OFII | GLOBAL INVESTMENT GROWS AMERICA'S ECONOMY

Beneficial Ownership: Pertinent Portion of the Proposed Regulations on BEAT (pages 18-19)

"In general, the treatment of a payment as deductible, or as other than deductible, such as an amount that reduces gross income or is excluded from gross income because it is beneficially owned by another person, generally will have federal income tax consequences that will affect the application of section 59A and will also have consequences for other provisions of the Code. In light of existing tax law dealing with identifying who is the beneficial owner of income, who owns an asset, and the related tax consequences (including under principal-agent principles, reimbursement doctrine, case law conduit principles, assignment of income or other principles of generally applicable tax law), the proposed regulations do not establish any specific rules for purposes of section 59A for determining whether a payment is treated as a deductible payment or, when viewed as part of a series of transactions, should be characterized in a different manner."

TAX EXECUTIVES INSTITUTE

1200 G Street, N.W., Suite 300
Washington, D.C. 20005-3814
202.638.5601
tei.org

August 12, 2019

Lafayette "Chip" G. Harter III
Deputy Assistant Secretary (International Tax Affairs)
U.S. Department of the Treasury

Douglas L. Poms
International Tax Counsel
U.S. Department of the Treasury

Via email

RE: Additional Comments of Tax Executives Institute, Inc. on the Proposed Base Erosion and Anti-Abuse Tax Regulations

Dear Messrs. Harter and Poms:

On December 21, 2018, the Internal Revenue Service (the Service) and the U.S. Department of the Treasury (the Treasury) published proposed regulations (the Proposed Regulations)[1] under new section 59A.[2] Section 59A imposes a liability on the base-erosion minimum tax amount (as defined) of certain taxpayers.[3] Section 59A was enacted as part of Public Law 115-97,[4] colloquially known as the "Tax Cuts & Jobs Act" (the Act). The Service and Treasury (collectively, the Government) requested public comments regarding the Proposed Regulations no later than February 19, 2019.

---

1 REG-104259-18, 83 Fed. Reg. 65,956. (Dec. 21, 2018).

2 Unless otherwise indicated, all "section" references are to the Internal Revenue Code of 1986, as amended (the Code) and all "§" references are to the Treasury regulations promulgated thereunder.

3 The tax imposed by section 59A is hereinafter referred to as the "BEAT."

4 Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054.

In response to the Government's request, Tax Executives Institute, Inc. (TEI), submitted detailed comments on February 19, 2019 (the February Comments).[5] TEI has continued to analyze the Proposed Regulations in light of the evolving business operations of TEI members in the nearly six months since filing our February Comments. As a result of that analysis, we provide below our brief supplemental comments on the Proposed Regulations.[6]

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 57 chapters in North and South America, Europe, and Asia. Our more than 7,000 individual members represent over 2,800 of the leading companies around the world. TEI members are responsible for administering the tax affairs of their companies and must contend daily with provisions of the tax law relating to the operation of business enterprises, including the new BEAT regime and many other aspects of the Act. We believe that the diversity and professional experience of our members enables TEI to bring a balanced and practical perspective to the issues raised by the Proposed Regulations, and we are eager to assist the Government in its important effort to effectively and efficiently implement the Act.

TEI Comments

TEI recommended in our February Comments that the Government permit taxpayers to use the "recomputation" method when calculating their BEAT liabilities as an alternative to the Proposed Regulations' "add-back" method.[7] We recommended the recomputation method because it would enable taxpayers with pre-TCJA (i.e., pre-2018) net operating losses (NOLs) to preserve the full benefit of those losses when calculating their BEAT liability, even though the recomputation method would introduce additional complexity when compared to the add-back method.

Since filing our February Comments, an alternative method for preserving the full benefit of pre-TCJA NOLs has been proposed. This method (which has been labeled as the "proxy-method") would preserve the benefit of pre-TCJA NOLs much in the same way as the recomputation method, without introducing some of the recomputation method's complexity.

The proxy-method would simply increase a taxpayer's "regular tax liability" by 11%[8] of the taxpayer's pre-2018 NOLs utilized in computing the taxpayer's regular tax liability. That is, if a taxpayer had pre-TCJA NOLs of $400, its regular tax liability would be increased by the product of 11% and $400, or $44 (the proxy-tax), which would reduce the taxpayer's BEAT liability by the same amount (i.e., $44).[9]

---

5 TEI's February Comments are available at https://www.tei.org/sites/default/files/advocacy_pdfs/TEI-Comments-Proposed-BEAT-Regulations-FINAL-to-IRS-19Feb2019.pdf.

6 TEI recognizes that the deadline for commenting on the Proposed Regulations has long since passed and thus appreciates any consideration the Government may give to this letter.

7 *See* February Comments at 12-13.

8 11% is equal to the difference between the regular tax rate and the BEAT tax rate.

9 For a more detailed example of how the proxy-method would put taxpayers on an equal footing, see the comments filed at https://www.regulations.gov/document?D=IRS-2019-0002-0072.

This approach would put taxpayers with the same amount of taxable income (before taking into account pre-2018 NOLs) and base eroding payments in a particular taxable year on an equal footing as a taxpayer with pre-TCJA NOLs.

In addition, the proxy-method (as well as the recomputation method) is supported by the Act's effective date provisions, which only take into account base eroding payments made in taxable years after the Act's enactment.[10] Further, the proxy-method is consistent with the principle that new tax legislation should apply on a prospective basis, especially when the new policy relates to major changes in longstanding principles of taxation, such as the preservation of NOL carryovers.

