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Internal Revenue Service
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Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2023-2: *Initial Guidance Regarding the Application of the Corporate Alternative Minimum Tax under Sections 55, 56A, and 59 of the Internal Revenue Code*

To whom it may concern:

The National Association of Manufacturers ("NAM") appreciates the opportunity to provide comment to the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") on Notice 2023-7,[1] which provides initial guidance regarding the application of the corporate alternative minimum tax enacted by the Inflation Reduction Act ("IRA").[2] The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs 13 million men and women, contributes $2.81 trillion to the U.S. economy annually and accounts for 55% of private-sector research and development.

Background on Corporate Alternative Minimum Tax

The Inflation Reduction Act created a new 15% corporate alternative minimum tax in the form of a tax on financial statement income ("book tax") that applies to corporations with a three-year average adjusted financial statement income exceeding $1 billion for taxable years beginning after Dec. 31, 2022. Foreign-parented multinational groups with global income of $1 billion and U.S. income of $100 million would be subject to the tax. A corporation will owe tax under this regime if its book tax liability is greater than its regular tax liability plus the base erosion and anti-abuse tax.

A pure "book tax" would effectively eliminate Congressionally-approved measures that use the tax code to stimulate investment, such as accelerated depreciation and the R&D tax credit, or to prevent double taxation, such as the foreign tax credit. Manufacturers fought for statutory adjustments to the regime to keep in place these important provisions, and the enacted bill allows these amounts as adjustments to a company's book earnings. Financial statement losses can be carried forwarded indefinitely for taxable years ending after Dec. 31, 2019, but cannot

[1] *Notice 2023-7: Initial Guidance Regarding the Application of the Corporate Alternative Minimum Tax under Sections 55, 56A, and 59 of the Internal Revenue Code.* 2023-3 IRB 390 (17 January 2023). *Available at* https://www.irs.gov/pub/irs-irbs/irb23-03.pdf.
[2] *Inflation Reduction Act of 2022*. Pub.L. 117-169 (2022).

exceed 80% of income. A tax credit for prior year book taxes can be applied against regular tax liability provided that the regular tax liability is greater than the book tax liability. Finally, additional provisions address the treatment of specific items for book tax purposes, such as partnership income.

In this letter, the NAM offers comments to Treasury's guidance implementing the CAMT. However, manufacturers believe that alternative minimum taxes, including a "book tax," are unacceptable ways of addressing perceived deficiencies in the tax system and add complexity to an already complicated system.

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I. Safe Harbor Method for Determining Applicable Corporation Status

Guidance: The guidance proposes a safe harbor test with respect to whether a taxpayer may be subject to CAMT. Under the safe harbor test, a taxpayer would be able to perform a simplified calculation with respect to determining adjusted financial statement income if the taxpayer's three-year AFSI average does not exceed $500 million or $50 million for a foreign-parented multinational group. Most of the adjustments to AFSI would be ignored but for certain exceptions. According to the guidance, AFSI is "determined after taking into account AFS consolidation entries except those that eliminate transactions between persons not treated as a single employer (under Section 52(a) or (b))."[3] As currently proposed, the safe harbor is only applicable to the first tax year (2023 for calendar year taxpayers).

Recommendation: While manufacturers appreciate the proposed safe harbor, the NAM respectfully recommends that Treasury and the IRS consider making the safe harbor test permanent. At a minimum Treasury and the IRS should allow for the safe harbor until the 2026 tax year, at which point the pre-CAMT years will not be covered by the three-year AFSI period. Permanently continuing the safe harbor is reasonable in light of the fact that the IRA does not establish a limit on the length of the safe harbor. Without an extension, a taxpayer could be subject to CAMT in 2024 and beyond solely because the safe harbor is not available after 2023.

For example, consider a scenario whereby the taxpayer's financial statement income, as reported to shareholders, has been consistently below $500 million since 2020 and is expected to remain so in the future. However, in 2022 there was an intercompany gain that was eliminated from the global applicable financial statement with a consolidation entry. Without the safe harbor (or any other provision that clarifies that such entry is not excluded) this gain would cause any three-year period covered by the AFS to exceed the $1 billion threshold.

Finally, Treasury and the IRS should also consider increasing the thresholds to $1 billion and $100 million as a way of easing the compliance burden associated with CAMT.

[3] Notice 2023-7 at 399.

II. AFSI Adjustments for Depreciation

AFSI Adjustment for Tax Depreciation

Guidance: One of the key adjustments the IRA provides with respect to AFSI is the regular tax system's depreciation deductions for property. Specifically, a taxpayer must disregard any amount of depreciation expense that is taken into account on the taxpayer's AFS and instead use the regular tax system's depreciation (i.e., bonus depreciation). The guidance proposes that such an adjustment would apply to tax depreciation deductions claimed in the years prior to Jan. 1, 2023 (prior to becoming subject to the CAMT).

