



LB&I Concept Unit

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General Overview

IRC 59A Base Erosion Anti-Abuse Tax Overview

IRC 59A was added to the Internal Revenue Code by section 14401 of P.L. 115-97 (the Tax Cuts and Jobs Act (“TCJA”)) on December 22, 2017, and imposes a new tax often referred to as the Base Erosion Anti-Abuse Tax (“BEAT”). Proposed regulations (“Prop. Treas. Regs.”) were published in the Federal Register on December 21, 2018 (26 CFR Part 1 [REG-104259-18]) (the “2018 Prop. Regs.”). Final regulations were published in the Federal Register on December 6, 2019 (26 CFR Part 1, T.D. 9885) (the “2019 Final Regs.”) and provide detailed guidance regarding which taxpayers will be subject to BEAT, the determination of what is a base erosion payment and base erosion tax benefit, the steps required for calculating the base erosion minimum tax amount, and certain reporting requirements. Prop. Treas. Regs. were also published in the Federal Register on December 6, 2019 (26 CFR Part 1 [REG-112607-19]) (the “2019 Prop. Regs.”). Final regulations were published in the Federal Register on October 9, 2020 (26 CFR Part 1, T.D. 9910) (the “2020 Final Regs.” and together with the 2019 Final Regs, as modified by the 2020 Final Regs., the “Final Regs.”) and address, among other things, aggregate groups, the BEAT waiver election, the application of the BEAT to partnerships, and an anti-abuse rule with respect to certain basis step-up transactions. BEAT applies to base erosion payments (“BEPs”) paid or accrued in taxable years beginning after December 31, 2017.

General Overview (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

BEAT is a corporate minimum tax imposed on applicable taxpayers that make certain base erosion payments to foreign related parties (“FRPs”). Generally, an applicable taxpayer is a corporation that has average annual gross receipts for the preceding 3 years of greater than or equal to \$500 million, has a base erosion percentage (BE%) for the taxable year of greater than or equal to 3% (2% for certain taxpayers that include a bank or registered securities dealer that is a member of an affiliated group). If the applicable taxpayer has an aggregate group, the determination of both the 3-year average annual gross receipts and the BE% is made at an aggregate group level. An aggregate group of an applicable taxpayer may differ from the aggregate group of another member of the taxpayer’s aggregate group. Special rules apply to partnerships, generally applying the aggregate principle.

Generally, a base erosion tax benefit (“BETB”) is the deduction allowed in the taxable year for the BEP. The BE% is aggregate BETBs divided by aggregate total allowable deductions plus BETBs that are not deductions.

Base Erosion Minimum Tax Amount (“BEMTA”) is an additional tax separate from regular income tax. It is different from the old alternative minimum tax (“AMT”) and is computed differently. For example, BETBs and certain Net Operating Losses (“NOLs”) are added back to taxable income to derive modified taxable income (“MTI”) as opposed to the re-computation of taxable income under AMT.

BEMTA is equal to the MTI multiplied by the BEAT tax rate over the regular tax liability adjusted for certain credits. Any BEMTA that is paid is not credited against future regular taxes like the AMT.

Detailed Explanation of the Concept

IRC 59A Base Erosion Anti-Abuse Tax Overview

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Aggregate Group

The controlled group of corporations that include the taxpayer where controlled group means a controlled group as defined in IRC 1563 except “more than 50%” replaces “at least 80%” each place it appears in IRC 1563(a)(1); and IRC 1563(a)(4) and (e)(3)(C) are not taken into account. Special rules apply for changes in the composition of an aggregate group and are covered in Treas. Reg. 1.59A-2(c)(2)(ii).

Foreign corporations are generally excluded from an aggregate group except with regard to income that is, or is treated as, effectively connected with the conduct of a trade or business in the United States (“ECI”); or if the foreign corporation determines its net income under a treaty, except with regard to income taken into account in determining its net taxable income.

Under the Final Regs., a taxpayer that is a member of an aggregate group measures the gross receipts and BE% of the aggregate group by reference to the taxpayer’s gross receipts, BETBs and deductions and those of each member of the aggregate group for the taxable year of the member that ends with or within the taxpayer’s taxable year. Transactions between members of the taxpayer’s aggregate group at the time of the transaction are not taken into account.