For these reasons, TEI recommends the Government permit taxpayers to use the proxy-method, as a modified alternative to the add-back method and as an alternative to the recomputation method, when computing their BEAT tax liability.

• • •

TEI commends the Government in its efforts to promulgate regulatory guidance under the Act on a timely basis, it has been a monumental undertaking. Should you have any questions regarding our supplemental comments, please do not hesitate to contact Emily Whittenburg, Chair of TEI's Tax Reform Task Force, at Emily.Whittenburg@shell.com or 832.337.0827; or Benjamin R. Shreck of the Institute's legal staff at bshreck@tei.org or 202.464.8353.

Respectfully submitted,
TAX EXECUTIVES INSTITUTE

Katrina Welch

Katrina H. Welch
International President

---

10 *See, e.g.,* Section 14401(e) of the Act, not codified, providing that "The amendments made by this section shall apply to base erosion payments (as defined in IRC sec. 59A(d) of the Internal Revenue Code of 1986, as added by this section) paid or accrued in taxable years beginning after December 31, 2017."

CAL DOOLEY
PRESIDENT AND CEO

August 8, 2019

Internal Revenue Service
CC:PA:LPD:PR (REG-104259-18)
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Further Comments on BEAT Proposed Regulations – Vintage NOLs

Dear Sir or Madam:

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC member companies apply the science of chemistry to create and manufacture innovative products that make people's lives better, healthier, and safer. The business of chemistry is a $526 billion enterprise and a key element of the nation's economy. Over 25% of U.S. GDP is generated from industries that rely on chemistry, ranging from agriculture to oil and gas production, from semiconductors and electronics to textiles and vehicles, and from pharmaceuticals to residential and commercial energy efficiency products.

The ACC would like to commend the Department of Treasury ("Treasury") and the Internal Revenue Service (the "IRS") on their significant efforts to provide substantial and timely guidance on the provisions enacted by the Tax Cuts and Jobs Act ("TCJA"), including guidance related to the Base Erosion and Anti-Abuse Tax ("BEAT") contained in REG-104259-18 (the "Proposed Regulations").

In particular, as we noted in our previous letter of February 19, 2019, we appreciate the approach proposed by Treasury and the IRS that section 59A modified taxable income includes the base erosion percentage of any net operating loss ("NOL") for the year that the NOL arose, i.e., the "Vintage Year." We also appreciated the clarification that such a rule meant that the pre-2018 base erosion percentage of an NOL that arose in a taxable years beginning before January 1, 2018 would be zero.

As a follow-up to our previous letter, and after further review and discussion of the Proposed Regulations, we are writing to urge Treasury and the IRS that when finalizing these regulations, clarification is provided that that pre-2018 NOLs are "vintage" for all purposes of the BEAT. Such a clarification would mean that ACC member companies would determine their BEAT liability by comparing their regular tax liability to their modified taxable income adjusted to reflect the impact of the pre-2018 NOL on their regular tax liability. Such clarification is consistent with the statute, the policy behind it, and the Proposed Regulations.

Thank you for the opportunity to submit these comments. We continue to welcome the opportunity to work with Treasury and the IRS as they promulgate guidance.

Sincerely,

Cal Dooley

Cal Dooley

cc:
Lafayette "Chip" G. Harter III
Deputy Assistant Secretary (International Tax Affairs)
Department of the Treasury

Douglas L. Poms
International Tax Counsel
Department of the Treasury

Balfour Beatty

May 17, 2019

Lafayette "Chip" G. Harter III
Deputy Assistant Secretary (International Tax Affairs)
Department of the Treasury

Douglas L. Poms
International Tax Counsel
Department of the Treasury

Kevin Nichols
Senior Counsel
Department of the Treasury

Peter Merkel
Branch Chief
Office of the Associate Chief Counsel

Karen Walny
Attorney-Advisor
Office of Associate Chief Counsel

Balfour Beatty
Management, Inc.
t.201.995.1370
f.201.995.1374
10 Mountainview Road
Suite 120SP
Upper Saddle River, NJ 07458

Re: Comments on Tax Treatment of Pre-TCJA NOLs for Calculating Tax Under Proposed BEAT Regulations (REG-104259-18)

Balfour Beatty wishes to comment on the proposed Base Erosion and Anti-Abuse Tax (BEAT) regulations published in the Federal Register on December 21, 2018.

We are concerned that the proposed regulations will have an unintended effect in reducing the value of pre-enactment net operating losses. The proposed regulations recognize – through a zero-percent base erosion percentage – that pre-Tax Cuts and Jobs Act NOLs should not be affected by the BEAT. However, the proposed regulations do not fully address the retrospective impact on pre-enactment NOLs. Unless the proposed regulations are modified, they may result in taxpayers having significantly higher tax liability as every base erosion payment will reduce the benefit of pre-enactment NOLs utilized in determining regular tax liability.

We are aware that several other companies – including HSBC North America Holdings Inc., Rio Tinto, and FortisUS – have written to you to recommend a Proxy Method modification to the computation of BEAT liability. Under this Proxy Method for purposes of computing BEAT tax, the taxpayer's regular tax paid would be treated as increased by a percentage (equal to the difference between the regular tax rate and the BEAT tax rate) of the NOLs utilized in computing regular tax. The February 19, 2019, HSBC letter and the May 3, 2019, FortisUS letter both include the following proposed language to implement the Proxy Method.

