General Feedback for Issues Requiring Regulatory Attention as of 3/7/2018

This document covers the following issue areas:

INDIVIDUAL TAX REFORM - TREATMENT OF BUSINESS INCOME

BILL SECTION # / CODE SECTION # / TITLE	TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION
Sec. 11011 / Sec. 199A[1] / "Qualified Business Income"	Aggregation of Activities and Application of W-2 Wage Limitation	Guidance should provide that all qualified trade/business activities may be aggregated at the partner level for purposes of the wage and asset tests.	Guidance should provide that all qualified trade/business activities may be aggregated at the partner level for purposes of the wage and asset tests. The AICPA recently provided a comment letter indicating a number of areas where guidance is needed to ensure consistency among industries and taxpayers. Section 14 highlights the calculation of QBI can be complicated with multi-tier entities and profitable entities existing with loss entities. Whether all similar qualified businesses are aggregated for purposes of the calculation or if each business is evaluated separately. Clarity is needed, for taxpayers with non-qualified business activities, as to whether or not there is a *de minimis* percentage at which the activity is not excluded, or whether the taxpayer makes separate computations for the personal service activity versus the non-personal service activity. Similarly, whether wages are determined similar to the concepts provided in Regs. §1.199-2(a)(2) (consider wages of the common law employees, regardless of who is responsible for the payment of the wage). Whether a trade or business is defined as an activity within an entity. For example, what if an entity has two clearly separate trades or businesses?
	Clarifying the application of the 20% deduction to shareholders of a mutual fund owning REITs	Guidance should provide that mutual fund shareholders receiving REIT dividends receive the 20% deduction	The Treasury Department has ample regulatory power to issue this guidance under §199A(f)(4) to clarify that Congress intended that the 20% deduction should apply whether shareholders own REITs directly or indirectly through mutual funds.
	Clarification for what Constitutes Qualified Business Income	Clarify that §481 adjustments related to pre-effective date periods are excluded from QBI.	QBI is intended to capture the income for that year and a §481 adjustments related to pre-effective date periods --positive or negative--is a timing issue from a prior period that shouldn't be considered in the current year.

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

BUSINESS TAX REFORM – COST RECOVERY

BILL SECTION # / CODE SECTION # / TITLE	TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION
Sec. 13204/ Sec. 168(e)/ "Applicable Recovery Period for Real Property"	Alternative Depreciation System (ADS) Method Requirement	Application of 30-year ADS life to existing property of an electing real property trade or business.	The TCJA allows real property trades or businesses to elect[2] out of limits on interest deductibility, but if they make such an election, they must depreciate residential rental property under the Alternative Depreciation System (ADS). In addition, the TCJA reduces the ADS period for residential property from 40 years to 30 years. While the effective date for these depreciation changes is generally for property placed in service after 12/31/17, changes related to electing real property trades or businesses apply to taxable years beginning after 12/31/17. While the effective date language indicates that real estate firms that opt to deduct business interest would depreciate existing residential real estate over the new ADS period of 30 years, the language could be read to apply the 30-year ADS period only to properties placed in service after 2017, requiring such real estate firms to depreciate existing residential real estate over 40 years, the prior-law ADS period. This is in contrast to prior law's general depreciation period of 27.5 years applicable to residential real estate.

BUSINESS TAX REFORM - REFORM OF BUSINESS RELATED EXCLUSIONS, DEDUCTIONS, ETC

BILL SECTION # / CODE SECTION # / TITLE	TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION
Sec. 13301 / Sec. 163(j) / "Limitation on Business Interest"	Partnership Examples	Would like to see examples of the impact (or lack thereof) of a partnership on the owners' calculations.	
	"Properly Allocable" Standard for Regulated	Provide guidelines for allocation methodologies, for determining	

[2] In the section of TCJA establishing the limitation on interest deductibility, Treasury is provided the authority to determine the method of the election. The Chamber thinks this provides sufficient authority for Treasury to issue guidance on the consequences for depreciation.