- Treas. Reg. 1.59A-1(b)(1)(i)
- IRC 1563
- Treas. Reg. 1.59A-2(c)(2)(ii)

- Treas. Reg. 1.59A-1(b)(1)(ii)

- Treas. Reg. 1.59A-2(c)(3)

Detailed Explanation of the Concept (cont'd)

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<p><u>Aggregate Group (cont'd)</u></p> <p>With respect to a group member leaving and/or joining an aggregate group, the Final Regs. provide that only items of aggregate group members which occur during the period in which they are members of the taxpayer's aggregate group are taken into account for purposes of determining gross receipts and BE% of the taxpayer's aggregate group.</p> <p>If a corporation joins or leaves an aggregate group in a transaction that does not result in the corporation having a taxable year-end, the corporation is treated as having a deemed taxable year-end at the end of the day on which the transaction occurs. A corporation that has a deemed taxable year-end determines gross receipts, BETBs, and deductions attributable to the deemed taxable year ending upon, or beginning immediately after, the deemed taxable year-end by either:</p> <ul style="list-style-type: none"> ▪ Deeming a close of the taxpayer's books, or ▪ For items other than "extraordinary items" (as defined in Treas. Reg. 1.1502-76(b)(2)(ii)(C), as well as any other payment not made in the ordinary course of business that would be treated as a BEP), making a pro-rata allocation. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.59A-2(c)(4) ▪ Treas. Reg. 1.59A-2(c)(4)(ii) ▪ Treas. Reg. 1.59A-2(c)(4)(iii)

Detailed Explanation of the Concept (cont'd)

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Gross Receipts

Generally include total sales (net of returns and allowances) and all amounts received for services, interest, dividends, rents, royalties, and annuities, regardless of whether such amounts are derived in the ordinary course of the taxpayer's trade or business but are not reduced by cost of goods sold or by the cost of property sold if such property is described in IRC 1221(1), IRC 1221(3), IRC 1221(4) or IRC 1221(5). With respect to sales of capital assets as defined in IRC 1221 or sales of property described in IRC 1221(2) (relating to property used in a trade or business), gross receipts shall be reduced by the taxpayer's adjusted basis in such property.

Gross receipts of a foreign corporation are only included if the gross receipts are taken into account in determining income that is, or is treated as, effectively connected with the conduct of a trade or business within the U.S. (or if a treaty applies, only gross receipts attributable to transactions taken into account in determining net taxable income).

Gross receipts are annualized for short taxable years. Consolidated group gross receipts are determined by aggregating the gross receipts of all members (see Treas. Reg. 1.1502-59A(b)).

For purposes of determining gross receipts, a taxpayer includes any predecessor of the taxpayer, including the distributor or transferor corporation in a transaction described in IRC 381(a) in which the taxpayer is the acquiring corporation.

Resources

- IRC 59A(e)(2)(B)
- Treas. Reg. 1.59A-1(b)(13) and Temp. Reg. 1.448-1T(f)(2)(iv)
- IRC 1221(1)-(5)

- IRC 59A(e)(2)(A)
- Treas. Reg. 1.59A-2(d)

- Treas. Reg. 1.1502-59A(b)

- IRC 381

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

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Foreign Related Party

A FRP is a foreign person that is a related party with respect to the taxpayer. A foreign person is any person who is not a United States person (a "U.S. person"). A U.S. person is defined under IRC 7701(a)(30), except that any individual who is a citizen of any U.S. possession (but not otherwise a U.S. citizen); and who is not a U.S. resident is not a U.S. person.

A related party means, with respect to a taxpayer:

- Any 25-percent owner of the taxpayer,
- Any person who is related (within the meaning of IRC 267(b) or IRC 707(b)(1)) to the taxpayer or any 25-percent owner of the taxpayer, or
- A controlled taxpayer within the meaning of Treas. Reg. 1.482-1(i)(5) together with, or with respect to, the taxpayer.

A 25-percent owner is any person who owns at least 25% of:

- Total voting power of all classes of stock of the corporation entitled to vote, or
- Total value of all classes of stock of the corporation.

IRC 318 attribution rules apply except:

- "10 percent" replaces "50 percent" in IRC 318(a)(2)(C); and
- IRC 318(a)(3)(A), IRC 318(a)(3)(B), and IRC 318(a)(3) (C) are not applied so as to consider a U.S. person as owning stock that is owned by a person who is not a U.S. person.