Recommendation — Suggested Final Language (addition in italics)

> Final Treas. Reg. § 1. 59A-1 (b)(16) Regular Tax Liability. The term regular tax liability has the meaning provided in section 26(b). *For the purposes of calculating the base erosion minimum tax under section 59A(b), regular tax liability shall also include an amount equal to the differential between the current tax rate under section 11(b) and the applicable base erosion tax rate under section 59A(b) times any Section 172 deduction actually used to reduce taxable income for the current year for a net operating loss that arose in a taxable year ending prior to January 1, 2018.*

Balfour Beatty supports the recommended Proxy Method language and believes it will appropriately treat pre-enactment NOLs while satisfying the Treasury Department/IRS goal of reducing computational complexity.

Thank you for your consideration of our request. Please contact the undersigned if you have any questions.

Sincerely,

Joanne Bonfiglio

Joanne Bonfiglio

Vice President - Tax

HEINEKEN

HEINEKEN USA
360 Hamilton Avenue, Suite 1103
White Plains, NY 10601
(914) 681-4100

July 25, 2019

Lafayette "Chip" G. Harter III
Deputy Assistant Secretary (International Tax Affairs)
Department of the Treasury

Douglas L. Poms
International Tax Counsel
Department of the Treasury

Kevin Nichols
Senior Counsel
Department of the Treasury

Peter Merkel
Branch Chief
Office of the Associate Chief Counsel

Karen Walny
Attorney-Advisor
Office of Associate Chief Counsel

Re: Comments on Tax Treatment of Pre-TCJA NOLs for Calculating Tax Under Proposed BEAT Regulations (REG-104259-18)

HEINEKEN USA wishes to comment on the proposed Base Erosion and Anti-Abuse Tax (BEAT) regulations published in the Federal Register on December 21, 2018.

We are concerned that the proposed regulations will have an unintended effect in reducing the value of pre-enactment net operating losses. The proposed regulations recognize – through a zero-percent base erosion percentage – that pre-Tax Cuts and Jobs Act NOLs should not be affected by the BEAT. However, the proposed regulations do not fully address the retrospective impact on pre-enactment NOLs. Unless the proposed regulations are modified, they may result in taxpayers having significantly higher tax liability as every base erosion payment will reduce the benefit of pre-enactment NOLs utilized in determining regular tax liability.

We are aware that several other companies – including HSBC North America Holdings Inc and FortisUS – have written to you to recommend a Proxy Method modification to the computation of BEAT liability. Under this Proxy Method for purposes of computing BEAT tax, the taxpayer's regular tax paid would be treated as increased by a percentage (equal to the difference between the regular tax rate and the BEAT tax rate) of the NOLs utilized in computing regular tax. The HSBC letter dated February 19, 2019 and the FortisUS letter dated May 3, 2019 both include the following proposed language to implement the Proxy Method:

HEINEKEN

HEINEKEN USA
360 Hamilton Avenue, Suite 1103
White Plains, NY 10601
(914) 681-4100

Recommendation — Suggested Final Language (addition in italics)

> Final Treas. Reg. § 1. 59A-1 (b)(16) Regular Tax Liability. The term regular tax liability has the meaning provided in section 26(b). *For the purposes of calculating the base erosion minimum tax under section 59A(b), regular tax liability shall also include an amount equal to the differential between the current tax rate under section 11(b) and the applicable base erosion tax rate under section 59A(b) times any Section 172 deduction actually used to reduce taxable income for the current year for a net operating loss that arose in a taxable year ending prior to January 1, 2018.*

HEINEKEN USA supports the recommended Proxy Method language and believes it will appropriately treat pre-enactment NOLs while satisfying the Treasury Department/IRS goal of reducing computational complexity.

Thank you for your consideration.

Sincerely,

Thomas Tulfer
Chief Financial Officer

Rio Tinto

4700 Daybreak Parkway
South Jordan, UT 84009
USA
T 801-204-2000
F 801-204-2891

April 16, 2019

Lafayette "Chip" G. Harter III
Deputy Assistant Secretary (International Tax Affairs)
Department of the Treasury

Douglas L. Poms
International Tax Counsel
Department of the Treasury

Kevin Nichols
Senior Counsel
Department of Treasury

Peter Merkel
Branch Chief
Office of Associate Chief Counsel

Karen Walny
Attorney-Advisor
Office of Associate Chief Counsel

Re: The Treatment of Pre-TCJA NOLs for calculating MTI under REG-104259-18 (Proposed Regulations on Base Erosion and Anti-Abuse Tax)

We are writing to follow up on discussions that we have had with you regarding the appropriate treatment under the base erosion and anti-abuse tax (BEAT) of net operating losses (NOLs) that arose prior to the enactment of the Tax Cuts and Jobs Act (TCJA) and that are allowed to be carried forward for regular tax purposes without the limitations imposed by the TCJA.[1] The preamble to the proposed BEAT regulations (IRS REG-104259-18) discussed two methods for computing modified taxable income (MTI) – the add-back and recomputation methods. While the proposed regulations provide MTI would be calculated under the add-back method, Treasury also requests comments on this method and the practical effects of the recomputation method.

