated based on the share of the partner's profits. These rules no longer allow a partner full basis on guaranteed debt for purposes of determining if there has been a disguised sale when debt is transferred to the partnership. This is the case even when that guarantee meets the requirements of the new final rules concerning debt guarantees.

Issued simultaneously and intertwined in some respects, T.D. 9787 purports to curb disguised sales of property under § 707 and tighten provisions relating to a partnership's allocations of excess nonrecourse liabilities to partners for disguised-sale purposes under § 752.

2. Recommendation

The Chamber recommends withdrawal of rules issued under both T.D.s 9787 and 9788. At a minimum, the effective date of such rules must be deferred for debt instruments issued (or deemed issued) before one year from the date that action is taken by Treasury and the IRS on these regulations.

E. § 987 (T.D. 9794, T.D. 9795)

1. Description

Issued in December 2016, these regulations address how to deal with the computation of foreign exchange gains and losses of remittances from branches and other flow-through entities that use a functional currency other than the currency of their owner(s). These rules are a significant departure from how taxpayers generally calculate gains and losses under § 987 and implement onerous compliance burdens. As commentators have noted, they are extraordinarily complex and can have a significant economic impact on the economy as a whole.[9] In addition, the transition rules included in the regulations can result in a disallowance of built-in economic foreign exchange losses for certain taxpayers.

2. Recommendation

The Chamber recommends withdrawal of these rules. While Notice 2017-38 identifies only T.D. 9794 for action, the Chamber believes T.D. 9795 also merits withdrawal.

F. § 2704(b) (REG-163113-02)

1. Description

In August 2016, Treasury and the IRS issued proposed rules instituting one of the most sweeping changes to estate tax regulations in the last 25 years. These proposed rules in effect deny the recognition of minority valuation discounts in the context of closely held, family-owned businesses. The Internal Revenue Code imposes gift and estate tax on the transfer of value; these regulations deny that the transfer of a minority interest is less valuable pro rata than a 100% ownership. These discounts are important because they promote the continuation of family businesses by lowering the transfer tax cost of transferring interests during life to the children,

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[9] *See* Jackel, "Trump's tax regulation order: what (besides earnings stripping) could be on the chopping block?," *MNE News* (Apr. 24, 2017, *available at* http://mnetax.com/trumps-tax-regulation-order-besides-earnings-stripping-chopping-block-20722.

which makes the children more inclined to stay with the business, as compared to the parents holding on to assets during their lives and giving the closely held business interests only at death. Due to the lack of earlier involvement with the business while the experienced parents were alive, the transfer after death often results in the business closing. The discounts promote the flow of wealth to younger generations, which is good for the economy and for the continuation of family businesses. Unfortunately, these rules simply complicate how families can pass businesses on to the next generation.

2. Recommendation

The Chamber recommends withdrawal of these rules.

G. § 7602 (T.D. 9778)

1. Description

In July 2016, Treasury and the IRS finalized regulations providing the IRS with authority to retain outside counsel to participate and take testimony in an audit which is an inherently governmental function. The final regulations provide that persons described in § 6103(n) and Regs. § 301.6103(n)-1(a) with whom the IRS or Chief Counsel contracts for services, such as outside economists, engineers, consultants, or attorneys, may receive books, papers, records, or other data summoned by the IRS and, in the presence and under the guidance of an IRS officer or employee, participate fully in the interview of a person who the IRS has summoned as a witness to provide testimony under oath. The final regulations remove temporary regulations (T.D. 9669) regarding participation in an interview of a summoned person described in § 6103(n), printed in the Federal Register on June 18, 2014.

It is common for the IRS to retain outside experts such as economists, engineers, and appraisers to assist the IRS in ascertaining the correctness of a tax return. However, taxpayers are concerned these regulations improperly delegate the authority to perform audit examination functions outside of the IRS by allowing the retention of external private sector lawyers for the purpose of participating fully in an examination. We agree with concerns raised by Senate Finance Committee Chairman Hatch in his May 13, 2014 letter to IRS Commissioner Koskinen that "[t]he IRS's hiring of a private contractor to conduct an examination of a taxpayer raises concerns because the action: 1) appears to violate federal law and the express will of the Congress; 2) removes taxpayer protections by allowing the performance of inherently governmental functions by private contractors; and 3) calls into question the IRS's use of its limited resources."

2. Recommendation

The Chamber recommends withdrawal of these rules.

III. Recommendations for Action on Regulations the Chamber Identified as Meriting Action In Response to EO 13789 but not Listed for Action in Notice 2017-38

The Chamber resubmits its prior recommendations and continues to believe that EO 13789 encourages action on the below regulations.

A. § 355 (REG-134016-15)

1. Description

Issued in July 2016 in response to certain highly-structured transactions, these proposed rules introduce several new tests to measure whether a transaction qualifies as a tax-free spin-off under § 355. These rules broadly apply to spin-offs and rigidly rely on bright-line tests and difficult asset valuation calculations without allowing for other relevant considerations that justify qualification of a spin-off under § 355.