By failing to provide for a transition rule for property placed in service in pre-CAMT years, the guidance undermines the use of the regular tax system's accelerated depreciation. The guidance's example (Section 4.08) whereby a taxpayer placed in service in 2018 a $1,000 property and took 100% bonus depreciation that same year and meanwhile depreciated the property over 40 years ($25 per year) for book purposes clearly illustrates the impact. For 2023, the taxpayer would have zero in tax depreciation while with respect to AFSI it would have to disregard the $25 in book depreciation resulting in a net increase in AFSI. Accordingly, without a transition rule, capital intensive industries like manufacturing would be penalized for using accelerated depreciation, a critical pro-growth incentive with longstanding congressional support that reduces the after-tax cost for the purchases of property.

Recommendation: The NAM respectfully recommends that Treasury and the IRS provide a transition rule that provides no AFSI adjustment for depreciation be made with respect to property placed into service prior to the corporation becoming an applicable corporation.

In addition, the NAM recommends that Treasury and the IRS exercise its authority to provide transition relief for taxpayers that have generated a net operating loss due in part to accelerated deprecation in a pre-CAMT year. This relief would allow taxpayers with tax depreciation deductions associated with tax NOL carryforwards to use the tax depreciation deductions as an adjustment to AFSI. As a result, the tax depreciation deduction that is associated with the tax NOL carryforward could be included in the financial statement NOL, which would then be subsequently carried forward.

Adjustments Relating to Depreciation Capitalized to Inventory

Guidance: The guidance proposes that AFSI can be reduced by tax depreciation that is capitalized to inventory (under Section 263A) and recovered as part of cost of goods sold in computing gross income.

Recommendation: The NAM supports Treasury's proposal in this instance, as it is similar to the treatment of regular tax depreciation and is consistent with the regular tax system's treatment of depreciation in COGS, in particular with the treatment of depreciation in COGS for purposes of section 163(j), which relates to the tax treatment of interest expense.[4] The NAM notes that taxpayers subject to Section 263A are required to capitalize all direct costs and certain indirect costs into the basis of property produced or acquired for resale. Among the

[4] *See* § 1.163(j)-1(b)(1)(iii) whereby depreciation, amortization or depletion expenses that are capitalized into inventory under Section 263A are added back to taxable income to determine the ATI base from which a taxpayer's allowable interest deduction is calculated.

indirect costs required to be capitalized are depreciation (along with amortization and cost recovery allowances) on equipment and facilities used to produce inventory.

III. AFSI Consequences of Covered Nonrecognition Transactions

Covered Transactions Involving Solely an Acquirer AFS Group and a Target AFS Group

Guidance: According to the guidance, the AFSI of the target's AFS for a group of entities (AFS group) is combined with the AFSI of the acquirer AFS group for every year of their respective three-taxable-year periods in the event of a covered transaction.

Recommendation: The NAM respectfully urges Treasury to consider an alternative approach whereby the target becomes part of the acquirer group via a taxable year-end transaction which would mean that the target would become a member of the group immediately after its taxable year-end.[5] In other words, the AFSI of the target will not be combined with those of the acquirer during the time before the transaction. Otherwise, the acquirer could find itself subject to CAMT immediately following the acquisition of the target. Moreover, Treasury's proposed approach would cover transactions during 2020-2022 or the period before the enactment of CAMT when taxpayers did not have any reasonable expectation of being possibly subject to this new tax regime.

AFSI and Applicable Corporation Status Resulting from Certain Transactions

Guidance: According to the guidance, covered nonrecognition transaction is defined as a transaction that does not give rise to a gain or loss and thus is not recognized for income tax purposes. However, per the guidance in a multi-step transaction that, when considered as a whole, constitutes a single nonrecognition transaction, each portion of a larger transaction is evaluated separately. As a result, the treatment of a particular portion may be affected by the tax treatment of another portion as part of the larger transaction. In other words, what the guidance proposes is essentially an all-or-nothing rule whereby a recognized portion of a transaction would result in the denial of the nonrecognition treatment for the rest of the transaction.

Of note, the guidance includes an example (Section 3.03(e) Example 5) whereby partnership nonrecognition transactions may result in financial statement net income. Under this example there is transfer of property to a partnership by a partner and a transfer of cash to the partner by the partnership. However, the guidance finds that the entire transaction is a covered recognition transaction for the purposes of CAMT as one part of the transaction (exchange) is considered taxable even though another part is nontaxable (contribution) under the regular tax system. In other words, the guidance provides that no adjustments to AFSI are made on any portion of the transaction (therefore, no financial statement gain is excluded from AFSI even if it is attributable to the contribution portion of the transaction).