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	Utility Trades or Businesses	interest incurred on indebtedness "properly allocable" to a trade or business described in §163(j)(7)(A)(iv) (i.e., a regulated utility trade or business that is excluded from the definition of "trade or business" for purposes of §163(j)). including for directly associating [tracing] indebtedness with [to] specifically identifiable assets or groups of assets the taxpayer may own or acquire and for allocating indebtedness based on assets such as a method modeled on §864(e) and the Treasury Regulations promulgated under §861.	
	Consolidated Approach	In addition to the blanket approach to consolidated application recommendation included in the Miscellaneous section, below, clarify that this is applied on a consolidated basis, including each corporate partner's distributive share of the partnership's excess taxable income.	
	Definition of Business Interest	Clarify that business interest means any interest paid or accrued by a U.S. corporation or on indebtedness properly	It is unclear whether §163(j) applies to the calculation of CFC tested income or tested loss under §951A. Consistent with Prop. Regs. §1.163(j)-8(a), §163(j) should only apply to foreign corporations with a U.S. trade or business.

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		allocable to a US trade or business.	
Sec. 13303 / Sec. 1031 / 1031 Like-Kind Exchange	Personal Property in 1031 Like-Kind Exchange	Guidance should clarify state law determines whether property is personal or real property for purposes of §1031. Specifically, guidance should provide that personal property that is in service and associated with a piece of real property will be considered real property for the purposes of §1031.	The question is how the rule will treat personal property that is a "part" of a building (real property). A commonly-cited example is carpeting, which is technically defined as personal property under the Federal law (for depreciation purposes). However, 1031 exchanges currently rely on State law definitions for personal and real property, and most State laws include affixed personal property, e.g. carpeting, in their definitions of "real property". Before the TCJA, treating personal property such as carpeting as real property in a 1031 did not conflict with Federal law because both personal and real property were eligible for like-kind exchanges. However, since personal property is now excluded from 1031 eligibility, there could be a perceived conflict. While taxpayers believe items within a building such a carpet, etc. still qualify as part of the real property as defined under State laws, clarity on this issue would be helpful.
Sec. 13312/ Sec. 118 "Certain Contributions by Governmental Entities Not Treated as Contributions to Capital"	Taxation of Government Incentives	The TCJA establishes that "any contribution by any governmental entity or civic group" shall be included in income. Because government incentives come in many forms, guidance is needed regarding what does and does not constitute a "contribution."	Would also seek specific guidance specific to abatements and refunds.

BUSINESS TAX REFORM - OTHER PROVISIONS

BILL SECTION # / CODE SECTION # / TITLE	TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION
Sec. 13501 / Sec. 864(c) / "Effectively Connected Income"/ Sec. 1446(f) "Withholding tax on foreign	Withholding Obligations	Request a temporary suspension of withholding obligation until guidance is issued and feasibly implemented.	Notice 2018-08 suspended withholding with respect to sales of interests in publicly traded partnerships. This suspension should apply across the board. Section 1446(f) generally provides a mechanism to ensure that any tax due from a foreign person on the disposition of its partnership interest would be collected at source. Specifically,

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partners' share of effectively connected income"			the new requirement provides that if any portion of the gain on the disposition of a partnership interest would be ECI under new §864(c)(8), then the transferee is required to deduct and withhold 10% of the amount realized by the transferor, unless the transferee obtains a non-foreign affidavit. Section 1446(f)(6) authorizes the Secretary to prescribe "such regulations or other guidance as may be necessary to carry out the purposes of this subsection, including regulations providing for exceptions from the provisions of this subsection." New §864(c)(8) which may treat gain or loss on the sale of a partnership interest by a foreign person as ECI is effective for dispositions after November 27, 2017. The withholding tax provision under new §1446(f) is effective for dispositions of a partnership interest after December 31, 2017. The period from enactment to effective date is nine days. Transferees, partnerships, and intermediaries or agents acting on behalf of such persons have not had adequate time to determine how to implement the new withholding obligation. Both guidance on the new withholding obligation and time to implement such guidance is needed for taxpayers to determine which transactions are relevant and to develop the practical processes needed to effectively comply with these new rules.

BUSINESS TAX REFORM - COMPENSATION

BILL SECTION # / CODE SECTION # / TITLE	TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION
Sec. 13601 / Sec. 162(m) / "Certain Excessive Employee Remuneration"	Section 162(m) $1M Compensation Deduction Limitation; Grandfather Rule	Clarification of the circumstances under which future grants may be grandfathered (i.e., Would like binding contract examples, and example of calculation for 2019	

		and 2020).	
		Clarification of the circumstances under which past grants but future vests qualify for grandfather rule.	