2. Recommendation

The Chamber resubmits its prior recommendation for withdrawal of these rules.

B. § 871(m) (T.D. 9815)

1. Description

Section 871(m) was enacted in 2010 in response to concerns over transactions where foreign investors avoided U.S. withholding taxes on dividends by using swap transactions referencing U.S. equities in lieu of direct ownership. The provision granted regulatory authority to the Treasury to develop rules to distinguish certain derivative transactions subject to withholding from those that do not have the potential for tax-avoidance. Those regulations are currently relatively narrow in scope and generally only apply to so-called “delta one” transactions; however, effective January 1, 2018, regulations promulgated and released on the last day of the prior Administration would impose withholding tax on a broader universe of transactions that have generally been viewed as non-abusive and do not appear to have been the subject of the 2010 legislation. These prospective dividend equivalent rules are costly for the financial industry and make common non-delta-one derivative transactions referencing U.S.-issued stocks and securities much less attractive to international investors. The Chamber believes the rules set to become effective January 1, 2018, go beyond what is necessary to address abuse, leave critical definitional and operational issues unresolved, and impose onerous compliance burdens for the financial services industry.

2. Recommendation

The Chamber resubmits its prior recommendation for withdrawal of these rules back to the in-scope definition adopted by the September 2015 final regulations (i.e., crossing-in/crossing-out).

C. § 901(m) (T.D. 9800)

1. Description

Section 901(m) limits the benefit of foreign tax credits in certain transactions that cause basis differences between the U.S. and foreign tax. The temporary and proposed regulations issued in December 2016 provide detailed guidance around the calculation of the disallowed foreign tax credits under § 901(m). The proposed § 901(m) regulations add three new covered asset acquisitions (CAAs) and a number of accounting rules, and, as drafted, expand the scope of § 901(m). While some of those rules are helpful, like the election to use foreign tax basis as initial basis, in many instances, the rules are harmful, e.g., forcing taxpayers to carry over tax basis when such basis has not yet disallowed foreign tax credits (which also contradicts the unambiguous statutory formula). This approach has extended the reach of the regulations and, consequently, the regulations are overly complex and impose a significant financial burden on taxpayers.

2. Recommendation

The Chamber resubmits its prior recommendation to revise the § 901(m) proposed regulations. The proposed regulations should be made simpler and more taxpayer friendly by eliminating the three new CAAs and harmful accounting rules. Additionally, a related-party exception should be added to § 901(m) to eliminate a double-taxation burden that now arises when U.S. companies have their foreign tax credits eliminated in internal restructurings even though they have paid for a basis step up with taxable income—yet another instance of the current U.S. tax system handicapping domestic competitiveness. The related-party exception should stop foreign tax credit disallowances as of the date of the proposed regulations, December 7, 2016, including for transactions that have already occurred and for which U.S. companies are being double taxed.

D. § 956 (T.D. 9792)

1. Description

Issued in November 2016, these final rules impose a complex series of requirements on foreign partnerships with U.S.-related parties as partners that treat a loan by a controlled foreign corporation (CFC) to a related foreign partnership as a U.S. asset in applying the subpart F rules even though the loan proceeds may not be repatriated into the United States. The Treasury and IRS made little change from the proposed rules, despite significant feedback and concerns expressed by taxpayers. Specifically, taxpayers expressed concern over the regulation's extremely broad approach as well as potential retroactive effective date.

2. Recommendation

The Chamber resubmits its prior recommendation for withdrawal of these rules.

E. § 6035 (REG-127923-15)

1. Description

In 2016, the Treasury and IRS issued proposed rules relating to consistent basis reporting between estates and the person acquiring property from the decedent. The IRS proposed requiring basis reporting when a beneficiary makes a nontaxable transfer of property, where that property had been subject to basis information reporting. The result of such rules is onerous and places impracticable compliance burdens on taxpayers. For instance, under the proposed subsequent transfer rule, such transfer may not transpire for decades after the original transaction, and, as such, these rules present impracticable and onerous recordkeeping requirements. Likewise, the 30-day deadline is inconsistent with when transfers are generally reported and, as a result, is likely to trigger unfair late filing penalties.

2. Recommendation

The Chamber resubmits its prior recommendation for withdrawal of these rules.

IV. Conclusion

The Chamber appreciates the opportunity to provide feedback on rules meriting attention under Notice 2017-38. In sum, the Chamber strongly urges the IRS and Treasury to take action on the above rules which impose undue financial and compliance burdens or which clearly exceed statutory authority. We believe the above changes are necessary to ease the regulatory drag on our economy and to ensure both that U.S. companies can compete globally and that foreign capital is welcomed within our borders. The Chamber looks forward to working with you on these issues.

Sincerely,

Caroline L. Harris

Cc: Steven Mnuchin, Secretary of the Treasury
Commissioner John Koskinen, Internal Revenue Service
David Kautter, Assistant Secretary, Tax Policy, U.S. Department of the Treasury