We request the Treasury Department's consideration of a revision to the add-back method for calculating MTI that would be limited to pre-enactment NOLs. This new approach (referred to herein as the "proxy method") provides a transition rule for taxpayers that have pre-enactment NOLs to create parity with taxpayers that do not. The proxy method is simple to administer and straightforward to enforce. Importantly, the proxy method also avoids any concerns about double benefits or double deductions. Finally, the proxy method is consistent with Treasury's view, as indicated in the preamble to the proposed regulations, that pre-enactment NOLs should not have a BEAT impact in post enactment years.

The add-back method in the proposed regulations does not provide an adequate transition for pre-enactment NOLs, causing every base erosion payment to reduce the value of pre-enactment NOLs absorbed in determining regular taxable liability. We observe that the add-back method allows taxpayers without pre-enactment NOLs to make more base erosion payments than taxpayers with pre-enactment

[1] Section 13302 of the TCJA limited the use of NOLs arising in taxable years beginning after December 31, 2017. NOLs arising in taxable years before January 1, 2018 (pre-enactment NOLs) are not subject to these limitations.

NOLs before being subject to any BEAT liability.[2] Consistent with the treatment under the proposed regulations of pre-enactment NOLs having a base erosion percentage of zero, final regulations should also remove any economic disparity between similarly situated taxpayers simply because one taxpayer has pre-enactment NOLs. The recomputation method was one approach proposed to address the disparity; the proxy method discussed below is another approach, but without the requirement of creating different, parallel attributes that are maintained separately, as the preamble notes would occur under the recomputation approach.

The proxy method provides a simple and straightforward method to preserve the value of pre-enactment NOLs while those NOLs are absorbed under rules prior to the TCJA. Importantly, the proxy method also avoids any concerns about double benefits or double deductions.

Treatment of pre-enactment NOLs under the Proposed Regulations

We commend the Treasury Department for acknowledging in the preamble to the proposed regulations that NOLs that arose prior to the date of enactment have a base erosion percentage of zero "because section 59A applies only to base erosion payments that are paid or accrued in taxable years beginning after December 31, 2017." As a result, there is no add-back to MTI for pre-enactment NOLs. The proxy method, as a revision to the add-back method, provides consistent treatment for pre-enactment NOLs. Without revising the add-back method with the proxy method, the result for taxpayers with pre-enactment NOL will be an increase in MTI that will not result for taxpayers without pre-enactment NOLs, even when those taxpayers have more base erosion payments. A taxpayer that uses pre-enactment NOLs to reduce its regular cash tax loses the value of those NOLs if the add-back method is not revised. Without revision, the add-back method imposes BEAT liability that reduces the value of the pre-enactment NOLs used by the difference between the 21% value of the pre-enactment NOL and the BEAT rate (currently at 10%) that is applied to each dollar of base erosion payment. This creates a retroactive application of the BEAT to pre-enactment NOLs that the proposed regulations seek to avoid in applying a zero base erosion percentage for pre-enactment NOLs. The impact on the value of pre-enactment NOLs from a retroactive application of BEAT can be seen in the following example:

Taxpayer has $300 of taxable income prior to the use of $300 of pre-enactment NOLs. Taxpayer is subject to the BEAT and has $600 of base erosion payments (BEP). With the use of the pre-enactment NOLs, taxpayer's regular tax owed is reduced to $0 ($300 - $300). The value of using the pre-enactment NOL is $63 (21% of the $300 NOL) – the amount of cash tax owed, offset by the use of the NOL. However, the use of the NOL increases taxpayer's BEAT by every dollar of base erosion payment. Taxpayer's MTI is $600 and the BEAT liability is $60 (10% of $600). This results in a reduction of the value of the pre-enactment NOLs to extent of the tax imposed under the BEAT ($63 NOL value less the $60 BEAT liability).

TI before NOLs	300	(includes 600 of BEP)
Less pre-TCJA NOL	(300)	(value of NOL = $63 ($300 x 21%))
= Taxable Income	0	
* 21% = Reg tax	0	
MTI = TI + BEP	600	
* 10%	60	
Less Regular Tax	(0)	
= BEAT liability	60	
Proper Value of NOL (300 @ 21%)	63	
Actual Value of NOL within the BEAT liability (300 @ 10%)	(30)	
NOL lost, due to BEAT (300 @ 11%)	33	

[2] *See* Example 2 in Appendix.

The Treasury Department expressed a preference for the add-back method for the simplification it provides taxpayers over the recomputation method, explaining that it would require "complex tracking of separate attributes on a BEAT basis . . ." The proxy method, however, would not undermine the simplification associated with the add-back method, but revise the method to ensure the BEAT does not apply retroactively, to reduce the value of pre-enactment NOLs.

Providing parity between cash tax and pre-TCJA NOLs

The proxy method ensures that taxpayers do not lose the economic benefit provided under section 172 as it applied prior to the TCJA through the application of the BEAT to pre-enactment NOLs. The proxy method is a refinement to the add-back method in the Proposed Regulations that retains the value of pre-enactment NOLs. A taxpayer's BEAT liability would be determined by increasing the amount of deemed regular tax paid by a percentage of the pre-enactment NOL used in the current year. The percentage would be measured as the difference between the U.S. corporate tax rate of 21% (which is the proper value of the pre-enactment NOL) and the BEAT rate of 10% (which is the reduced value that pre-enactment NOL's obtain under the Proposed Regulations). The proxy method would not remove BEAT liability in all cases because only a percentage of the pre-enactment NOL would be taken into account in determining BEAT liability.