INTERNATIONAL TAX PROVISIONS - ESTABLISHMENT OF PARTICIPATION EXEMPTION SYSTEM FOR TAXATION OF FOREIGN INCOME

BILL SECTION # / CODE SECTION # / TITLE	TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION
Sec. 14103 / Sec. 965 / "Treatment of Deferred Foreign Income Upon Transition to Participation Exemption System of Taxation"	Please see comments already filed on Notices 2018-07 and 2018-13.		.
	Election to pay liability in installments	Guidance providing a method of making the 8-year installment election under §965(h)(5) (e.g., which form /statement to file, and time for making such election).	

INTERNATIONAL TAX PROVISIONS - RULES RELATED TO PASSIVE AND MOBILE INCOME AND MODIFICATION OF SUBPART F PROVISIONS

BILL SECTION # / CODE SECTION # / TITLE	TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION
Sec. 14201 / Sec. 951A / "Global Intangible Low-	Overall Foreign Losses (OFL)/ FTC limitation	Clarification on how Overall Foreign Losses (OFL) impact the	

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Income Included in Gross Income of United States Shareholders" and Sec. 14202 / Sec. 250 / "Foreign-Derived Intangible Income (FDII) and Global Intangible Low-Taxed Income (GILTI)"		FTC limitation for GILTI purposes (including whether the same 50% recapture rule applies to the GILTI basket)	
	Appropriate Basket of GILTI Gross-Up	Request for guidance to treat the "section 78" gross-up income related to FTCs on GILTI in the GILTI basket.	Without further guidance, it appears that any "section 78" gross-up income related to foreign tax credits FTCs on GILTI would generally be treated as general category income under §904(d)(3)(A), because the relevant look-through rules under §904(d)(3)(G) apply to income inclusions under §951(a)(1)(A) (i.e., subpart F income) but not income inclusions under §951A (i.e., GILTI). However, treating the gross-up as GILTI basket income would be consistent with Regs. §§1.904-6(b)(3) and 1.902-1(c)(2)(i) which generally include section 78 gross-up in the same basket as the related taxes.
	Interest/Stewardship Expense Allocation	Clarify that interest and stewardship expenses should not be allocated to GILTI where the foreign tax rate is 13.125% or higher.	If Treasury determines expense allocation and apportionment is required, rules should be developed in light of Congressional intent to limit U.S. tax when foreign tax rate is 13.125% or higher. The premise of GILTI is that if your non-US tax is 13.125% or higher, you shouldn't owe additional U.S. tax but this isn't true if §904 requires you to allocate interest and stewardship expenses against the stock of CFCs for purposes of GILTI. When non-US tax is above 13.125% and interest and stewardship is allocated to the GILTI inclusion, there is not enough GILTI inclusion to use all FTCs and those FTCs are foregone. This isn't how the Conference Report describes the GILTI computation.
	Application of the §954(b)(4) exception for high tax to the GILTI basket	Guidance under §954 that would permit taxpayers to make the high tax exception election for income that would be Subpart F under §953 or §954 in the absence of another exception.	The GILTI provisions were intended to target low taxed non-subpart F foreign earnings. Accordingly, subpart F income and income that is excluded from subpart F under the high-tax exception of §954(b)(4) are excluded from CFC tested income. Consistent with this policy, taxpayers should be permitted to make the high-tax exception election with respect to items of income that would be Subpart F income in the absence of another exception.

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	Qualified Business Asset Investment Definition	Clarification as to whether manufacturing equipment made of precious metals is included in the calculation of foreign tangible property (QBAI).	Where a company uses melting tanks made of precious metals because such metals degrade less than other metals at high heat, such equipment is typically not depreciable (you get a depletion allowance instead). As such, it appears that such equipment may not qualify for inclusion in the GILTI determination of foreign tangible property. Under the GILTI provision, property must be depreciable under §167 to be included as foreign tangible property. While §167 may serve as a workable bright-line test in most cases, in this case the §167 requirement rules out property which is genuinely tangible and used in our manufacturing operation. Manufacturing equipment of any composition should be considered tangible property under a provision of law aimed at deterring low-taxed intangible income.
	REIT Gross Income Test	Confirmation that treatment of GILTI inclusions for purposes of REIT gross income tests under §856(c)(2) and (3).	The IRS should issue guidance concluding that under its authority of §856(c)(5)(J), the GILTI inclusion amount is either: 1) ignored for the REIT gross income tests (as in the case of deemed repatriation amounts); or, 2) qualified income under the REIT 95% gross income test of §856(c)(2). GILTI inclusions still would be included in taxable income, but this clarification would prevent the possibility of companies losing their REIT status.
	Source Rules	Clarification that the deduction for FDII under §250 is treated as a deduction against income from sources within the United States.	Section 250 provides domestic corporations with reduced effective rates of U.S. tax on their GILTI and FDII by allowing a deduction for a specified percentage of the corporation's GILTI and FDII. It would clearly frustrate the intent of the §250 deduction to require taxpayers to allocate and apportion the §250 deduction under the rules of §861 et seq. The §250 deduction for GILTI appears to be allocated to foreign-source income in the GILTI basket under §904(b). However, it is not clear how the §250 deduction for FDII is treated for sourcing purposes. Guidance should be issued that clarifies that the §250 deduction for FDII is treated as a deduction against income from sources within the United States.
	Calculation of FDDEI/DEI Ratio	Confirm that foreign-derived deduction eligible income (FDDEI) is determined by allocating deductions against FDDE gross income using the	