Recommendation: The NAM respectfully recommends that Treasury and the IRS adopt a bifurcation rule instead of the cliff approach proposed by the guidance. With the above example in mind, to the extent a partnership contribution or distribution transaction is part taxable and part nonrecognition, the NAM recommends that AFSI adjustments should still be made to the extent there is financial statement income or loss attributable to the nonrecognition portion of the transaction.

[5] *See* § 1.59A-2(c)(4)(ii).

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IV. Specific Guidance Questions

Below the NAM addresses specific questions posed by Treasury and the IRS in the guidance.

(1)(c) *Should any adjustments to AFS gain or loss be made to Covered Recognition Transactions carried out solely between or among members of a single AFS Group?*

As CAMT is based on financial statement income, when a company reports on a consolidated financial basis, transactions resulting in a gain between or among members of a single AFS group are "eliminated" and as a result are not reported to shareholders. It is also important to recognize that such a gain should not be considered as indicative of future earnings thus warranting its inclusion which in it of itself could trigger the group to CAMT due to its inclusion during the three-year AFS period.[6]

(2) *How should a taxpayer with Tax COGS Depreciation make adjustments (e.g. AFSI is reduced by only the amount of Tax COGS Depreciation that is recovered as part of COGS).*

The NAM would respectfully note that no special rules are required as taxpayers must already determine these amounts and make book-tax adjustments in preparing their federal tax returns. The NAM would also point out that tax and book figures for depreciation recovered in COGS are available and auditable.

(6) *What duration (if any) should be required before an applicable corporation should be treated as no longer an applicable corporation and (7) what additional facts and circumstances should be considered relevant in determining whether an applicable corporation should continue to be treated as an applicable corporation?*

According to the IRA, an applicable corporation shall no longer be subject to CAMT if there is a change in ownership or when the corporation does not meet the financial statement income test over a period of consecutive taxable years. The NAM respectfully recommends that the determination should occur annually and be based on the immediately preceding three-year AFS period. Whether a taxpayer is subject to CAMT should be based on recent AFSI as opposed to past AFSI that gave rise to CAMT as past AFSI is not necessarily predictive of future performance.

The NAM also recommends that extraordinary items such as gain or loss on disposition of a business be excluded from the calculation of the three-year AFS period given that such a one-time transaction should not in itself trigger CAMT as it is in no way predictive of AFSI.

[6] This would principally apply to entities such as partnerships to which Section 52(b) applies.

(16) ***To what extent (if any) should items included in Other Comprehensive Income in a taxpayer's AFS be included in AFSI?***

Based on the statutory language governing AFSI, the NAM respectfully submits that other comprehensive income should not be included in AFSI. The IRA states that AFSI is "the net income or loss of the taxpayer set forth on the taxpayer's AFS for such taxable year" and accordingly point out that OCI should not be included in AFSI because it is not considered part of "net income" as defined by the U.S. GAAP Master Glossary.[7] A colloquy between Senate Finance Committee Chairman Ron Wyden (D-OR) and Senator Ben Cardin (D-MD) during the Senate's consideration of the IRA in which Chairman Wyden confirms that OCI "is not included in financial statement income" supports this proposition.[8]

(19) ***To what extent should guidance provide adjustments to include in AFSI mark to market unrealized gains and losses that are not otherwise included in AFSI? Should this depend on the extent to which the taxpayer marks to market the item for regular tax purposes?***

Under the regular tax system, some taxpayers mark to market positions, either due to the requirements of the Code (*e.g.*, under section 475(a) or section 1256) or due to an election (*e.g.*, under section 475(e) or (f)). In some cases, these taxpayers do not use mark to market accounting for financial statement purposes, or they may reflect the impact of mark to market accounting in footnote disclosure in financial statements. Because of the potential for distortion that may arise if mark to market adjustments are not included in AFSI, we recommend that guidance provide that mark to market gains and losses that are included for regular tax purposes are likewise included in AFSI.

(20) ***Should the rules relating to the AFS for a group of entities (Section 451(b)(5)) be modified for purposes of determining the AFSI of a corporation included in an AFS Group?***

Under the regular tax system, if the financial results of a taxpayer are reported on the applicable financial statement for a group of entities, such statement is treated as the applicable financial statement of the taxpayer.[9] As further defined in regulation these financial statements are considered to be the applicable financial statements of the taxpayer (e.g. consolidated financial statements), which is reaffirmed by the IRA.[10] Said differently, in the case of group members filing a consolidated federal income tax return, the IRA makes it clear that they should be treated as one entity, which means that consolidating entries should be included.