The result of revising the add-back method with the proxy method can be compared with the results using the facts above. Based on those facts, the amount of deemed regular tax paid would be increased by 11% of the pre-enactment NOL used in the current year.

TI before NOLs	300	(includes 600 of deductions for BEPs)
Less pre-TCJA NOL	(300)	(value of NOL = $63 ($300 x 21%))
= Taxable Income	0	
* 21% = Reg tax	0	
MTI = TI + BEPs	600	
* 10%	60	
Less Regular Tax + Proxy Adjustment	33	(0 regular tax + 11% of 300)
= BEAT liability	27	
Proper Value of NOL @ 21%	63	
Actual Value of NOL within BEAT Calculation	(63)	
Value of NOL lost, due to BEAT	0	

The proxy method prevents the result under the recomputation method, where the starting point for MTI could be less than zero. Furthermore, the proxy method would not change the amount of the NOL deduction determined in the Proposed Regulations for purposes of adding the base erosion percentage to MTI. For this purpose, the NOL deduction also would not be less than zero.

The additional examples included in the Appendix compare the impacts of the add-back method on taxpayers with and without pre-enactment NOLs. These examples illustrate how the proxy method ensures the BEAT is not applying retroactively to taxpayers with pre-enactment NOLs without the complexity and potential for double counting of NOL economic benefits that some have suggested might exist under the recomputation approach

* * * * *

Rio Tinto

We very much appreciate your consideration of these comments and look forward to discussing with you the approach described in this letter. Please contact Michael Gardner, Vice President of Rio Tinto America and U.S. Tax Leader at michael.gardner@riotinto.com if you have any questions regarding this submission.

Respectfully,

Michael Gardner

Michael Gardner

Appendix

Example 1: comparing taxpayers with and without pre-enactment NOLs

	Taxpayer with Pre-TCJA NOLs			Taxpayer without NOLs		
Taxable Income Before NOL	300	300	300	300	300	300
Pre-TCJA NOL	(300)	(300)	(300)	0	0	0
Base Erosion Payments	600	300	0	600	300	0
BEAT rate	10%	10%	10%	10%	10%	10%

(a) Calculation under the Proposed Regulations' add-back method

	Taxpayer with Pre-TCJA NOLs			Taxpayer without NOLs		
Taxable Income Before NOL	300	300	300	300	300	300
Pre-TCJA NOL Utilized	(300)	(300)	(300)	0	0	0
Taxable Income	0	0	0	300	300	300
Regular Tax (@21%)	**0**	**0**	**0**	**63**	**63**	**63**
Taxable Income	0	0	0	300	300	300
Base Erosion Payments	600	300	0	600	300	0
Modified Taxable Income	600	300	0	900	600	300
Tentative BEAT (@10%)	**60**	**30**	**0**	**90**	**60**	**30**
Less Reg Tax	(0)	(0)	(0)	(63)	(63)	(63)
BEAT liability	**60**	**30**	**0**	**27**	**0**	**0**

(b) Calculation under the Proposed Regulations' add-back method (revised for the proxy method)

	Taxpayer with Pre-TCJA NOLs			Taxpayer without NOLs		
Taxable Income Before NOL	300	300	300	300	300	300
Pre-TCJA NOL Utilized	(300)	(300)	(300)	0	0	0
Taxable Income	0	0	0	300	300	300
Regular Tax (@21%)	**0**	**0**	**0**	**63**	**63**	**63**
Taxable Income	0	0	0	300	300	300
Base Erosion Payments	600	300	0	600	300	0
Modified Taxable Income	600	300	0	900	600	300
Tentative BEAT (@10%)	**60**	**30**	**0**	**90**	**60**	**30**
Less: Reg tax + [Proxy]	(33)	(33)	(33)	63	63	63
BEAT liability	**27**	**0**	**0**	**27**	**0**	**0**

Rio Tinto

Example 2: comparing taxpayers with and without pre-enactment NOLs that have disparate base erosion payments

(a) Calculation under the Proposed Regulations' add-back method

	Taxpayer with Pre-TCJA NOLs		**Taxpayer without NOLs**
Taxable Income Before NOL	300		300
Pre-TCJA NOL utilized	(300)		0
Taxable Income	0		300
Regular Tax (@21%)	**0**		**63**
Taxable Income	0		300
Base Erosion Payments	**300**		**600**
BEAT rate	10%		10%
MTI	300		900
* 10%	30		90
Less Reg Tax	(0)		(63)
BEAT liability	30		27

(b) Calculation under the Proposed Regulations' add-back method (revised for the proxy method)

	Taxpayer with Pre-TCJA NOLs		**Taxpayer without NOLs**
Taxable Income Before NOL	300		300
Pre-TCJA NOL	(300)		0
*** 21% US rate**	0		63
Base Erosion Payments	300		600
BEAT rate	10%		10%
MTI	300		900
*** 10%**	30		90
Less Reg Tax + 11% NOL	(0 + 33)		(63 + 0)
BEAT liability	**0**		**27**

Stephen E. Comstock
Director, Tax and Accounting Policy

200 Massachusetts Avenue
Washington, DC 20001
Telephone (202) 682-8455
Fax (202) 682-8408
Email comstocks@api.org
www.api.org

August 1, 2019

CC:PA:LPD:PR (REG – 104259-18)
Internal Revenue Service
Room 5203
Post Office Box 7604
Ben Franklin Station
Washington, DC 20044

Re: BEAT "Proxy Method" for Net Operating Loss Treatment

As stated in our letter dated February 18, 2019, API and its member companies (hereafter referred to collectively as "API") strongly support the approach proposed by Treasury to exclude pre-2018 NOLs from the IRC sec. 59A Base Erosion Anti-Abuse Tax ("BEAT") NOL add-back computation. Such an approach is consistent with the policy objectives and statutory construct of IRC sec. 59A.