- IRC 59A(f) and Treas. Reg. 1.59A-1(b)(10) and (12)

- IRC 7701(a)(30)

- IRC 59A(g)(1) and Treas. Reg. 1.59A-1(b)(17)

- IRC 267(b)

- IRC 707(b)(1)

- IRC 482

- Treas. Reg. 1.482-1(i)(5)

- IRC 59A(g)(2) and Treas. Reg. 1.59A-1(b)(17)(ii)

- IRC 59A(g)(3) and Treas. Reg. 1.59A-1(b)(17)(iii)

- IRC 318(a)(2)(C)

- IRC 318(a)(3)(A)-(C)

Detailed Explanation of the Concept (cont'd)

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Base Erosion Percentage

BE% for any taxable year is determined by dividing the aggregate BETBs by the sum of the aggregate allowable deductions plus BETBs that are not deductions, subject to certain exclusions.

If the taxpayer has an aggregate group, the BE% is computed at the aggregate group level but transactions between members of an aggregate group that were members at the time of the transaction are not included in computing BE%.

Resources

- IRC 59A(c)(4)(A)
- Treas. Reg. 1.59A-2(e)
- IRC 59A(c)(4)(A)(ii)
- Treas. Reg. 1.59A-2(c)(1).

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

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<p><u>Base Erosion Percentage (cont'd)</u></p> <p>Allowable deductions in the denominator generally are those identified in Subtitle A, Chapter 1 of the Internal Revenue Code and do not include:</p> <ul style="list-style-type: none"> ▪ NOLs under IRC 172; ▪ Deduction for foreign source portion of dividends received from specified 10 percent owned foreign corporations (IRC 245A); ▪ Deduction for foreign-derived intangible income and global intangible low-taxed income under IRC 250; ▪ Exchange losses from IRC 988 transactions that result from a payment or accrual by the taxpayer to a FRP not treated as a BEP under Treas. Reg. 1.59A-3(b)(3)(iv); ▪ Deduction not allowed in determining taxable income for the taxable year; ▪ Payment or accrual for services to FRP not treated as BEP under Treas. Reg. 1.59A-3(b)(3)(i) (Services Cost Method (“SCM”) exception);* ▪ Deduction for qualified derivative payment not treated as BEP under Treas. Reg. 1.59A-3(b)(3)(ii);* ▪ Deduction for amounts paid or accrued to FRP with respect to certain Total Loss Absorption Capacity (“TLAC”) securities that are not treated as BEPs under Treas. Reg. 1.59A-3(b)(3)(v);* and ▪ Certain reinsurance losses incurred and claims payments. <p>* If a payment in any of these three categories qualifies for the ECI exception in Treas. Reg. 1.59A-3(b)(3)(iii) and the amount is paid to a FRP that is not in the aggregate group, then that payment is included in the denominator of the BE%.</p>	<ul style="list-style-type: none"> ▪ IRC 59A(c)(4)(A)(ii) and Treas. Reg. 1.59A-2(e)(3) ▪ IRC 59A(c)(4)(B) ▪ IRC 172 ▪ IRC 245A ▪ IRC 250 ▪ IRC 988 ▪ IRC 59A(d)(5) ▪ IRC 59A(h) ▪ Treas. Reg. 1.59A-2(e)(3)(vii)

Detailed Explanation of the Concept (cont'd)

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<p><u>Base Erosion Percentage (cont'd)</u></p> <p>BETBs that are not deductions may include:</p> <ul style="list-style-type: none"> ▪ Any reduction under IRC 803(a)(1)(B) in the gross amount of premiums and other consideration on insurance and annuity contracts for premiums and other consideration arising out of indemnity reinsurance for a BEP described in Treas. Reg. 1.59A-3(b)(1)(iii); and ▪ Any reduction in gross receipts with respect to a BEP described in Treas. Reg. 1.59A-3(b)(1)(iv) for amounts paid or accrued by the taxpayer that results in a reduction of the gross receipts of the taxpayer if the amount paid or accrued is with respect to a surrogate foreign corporation as defined in IRC 59A(d)(4)(C)(i) ("SFC") that becomes an SFC after November 9, 2017 that is a related party of the taxpayer or a foreign person that is a member of the same extended affiliated group as defined in IRC 59A(d)(4)(C)(ii) ("EAG") as the SFC) in computing gross income for the taxpayer for the taxable year. 	<ul style="list-style-type: none"> ▪ IRC 59A(d)(3) and Treas. Reg. 1.59A-3(c) ▪ IRC 59A(d)(4)(A) ▪ IRC 59A(d)(4)(B)

Detailed Explanation of the Concept (cont'd)