Accordingly, clarifying guidance is needed regarding consolidating financial entries and to what extent they must be included in the calculation of AFSI specifically in the case of partnerships, particularly those that are 100% owned by members of a consolidated group and that (under Section 52(b)) are considered along with its owners as part of a single employer. In this case, it is important to point out that for financial statement purposes, the partnership is effectively a member of the group and as all of its income is included in the consolidated income tax return it should be treated as such. As a result, consolidating entries between the two entities should be

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[7] *See* IRC § 56A(a).
[8] 168 CONG. REC. S4165 (daily ed. Aug. 6, 2022) (colloquy between Sens. Wyden and Cardin).
[9] *See* IRC § 451(b)(5).
[10] *See* §1.451-3(h)(3) and IRC § 56A(c)(2)(A).

included in the calculation of AFSI. Failing to do so would then lead to a result that is inconsistent with the consolidated financial statements that include the results of both entities.

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V. Comments Regarding Rules Not Included in this Notice

Below the NAM addresses specific CAMT issues not addressed by the guidance.

(2) *How should the term "distributive share" of a partnership's AFSI be interpreted? Should the term be based on financial accounting principles or tax principles or both?*

According to the IRA, if the taxpayer is a partner in a partnership, the AFSI of the taxpayer with respect to such partnership shall be adjusted to only take into account the taxpayer's distributive share of the AFSI of such partnership (under the IRA, the AFSI of a partnership is the partnership net income or loss set forth on the partnership's AFS, adjusted under rules similar to the AFSI rules)[11].

Further guidance is needed to provide clarity in determining the corporation's "distributive share" of the AFSI of a partnership. The NAM recommends flexibility and suggests either using the tax rules relating to a partner's distribution share or financial statement principles.[12]

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VI. Issues Requiring Guidance

Below the NAM raises several issues not addressed in the current guidance but that are needed to be addressed in future guidance to provide taxpayer certainty.

AFSI Adjustments Relating to Trade or Business Expenses (Section 162 Tax Deductions)

The regular tax system allows a taxpayer to deduct ordinary and necessary expenses paid or incurred in carrying on a trade or business though some of these expenses may be capitalized improvements for financial statement purposes. With respect to these deductions, the NAM respectfully recommends that taxpayers be allowed to deduct future trade or business expenses on a tax basis and that a transition rule be provided such that pre-2023 expenses are deducted in AFSI through a decrease in the book depreciation addback. This approach would prevent an unfair burden on the taxpayer in a year in which a significant Section 162 costs are incurred for regular tax but depreciated over the life of an asset for CAMT purposes.

AFSI Adjustments Relating to Dividends-Received Deduction (Section 245A Deduction for Foreign Source Dividends)

According to the IRA, in the case of any corporation which is not included in the taxpayer's U.S. consolidated group, AFSI "shall be determined by only taking into account the dividends received from such other corporation." Under the dividend exemption system established by the Tax Cuts and Jobs Act, U.S. taxpayers that are 10% owners of a foreign corporation, including any "10/50" company or controlled foreign corporation can receive a 100% deduction for the

[11] *See* IRC § 56A(c)(2)(D)(ii).
[12] *See* IRC § 704(b) or IRC § 704(c).

foreign-source dividends (dividends received deduction as provided for under Section 245A).[13] At the same time the regular tax system provides for a foreign tax credit regime intended to mitigate double taxation though not for 10/50 companies as they can qualify for the dividends received deduction. CAMT similarly provides for a foreign tax credit by a CFC though not for a 10/50 company.

With the aforementioned detail in mind, the NAM respectfully recommends that Treasury and the IRS provide for the dividends-received deduction with respect to dividends received from a 10/50 company. The IRA explicitly provides authority to reduce dividends from non-consolidated subsidiaries.[14] Moreover this approach is consistent with respect to the regular tax system's treatment of such dividends and would mitigate the double taxation of dividends from a 10/50 company.

Calculation of AFSI for Foreign-Parented Multinational Groups

As it is common for foreign-parented multinational groups not to have standalone U.S. audited financial statements, a top-down approach whereby the FPMG would have to use its parent's audited financial statement to identify the U.S.-source financial income would impose an extraordinary administrative burden in trying to calculate AFSI. Accordingly, the NAM respectfully recommends that Treasury and the IRS allow for the use of the U.S. financials regarding FPMG's calculation of AFSI. In other words, the FPMG would not be required to look to its global financial statement. This would permit U.S. subsidiaries of foreign corporations to use as their AFS the income statement and other financial statements that they use to prepare Form 1120 Schedule M-3, because this information is readily available.

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Thank you for the opportunity to comment. If you have questions or would like to discuss these issues further, please contact me.

Sincerely,

Chris Netram
Managing Vice President, Tax and Domestic Economic Policy
National Association of Manufacturers

[13] U.S. shareholder ownership ranging from 10% – 50% of a foreign corporation.
[14] *See* IRC § 56A(c)(2)(C).