Applying the same rationale, API recommends extending such an approach to pre-2018 NOLs for all purposes of the BEAT. In other words, taxpayers should assess their BEAT liability for post-TCJA tax years by comparing their regular tax liability as calculated under IRC sec. 59A(b)(1)(B) to their modified taxable income amount adjusted to reflect, amongst other things, the negative impact of the pre-2018 NOL on their regular tax liability. Such a result is likewise consistent with the policy objectives and statutory construct of IRC sec. 59A because it mitigates the potential for a pre-2018 loss to increase, or depending on the facts, trigger a BEAT tax liability as the result of the application of an entirely new international (minimum) tax rule to a tax base that includes deductions for pre-2018 domestic losses carryovers. If this issue is not addressed, the result is a retroactive application of the BEAT to expenses incurred by taxpayers prior to the enactment of IRC sec. 59A in contradiction to the clear intent of congress to apply BEAT to a taxpayer's related party deductible expenses on a prospective basis as supported by the statutory definition of Base Erosion Payment under IRC sec. 59A(d)(1)-(5)[1] and the legislative history to the BEAT as reflected in Section 14401(e) of the Tax Cuts and Jobs Act, not codified.[2]

[1] The definition of a base erosion payment can be found at IRC sec. 59A(d). That subsection does not speak to base erosion payments before enactment of the Tax Cuts and Jobs Act.

[2] Section 14401(e) of the Tax Cuts and Jobs Act ("TCJA"), not codified, provides that "The amendments made by this section shall apply to base erosion payments (as defined in IRC sec. 59A(d) of the Internal Revenue Code of 1986, as added by this section) paid or accrued in taxable years beginning after December 31, 2017." This provides with clear statutory authority that base erosion payments made prior to enactment of the TCJA should not be considered under IRC sec. 59A. The same conclusion should also be reached for any NOL carryforwards attributable to these pre-2018 payments because the carryforward deduction itself is not a separate and distinct base erosion payment in the year

API is aware this issue has been raised by numerous taxpayers and supports the BEAT "Proxy Method" as recommended by FORTIS US as one approach to ensure, similarly situated taxpayers will be able to compete on equal footing as they transition into the new international tax system, notwithstanding the fact one of the taxpayers may have a pre-2018 NOL carryforward. Since the exclusion of vintage losses will only apply to pre-2018 NOL carryovers, the complexity introduced by including such a rule is constrained by time and application. API believes the impacts attributable to this approach is limited.

Over the past decade, the natural gas and oil industry has experienced a normal market cycle that has required significant capital spending to achieve growth. As a result, many API companies carry pre-2018 NOLs (i.e., domestic losses) into the post-TCJA period, which, absent regulatory clarification by Treasury, have the potential to become significantly less valuable as the result of changes to the international tax rules.

It is clear from the numerous comments submitted on BEAT and GILTI that taxpayers and Treasury are aware of the complexities introduced by the interaction of pre-2018 tax attributes, including NOLs, with the new international tax rules. It is also clear that Treasury is working hard to address these disconnects to ensure a smooth transition into the post-TCJA tax years as evidenced by proposed regulations for BEAT and GILTI; API commends Treasury for this effort.

For example, the decision to treat pre-2018 NOLs as "vintage" for purposes of the BEAT add-back partially mitigates the negative effect of a pre-2018 NOL in determination of a taxpayers BEAT tax liability. Likewise, the recently proposed GILTI high-tax exception provides taxpayers a means to avoid inefficiently applying domestic NOL carryovers, including pre-2018 NOLs, against otherwise creditable high-taxed GILTI income.

Accordingly, API supports Treasury issuing further clarifying regulatory guidance to ensure pre-2018 NOLs are in effect "vintage" for all purposes of the BEAT.

Thank you for considering this modification to the regulations.

Sincerely,

Stephen Comstock
Director – Tax & Accounting Policy

---

it is utilized, but rather the reflection of costs paid and accrued in a pre-tax reform year. In addition, the rules in IRC sec. 172 do not disaggregate the NOLs into components that include a deduction for a base erosion payment.

OFII | GLOBAL INVESTMENT GROWS AMERICA'S ECONOMY

CC:PA:LPD:PR (REG – 104259-18)
Internal Revenue Service
Room 5203
Post Office Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on Net Operating Loss ("**NOL**") Treatment Under Proposed BEAT Regulations (REG-104259-18

The Organization for International Investment ("**OFII**") respectfully submits this letter as a supplement to our comment letter of February 19, 2019 regarding the Notice of Proposed Rulemaking under section 59A (commonly referred to as the "**Base Erosion and Anti-Abuse Tax**" or "**BEAT**") published by the Department of the Treasury ("**Treasury**") and the Internal Revenue Service ("**IRS**") in the Federal Register on December 21, 2018 (the "**Proposed BEAT Regulations**").