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<p><u>Applicable Taxpayer</u></p> <p>The Applicable Taxpayer may be required to pay a BEMTA and is a taxpayer, with respect to any taxable year, that:</p> <ul style="list-style-type: none"> ▪ Is a corporation (other than a regulated investment company (“RIC”), Real Estate Investment trust (“REIT”), or S corporation); ▪ Has average annual gross receipts for the 3-taxable-year period ending with the preceding taxable year of at least \$500 million;* and ▪ Has a BE% of 3% (2% for taxpayers in an affiliated group that includes a bank or registered securities dealer, subject to a de minimis exception) or higher for the taxable year.* <p>* A taxpayer that is a member of an aggregate group determines its gross receipts and BE% on the basis of the aggregate group.</p> <p>A bank is an entity defined in IRC 581 and a registered securities dealer is any dealer defined in section 3(a)(5) of the Securities Exchange Act of 1934 (the “Act”) that is registered, or required to be registered, under section 15 of the Act.</p>	<ul style="list-style-type: none"> ▪ IRC 59A(e)(1)(A) ▪ Treas. Reg. 1.59A-2 ▪ IRC 59A(e)(1)(B) ▪ IRC 59A(e)(1)(C) ▪ IRC 59A(b)(3)(B) ▪ IRC 581 ▪ Section 3(a)(5) of the Securities Exchange Act of 1934 ▪ Section 15 of the Securities Exchange Act of 1934

Detailed Explanation of the Concept (cont'd)

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Base Erosion Payment

BEPs generally include:

- Deductible payments and accruals to FRPs;
- Amounts paid or accrued to FRPs to acquire depreciable or amortizable property;
- Certain reinsurance payments or accruals to FRPs;
- Certain payments or accruals to a SFC that is a related party of the taxpayer if the SFC became an SFC after November 9, 2017, or a foreign person that is a member of the same expanded affiliated group as the SFC.

The following are BEP operating rules:

- Amount paid or accrued includes any form of consideration, including cash, property, stock or assumption of liability;
- Unless permitted by the Code or regulations, the amount of BEP is determined on a gross basis regardless of any contractual right to make or receive payments on a net basis;
- For any transaction with respect to which the taxpayer (or any aggregate group member) applies the mark to market method of accounting for U.S. federal income tax purposes, taxpayer must combine all items of income, gain, loss, or deduction arising from the transaction during the taxable year to determine its gain or loss with respect to the transaction;
- Payments to certain domestic passthrough entities will be treated as made to foreign related parties that are direct or indirect beneficiaries or shareholders of the entities; and
- If depreciable or amortizable property is acquired with a BEP and transferred to an aggregate group member, any depreciation or amortization deduction that would be a BETB to the transferor will remain a BETB to the transferee.

- IRC 59A(d)
- Treas. Reg. 1.59A-3(b)
- IRC 59A(d)(1)
- IRC 59A(d)(2)
- IRC 59A(d)(3)
- IRC 59A(d)(4)
- Treas. Reg. 1.59A-3(b)(4)(i)
- Treas. Reg. 1.59A-3(b)(2)
- Treas. Reg. 1.59A-3(b)(2)(iii)
- Treas. Reg. 1.59A-3(b)(2)(iv)
- Treas. Reg. 1.59A-3(b)(2)(vi)(C)
- Treas. Reg. 1.59A-3(b)(2)(vii)

Detailed Explanation of the Concept (cont'd)

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Base Erosion Payment (cont'd)

Generally Excluded as BEPs

The following are generally excluded as BEPs:

- Amounts paid or accrued in tax years beginning before January 1, 2018;
- Certain payments for services that meet the requirements for the services cost method ("SCM") under IRC 482, as modified by 1.59A-3(b)(3), to the extent of their total services cost within the meaning of Treas. Reg. 1.482-9(j). Any excess of the total services cost remains a BEP (including any markup);
- Qualified derivative payments ("QDP");
- Amounts paid or accrued to an FRP that are subject to U.S. federal income taxation as income that is or is as treated as, effectively connected with the conduct of a trade or business in the U.S. ("ECI") if taxpayer receives a withholding certification on which the FRP claims exemption from withholding under 1441 or 1442 because the amounts are ECI or if the FRP determines its taxable income pursuant to the business profits provision of a treat, the amounts paid or accrued to the FRP that are taken into account in determining its taxable income. Special rules apply for partnership transactions;
- Exchange loss within the meaning of Treas. Reg. 1.988-2 from a section 988 transaction as described in Treas. Reg. 1.988-1(a)(1);
- IRC 163(j)(2) disallowed business interest expense from tax years beginning before January 1, 2018;