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		rules of Regs. §1.861-8.	
	Foreign Use Where There is a Mixed Use	Section 250(b)(5)(C) requires that taxpayers "establish to the satisfaction of the Secretary that such property is for foreign use [or similar for services]." If property is sold for mixed use or services are split between domestic and foreign use will taxpayers be permitted to get FDII benefit with respect to the portion that qualifies?	Preference for the ability to get credit for the portion of mixed use sales or services that would otherwise qualify. Direct tracing of income allowed, and a de minimis rule.
	Foreign Use Substantiation	Section 250(b)(5)(C) requires that taxpayers "establish to the satisfaction of the Secretary that such property is for foreign use [or similar for services]." Guidance should provide administrable foreign use substantiation requirements.	
Sec. 14213 / Sec. 958(b) / "Constructive Ownership"	Stock Attribution Rules	Guidance should be issued to confirm that the CFC rules do not result in income inclusions to a U.S. shareholder of a foreign corporation in cases where the U.S. shareholder is neither in control of the foreign corporation (or part of a small group of U.S. shareholders that control the foreign corporation) nor related to an affiliated group of which the foreign corporation	Prior to its repeal in the 2017 Act, §958(b)(4) prevented the "downward attribution" of stock ownership from a foreign person to a related U.S. person for purposes of determining the status of a corporation as a CFC. In repealing §958(b)(4), Congress did not intend to override the bedrock principle of the CFC rules that a U.S. taxpayer should not be taxed on subpart F income from an entity it does not control either individually or collectively with other U.S. taxpayers.

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		is a part. Such guidance is consistent with the purpose and historical application of the CFC rules over their 55 year history, as well as Congress' stated intent in repealing §958(b)(4). Accordingly, the guidance would be within the authority of the Treasury Department.	

INTERNATIONAL TAX PROVISIONS - MODIFICATIONS RELATED TO FOREIGN TAX CREDIT SYSTEM

BILL SECTION # / CODE SECTION # / TITLE	TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION
Sec. 14301 / Sec. 902, 960 / "Deemed Paid Credit for Subpart F Inclusions"	Withholding Taxes under §960(b) and (c)	Guidance needed on determining how to track withholding taxes on PTI distributions up a chain of CFCs particularly where upper tier CFCs have PTI pools of their own or where lower tier distributions occur in a year prior to a distribution to the US.	