OFII represents the U.S. operations of many of the world's leading international companies. Over the course of more than two decades of promoting inbound investment in the United States, OFII has always supported transparency, compliance with U.S. laws and a level playing field for U.S. inbound investment. The BEAT raises both administrative and interpretative issues and OFII would like to commend Treasury and IRS for their efforts in developing proposed regulations.

In our previous comments and meetings OFII has supported Treasury's decision to exclude pre-2018 net operating losses (*i.e.*, NOL deductions allowed under section 172 attributable to losses arising in tax years beginning before January 1, 2018) from the amount that may be added back for purposes of computing modified taxable income ("**MTI**"). OFII believes that excluding pre-enactment NOLs from BEAT is consistent with the effective date of the BEAT provision not to apply to base erosion payments (or losses attributable to such payments) that were paid or accrued in tax years beginning before January 1, 2018.

Consistent with that approach, OFII further supports the exclusion of pre-2018 NOLs from a taxpayer's section 59A minimum tax computation by either adjusting the taxpayers Regular Tax Liability ("**RTL**") to exclude any pre-2018 NOL or through a corresponding adjustment to the MTI to back out the effect of the pre-2018 NOL.[1] These adjustments to the taxpayer's RTL or MTI would be made solely for purposes of the taxpayer's BEAT determination and only for pre-2018 NOLs as means to effectuate the transition from pre to post-BEAT years in a way that is consistent with Congressional intent as supported by the mechanics of section 59A and the legislative history.

Section 59A grants Treasury and IRS broad authority to issue regulations to address transition issues (and other matters) even where Congress may not have expressly addressed a particular issue, provided such regulations are "necessary and appropriate to carry out the provisions of (section 59A).[2] OFII supports regulatory action on this matter as both necessary and appropriate, as explained below. Furthermore, OFII believes it is particularly important for Treasury to issue regulatory guidance to accommodate transition for the BEAT given the fact Section 59A is fundamentally different from any prior base erosion provisions in

[1] The mechanics for adjusting MTI using the BEAT Proxy Method are discussed in comments filed by FortisUS on May 13, 2019 (ID: IRS-2019-0002-0072).
[2] Section 59A(i).

the Code prior to the enactment of the Tax Cuts and Jobs Act which arguably necessitates increased focus to ensure the statutory and regulatory guidance matches the policy objectives/legislative intent of Congress when they enacted the legislation.

Although section 59A normally applies on a year-by-year basis without any mechanism for credit for prior BEAT paid by the taxpayer, the statutory regime, as confirmed by the proposed regulations, is clearly intended to provide parity, to the extent possible, between taxpayers that generate current year losses, and thus NOLs, and those that do not.

For example, a taxpayer with a current year loss computes modified taxable income for the loss year by starting with negative taxable income, thereby reducing modified taxable income, and potentially BEAT, by the excess of deductions over income for the year, regardless of whether such excess is attributable to base erosion payments or non-base erosion payments or a combination thereof. The taxpayer, then, increases modified taxable income in the year the NOL is deducted by the base erosion percentage of such NOL deduction, determined by reference to the year of the origin of the NOL. Thus, a taxpayer that generates the same amount of base erosion payments and net income overall would generally pay the same overall tax (regular tax and/or BEAT).

However, this clearly intended parity can only apply if both years at issue are subject to BEAT. Where a taxpayer generates a NOL in a pre-2018 taxable year, requiring the taxpayer to reduce its regular tax liability by the NOL results in a breakdown of the parity described above by placing the taxpayer with a pre-2018 NOL in a materially worse position than a taxpayer that did not generate a NOL but otherwise generated the same modified taxable income, because the taxpayer with the pre-2018 NOL is not permitted to reduce its BEAT by amount of the loss that generated the NOL in the prior year, as BEAT did not apply.

Thus, where the statutory regime is intended to treat taxpayers that generate NOLs and those that do not similarly, it would be "appropriate to carry out the provisions of this section" to treat these taxpayers similarly in post-2017 years to which such pre-2018 NOLs are carried by adjusting the taxpayer's RTL or MTI (to neutralize the impact of pre-2018 NOLs) for purposes of the BEAT computation.

Thank you for the opportunity to submit these comments. We welcome the opportunity to answer any questions you might have on these as well as our previously submitted BEAT comments.

Sincerely,

Nancy McLernon
President and CEO
Organization for International Investment

FORTISUS INC.

27175 Energy Way
Novi, MI 48377
Telephone: (709) 737-2800
Facsimile: (709) 737-5307

April 30, 2019

Lafayette "Chip" G. Harter III
Deputy Assistant Secretary (International Tax Affairs)
Department of the Treasury

Douglas L. Poms
International Tax Counsel
Department of the Treasury

Kevin Nichols
Senior Counsel
Department of the Treasury

Peter Merkel
Branch Chief
Office of the Associate Chief Counsel

Karen Walny
Attorney-Advisor
Office of Associate Chief Counsel

Re: Comments on Tax Treatment of Pre-TCJA NOLs for Calculating Tax Under Proposed BEAT Regulations (REG-104259-18) and Proposed Modification to the Add-back Computation Method

This letter follows our comment letter of February 15, 2019 and our subsequent meeting on April 4, 2019, regarding the proposed Base Erosion and Anti-Abuse Tax ("**BEAT**") regulations ("**Proposed Regulations**") under Internal Revenue Code ("**IRC**") Section 59A published in the Federal Register on December 21, 2018. In contrast to our previous recommendations, we are now respectfully requesting that the Department of the Treasury and the Internal Revenue Service ("**IRS**") revise the guidance in the Proposed Regulations to include a modification to the add-back method addressing the treatment of pre-enactment net operating losses ("**NOLs**").