- Treas. Reg. 1.59A-3(b)(3)(vi)
- Treas. Reg. 1.59A-3(b)(3)(i)
- Treas. Reg. 1.482-9
- Treas. Regs. 1.59A-6
- Treas. Reg. 1.59A-3(b)(3)(iii)(A)
- Treas. Reg. 1.59A-3(b)(3)(iii)(B)
- Treas. Reg. 1.59A-3(b)(3)(iii)(C)
- Treas. Reg. 1.59A-3(b)(3)(iv)
- Treas. Reg. 1.59A-3(b)(3)(v)
- Treas. Reg. 1.59A-3(b)(2)(ix)
- Treas. Reg. 1.59A-3(b)(3)(viii)

Detailed Explanation of the Concept (cont'd)

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<p><u>Base Erosion Payment (cont'd)</u></p> <p><u>Generally Excluded as BEPs (cont'd)</u></p> <ul style="list-style-type: none"> ▪ Certain amounts paid or accrued with respect to TLAC securities (including foreign TLAC securities); ▪ Loss on the sale or transfer of built-in-loss property; ▪ Amounts transferred to, or exchanged with, an FRP pursuant to “specified non-recognition transactions” (“SNT”); ▪ Amounts paid by an insurance company to an FRP that is a regulated insurance company under a reinsurance contract for losses incurred and claims and benefits allocable to required payments to an unrelated party. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.59A-3(b)(3)(ix) ▪ Treas. Reg. 1.59A-3(b)(2)(viii)

Detailed Explanation of the Concept (cont'd)

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<p><u>Base Erosion Payment Exceptions</u></p> <p><u>Services Cost Method ("SCM")</u></p> <p>Amounts paid or accrued by the taxpayer to a FRP for services that meet the following requirements are not BEPs to the extent of their total services cost:</p> <ul style="list-style-type: none"> ▪ All of the requirements of Treas. Reg. 1.482-9(b) must be satisfied, except the business judgment rule under Treas. Reg. 1.482-9(b)(5) do not apply; and ▪ Adequate books and records must be maintained in accordance with the rules under Treas. Reg. 1.59A-3(b)(i)(C), instead of Treas. Reg. 1.482-9(b)(6). <p>Total services cost has the same meaning as in Treas. Reg. 1.482-9(j).</p> <p>Services are an activity as defined in Treas. Reg. 1.482-9(l)(2) performed by a FRP that provides a benefit as defined in Treas. Reg. 1.482-9(l)(3) to the taxpayer.</p> <p>Any amount in excess of total services cost remains a BEP.</p>	<ul style="list-style-type: none"> ▪ IRC 59A(d)(5)(A) ▪ IRC 59A(d)(5)(B) ▪ Treas. Reg. 1.59A-3(b)(3)(i)(A) ▪ Treas. Reg. 1.482-9(l)(2) ▪ Treas. Reg. 1.482-9(l)(3) ▪ Treas. Reg. 1.59A-3(b)(3)(i)(B)(1) and Treas. Reg. 1.482-9(b)(5) ▪ Treas. Reg. 1.59A-3(b)(3)(i)(B)(2) and Treas. Reg. 1.482-9(b)(6) ▪ Treas. Reg. 1.59A-3(b)(3)(i)(D) and Treas. Reg. 1.482-9(j) ▪ Treas. Reg. 1.59A-3(b)(3)(i)(A)

Detailed Explanation of the Concept (cont'd)

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<p><u>Base Erosion Payment Exceptions (cont'd)</u></p> <p><u>Qualified Derivative Payments ("QDPs")</u></p> <p>A QDP is any payment (subject to certain exclusions) made by a taxpayer to a FRP pursuant to a derivative with respect to which the taxpayer:</p> <ul style="list-style-type: none"> ▪ Recognizes gain or loss as if the derivative were sold for its fair market value on the last business day of the taxable year (and any additional time required by the Code or the taxpayer's method of accounting); ▪ Treats any gain or loss so recognized as ordinary; and ▪ Treats the character of all items of income, deduction, gain, or loss with respect to a payment pursuant to the derivative as ordinary. <p>QDP Exception is not available to:</p> <ul style="list-style-type: none"> ▪ A Taxpayer who fails to satisfy reporting requirements in Treas. Reg. 1.59A-6(b)(2); ▪ Any payment that would be treated as a BEP if it were not made pursuant to a derivative, including any interest, royalty, or service payment; or ▪ In the case of a contract that has derivative and non-derivative components, that portion of the payment properly allocable to the non-derivative component. 	<ul style="list-style-type: none"> ▪ IRC 59A(h)(2)(A) ▪ Treas. Reg. 1.59A-6 ▪ IRC 59A(h)(2)(A)(i) ▪ IRC 59A(h)(2)(A)(ii) ▪ IRC 59A(h)(2)(A)(iii) ▪ Treas. Reg. 1.59A-6(b)(2)(ii) ▪ IRC 59A(h)(3)(A) ▪ IRC 59A(h)(3)(B)

