



BY E-MAIL

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SUBJECT: EBF comments on the Proposed BEAT Regulations

Dear Mr Kautter, Mr Harter and Mr Paul,

The European Banking Federation ("EBF") appreciates the opportunity to submit brief comments on the recently released proposed regulations under Section 59A (the base erosion and anti-avoidance tax, or "BEAT") of the Internal Revenue Code. This letter echoes many of the comments that will be made by the Securities Industry and Financial Markets Association ("SIFMA") and the Institute of International Bankers ("IIB") in their respective submissions on the proposed BEAT regulations. However, in addition to many comments submitted by SIFMA and IIB, which we fully support, we would like to stress the following issues:

- Exception for Interest Paid on Intercompany Funding Held in the United States for Regulatory Reasons: International banks are often required by U.S. regulators or U.S. banking law to lend billions of dollars to their U.S. operations to enhance their resiliency and resolvability. The proposed BEAT regulations provide a welcome exception for interest paid on certain total loss-absorbing capacity ("TLAC") securities. Specifically, the exception applies to TLAC securities required by the Federal Reserve under subpart P of part 252 of 12 C.F.R. But this exception does not generally extend to similar securities issued by non-U.S. corporations engaged in a U.S. trade or business, nor does it capture other regulatory-driven funding, such as Reg YY requirements. Like

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TLAC, these non-exempt securities are part of a larger system that addresses bank solvency and liquidity and are issued to satisfy regulatory requirements. Echoing comments in the IIB submission, the EBF recommends that Treasury extend the TLAC exception to debt issued by banks in response to requirements of law or regulator supervisors, provided such debt is both monitored by a regulator and reported or disclosed to a regulator in a manner that shows the amounts allocated to satisfy the regulatory requirements.

- Clarification of the Treatment of Certain Interest Expense Determined by U.S. Regulations: The deductible interest expense of an international bank with U.S. operations has long been determined through a complex set of rules outlined under Section 1.882-5 of the Treasury Regulations and, in some cases, international tax treaties. Very generally, these rules provide for different methodologies for determining interest expense, including methods commonly referred to as the "AUSBL method," the "Separate currency pools method," and the "Treaty method." Depending on the particular situation, the 1.882-5 regulations may "attribute" to an international bank's U.S. branch interest on liabilities in excess of the interest paid on booked liabilities of the branch. While these methodologies differ, all can be viewed as different ways to allocate a portion of a foreign bank's interest expense to its U.S. branch. The BEAT regulations treat some of this allocated interest expense as subject to the BEAT. However, the amount treated as subject to BEAT can vary significantly depending on the methodology used by the taxpayer even in cases in which the amount of interest being deducted in the United States is relatively equal under the different methods. Echoing comments by the IIB, the EBF recommends that Treasury adopt a "surrogate" AUSBL method as a single consistent method for determining the amount of US branch interest expense that is treated as a base erosion payment. In addition, we ask Treasury to consider the simplifying elections requested in the IIB letter that would allow taxpayers to comply with these complicated rules.
- Exclusion of certain FX related payments (section 988) from the Denominator of the Base Erosion Percentage Calculation: We agree with and support the proposed Section 1.59A-3(b)(3)(iv) which provides for the exclusion of Section 988 Losses from the numerator of an applicable taxpayer's base erosion percentage since they are not base erosion payments. The Proposed Regulations also exclude all Section 988 Losses from the denominator, even though the preamble indicates that Treasury is specifically requesting comments on whether this wholesale exclusion of Section 988 losses is appropriate or if the denominator exclusion "should be limited to transactions with a foreign related party." Echoing the comments and reasons in the IIB submission, the EBF recommends that Section 988 Losses should not be excluded from the denominator of the base erosion percentage calculation, except with respect to Section 988 Losses on transactions with foreign related parties that are also excluded from the numerator.
- Clarification of the Interaction of Net Operating Losses and the BEAT: The BEAT is, by its terms, a minimum tax that only applies when the BEAT liability exceeds a taxpayer's regular tax liability. But because the BEAT regulations limit the net operating loss ("NOL") allowed when calculating modified taxable income to the taxpayer's taxable income (before taking into account the NOL), taxpayers that ordinarily would not be subject to income tax because of large NOLs now become subject to the BEAT on a large percentage of their base erosion payments. The EBF supports comments in the IIB and SIFMA letters that note

that Section 59A does not modify old Section 172 (applicable to losses from before 2018), which long-allowed a deduction for NOLs in excess of a taxpayer's taxable income (resulting in negative taxable income). We therefore do not believe there is a basis for the BEAT regulations to limit a taxpayer's NOLs in the manner described in the proposed regulations. We appreciate Treasury's concerns regarding the administrability of such carryovers but we hope Treasury will reconsider their view in light of the adverse effect it has on some of our member Banks. We would welcome an opportunity to discuss this and other of the above-mentioned issues with you.

We thank you for your consideration and we remain at your disposal should you have any questions or comments concerning the above.

Sincerely yours,



Wim Mijs
Chief Executive Officer
European Banking Federation

CC:

1. Mr Douglas Poms, Deputy International Tax Counsel at the U.S. Department of the Treasury;
2. Mr Lawrence D. Norton, U.S. Treasury's Representative for Europe;