INTERNATIONAL TAX PROVISIONS - PREVENTION OF BASE EROSION

BILL SECTION # / CODE SECTION # / TITLE	TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION
Sec. 14401 / Sec. 59A / "Base Erosion and Anti-Abuse Tax"	Services Cost Method	Clarification of the BEAT rules to ensure that only the "markup component" associated with intragroup payments that qualify under the "services cost method" are "base erosion payments" under the BEAT.	See this Colloquy between Sen. Portman and Chairman Hatch on this issue. See also KPMG, "A Response to an Off-BEAT Analysis," in Tax Notes (2/12/18) and EY, "BEAT and Low-Margin Services: Much Ado About No Markup," in BNA Daily Tax Report (2/23/18).
	Partnerships	Clarification of the BEAT rules to provide that partnerships are treated as an "aggregate" when receiving or making "base erosion payments."	Payments from a domestic corporation to a related foreign person that are deductible under Chapter 1 of the Code may be "base erosion payments." As a technical matter, a partnership that is not organized in the United States may be a foreign person under §6038A(c)(3)—even if the partnership is owned entirely by domestic corporations. It would be more appropriate to treat partnerships as an "aggregate" for purposes of applying the BEAT from both the payor and the payee. This would similar to how partnerships are treated for purposes of applying §954(c)(6) under Notice 2007-9) and consistent with the treatment of partnership items under Regs. §1.702-1(a)(8)(ii)).
	Base Erosion Percentage	Clarification of how foreign currency losses should be treated for purposes of determining the base erosion percentage.	Are taxpayers required to net foreign currency losses against foreign currency gains and only include the net amount of foreign currency losses in the denominator for calculating the base erosion percentage?
	Interest Expense	Clarification as to whether existing §163(j) deferred-interest expense as of 12/31/2017 forms part of the BEAT payment base for future years.	
	NOL Utilization	Clarification of the definition of "modified taxable income" in the BEAT rules to provide that "the base erosion percentage of any net operating loss deduction allowed under §172 for the	Under a possible alternative reading, the current year's base erosion percentage would apply to the same year's deduction of prior year NOL carryforwards, even though the NOL was incurred prior to the effective date of §59A and there is no connection between the current year base erosion percentage and the losses that created such NOL carry forwards.

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		taxable year," in §59A(c)(1)(B), is calculated by determining 2018 or later base eroding payments' contribution to the creation of a new NOL.	
	Inter-Year Transfers	Clarification on how inter-year transfers should be handled in determining whether a taxpayer is an "applicable taxpayer."	Under the single employer rule, all >50% entities are treated as a single entity. Further, the gross receipts test looks at the prior three years. Assume a consolidated group meets the $500M test. If ownership of a subsidiary of a consolidated group drops below 50% during the middle of year, when it files its stand-alone tax return, would the subsidiary be treated as an applicable taxpayer because for the prior three years, it was part of a group that met the $500M gross receipts test even if on its own, it would not meet the $500M gross receipts test? The statute provides that rules similar to those in §448(c)(3)(B) apply. Does that mean that in the subsequent year after the ownership change, a pro rata share of the consolidated group's gross receipts are treated as the subsidiary's gross receipts based on the period the subsidiary was owned >50%?
	In-Bound Reinsurance	Clarification of the BEAT rules to ensure that payments of reinsurance claims, expenses and ceding commissions relating to in-bound reinsurance from foreign affiliates (reinsurance sold to foreign affiliates, assumed in US, related to foreign risks) should not be considered base erosion payments.	
	Research and Experimentation (R&E) Reimbursements	Clarification on BEAT rules to exclude R&E reimbursements (which result in the transfer of legal ownership of IP back to the U.S.) from the definition of base erosion	To be internationally-competitive, a U.S. company may have technical centers in other parts of the world to serve the specific demands of overseas customers. As a result, companies do not always control the where new technologies develop. Prior to the Tax Cut & Jobs Act of 2017 (the Act), companies could bring foreign-developed IP back to the U.S. by reimbursing R&E costs incurred by their foreign

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		payments.	affiliates. These reimbursement payments cover the development of new technologies, so the foreign affiliates do not own the technologies. The U.S. parent also could charge royalties to its foreign affiliates for use of these technologies. While the intent of the Act is to increase IP-ownership in the U.S., the current language in the bill actually discourages companies from bringing IP into the U.S**.** to the extent it applies to a company's U.S. reimbursements to foreign affiliates for R&E costs in order for the U.S. company to obtain ownership of any IP developed by the foreign affiliates. If this correction is not made, unintended results could be: 1) Decreased U.S.-owned IP and 2) Decreased tax revenue to the U.S. This BEAT issue discourages a U.S.-based IP-ownership model: companies might choose to not reimburse its foreign affiliates for the IP ownership and instead pay royalties to its foreign affiliates. As a result, its U.S.-based IP ownership and associated royalties from foreign affiliates could decrease. U.S. tax revenue from these royalties would also decrease. Excluding R&E costs in (the aforementioned scenario) would incentivize companies to bring IP back to the U.S., it would also increase the tax base for the royalties paid by foreign affiliates to the U.S.-IP owner. Therefore, the tax revenues associated with these royalty payments should provide an offset for the exemption of the R&E reimbursements.

MISCELLANEOUS ISSUES

BILL SECTION # / CODE SECTION # / TITLE	TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION
Miscellaneous	TCJA/Consolidated Return Coordination In General	Guidance to clarify a consolidated application for §163(j), GILTI, BEAT, and the separate branch FTC basket.	