In our February 15 comment letter and subsequent meeting, we noted that the proposed add-back method and the alternative recomputation method could produce substantially different tax liabilities for taxpayers and recommended taxpayers be given the option, via an irrevocable election, of choosing which method they could use so as not to disadvantage a taxpayer.

This letter sets forth a means within the proposed add-back method to address the effect of the Proposed Regulations on pre-enactment NOLs (i.e., NOLs arising in tax years beginning before January 1, 2018).

The main concern we have with the Proposed Regulations and the proposed add-back method is the impact on pre-enactment NOLs. As a principle of the Proposed Regulations, and as set forth in other contexts in the Proposed Regulations, it is recognized that pre-enactment NOLs should not be affected by BEAT (i.e., the 0% base erosion percentage for such NOLs). However, the Proposed Regulations do not fully address the retrospective impact of the add-back method on pre-enactment NOLs. If the Proposed Regulations do not fully protect the pre-enactment NOLs, the add back method may result in the taxpayer having significantly higher tax liability as every base erosion payment will reduce the benefit of pre-enactment NOLs utilized in determining regular tax liability.

This adverse impact on pre-enactment NOLs is illustrated in the table below where two nearly identical corporate taxpayers are compared.

Taxpayers A and B each have $300 of taxable income (including $600 of base erosion payments) before NOLs. Taxpayer A also has $300 of pre-enactment NOLs. For Taxpayer A, the $300 of NOLs reduces regular tax to $0 while the $600 of base erosion payments give rise to a BEAT tax of $60 ($600 x 10% BEAT rate). For Taxpayer B, there is $63 of regular tax ($300 x 21% regular tax rate) and $27 of BEAT tax ($90 tentative BEAT tax less $63 regular tax). Taxpayer A pays a total tax of $60 while Taxpayer B pays a total tax of $90, which means Taxpayer A's $300 of NOLs saved it only $30 compared to Taxpayer B. This is the result of the benefit from utilizing pre-enactment NOLs at the 10% rate rather than at the 21% regular tax rate that would have applied absent BEAT.

Add-Back Method Illustrative Example		
	Taxpayer A ($)	Taxpayer B ($)
Taxable Income Before NOL	300	300
Pre-Enactment NOL Used	(300)	0
Taxable Income	0	300
Regular Tax (21% rate)	0	63
Taxable Income	0	300
Base Erosion Payments	600	600
Modified Taxable Income	600	900
Tentative BEAT (10% rate)	60	90
Less: Regular Tax	(0)	(63)
BEAT Liability	60	27

The Proposed Regulations should preserve the benefit of the pre-enactment NOLs. A proposed modified approach ("Proxy Method") for purposes of computing BEAT tax, would effectively increase the taxpayer's regular tax treated as paid by 11% (equal to the difference between the regular tax rate and the BEAT tax rate) of the NOLs utilized in computing regular tax. As illustrated in the table below, a taxpayer utilizing pre-enactment NOLs would not be subject to any higher BEAT tax liability than an otherwise identical taxpayer that did not have pre-enactment NOLs.

Proxy Method Illustrative Example		
	Taxpayer A ($)	Taxpayer B ($)
Taxable Income Before NOL	300	300
Pre-Enactment NOL Used	(300)	0
Taxable Income	0	300
Regular Tax (21% rate)	0	63
Taxable Income	0	300
Base Erosion Payments	600	600
Modified Taxable Income	600	900
Tentative BEAT (10% rate)	60	90
Less: Regular Tax + Proxy	(33)	(63)
BEAT Liability	27	27

The Proxy Method is consistent with the Department of the Treasury and the IRS goal of reducing computational complexity as it avoids any need to recompute tax or maintain separate sets of records to track annual limitations. In addition, the Proxy Method would maintain the principles of the Proposed Regulations to not impact pre-enactment NOLs and would have limited ongoing impact as it will cease to apply when taxpayers have fully utilized their pre-enactment NOLs.

We understand that two other companies - HSBC North America Holdings Inc. ("HSBC") and Rio Tinto - have recommended this Proxy Method. FortisUS supports their positions and joins them in recommending the Proxy Method as an alternative to preserve the principles of the Proposed Regulations. We also note HSBC's February 19, 2019, comment letter suggested simple, straightforward language to implement the proxy method:

> Recommendation - Suggested Final Language (addition in italics) Final Treas. Reg. § 1. 59A-1 (b)(16) Regular Tax Liability. The term regular tax liability has the meaning provided in section 26(b). *For the purposes of calculating the base erosion minimum tax under section 59A(b), regular tax liability shall also include an amount equal to the differential between the current tax rate under section 11(b) and the applicable base erosion tax rate under section 59A(b) times any Section 172 deduction actually used to reduce taxable income for the current year for a net operating loss that arose in a taxable year ending prior to January 1, 2018.*

We appreciate your consideration of our comments. We would be happy to discuss any questions you may have.

Sincerely,

Karen Gosse
Vice President Treasurer
FortisUS Inc.