Detailed Explanation of the Concept (cont'd)

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Base Erosion Payment Exceptions (cont'd)

Qualified Derivative Payments ("QDPs")(cont'd)

A derivative is any contract the value of which, or any payment or other transfer with respect to which, is (directly or indirectly) determined by reference to one or more of the following:

- Any share of stock in a corporation;
- Any evidence of indebtedness;
- Any commodity that is actively traded;
- Any currency; or
- Any rate, price, amount, index, formula, or algorithm.

The following are not derivatives:

- Any direct interest in any of the items listed above;
- American depository receipts or any similar instruments with respect to shares of stock in a foreign corporation that are treated as shares of stock in that foreign corporation;
- Any insurance, annuity, or endowment contract issued by an insurance company to which subchapter L applies (or, issued by a foreign corporation, to which subchapter L would apply if that corporation were a domestic corporation);
- Any securities lending transaction, sale-repurchase transaction ("repo"), or substantially similar transaction that is treated as a secured loan for federal tax purposes;
- The cash collateral component of a security lending transaction, along with cash payments pursuant to a repo or other similar payments pursuant to a substantially similar transaction; or
- Any securities lending transaction or substantially similar transaction that is part of an arrangement entered into with a principal purpose of avoiding a BEP and that provides the taxpayer with the economic equivalent of a substantially unsecured cash borrowing.

- IRC 59A(h)(4)(A)
- IRC 59A(h)(4)(A)(i)
- IRC 59A(h)(4)(A)(ii)
- IRC 59A(h)(4)(A)(iii)
- IRC 59A(h)(4)(A)(iv)
- IRC 59A(h)(4)(A)(v)
- IRC 59A(h)(4)(A)
- Treas. Reg. 1.59A-6(d)(2)(i)
- IRC 59A(h)(4)(B)
- IRC 59A(h)(4)(C)
- Treas. Reg. 1.59A-6(d)(2)(ii)
- Treas. Reg. 1.59A-6(d)(2)(iii)
- Treas. Reg. 1.59A-6(d)(2)(iii)(B)
- Treas. Reg. 1.59A-6(d)(2)(iii)(C)

Detailed Explanation of the Concept (cont'd)

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<p><u>Base Erosion Payment Exceptions (cont'd)</u></p> <p><u>Total Loss Absorption Capacity ("TLAC")</u></p> <p>TLAC securities are eligible internal debt securities as defined in 12 CFR 252.161.</p> <p>Foreign TLAC securities are internal debt securities issued under a bank regulatory requirement imposed under the laws or regulations of a foreign country that is comparable to 12 CFR 252.160-167. Generally, this means that the foreign TLAC securities are internal debt securities issued by Global Systemically Important Banking Organizations pursuant to laws of a foreign country that are comparable to the rules established by the Federal Reserve Board and they are treated as indebtedness for U.S. tax purposes.</p> <p>The amount paid or accrued to FRPs with respect to TLAC securities excluded from BEP is limited to the product of (i) the scaling ratio; and (ii) amounts paid or accrued to FRPs with respect to TLAC securities for which a deduction is allowed.</p> <p>The scaling ratio is a fraction (which cannot be greater than one): (115% of average TLAC long-term debt required amount) divided by (average TLAC securities amount).</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.59A-1(b)(20) and 12 CFR 252.161 ▪ Treas. Reg. 1.59A-3(b)(3)(v) ▪ Treas. Reg. 1.59A-3(b)(3)(v)(B) ▪ Treas. Reg. 1.59A-3(b)(3)(v)(C) ▪ Treas. Reg. 1.59A-3(b)(3)(v)(D) ▪ Treas. Reg. 1.59A-3(b)(3)(v)(E)

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<p><u>Base Erosion Payment Exceptions (cont'd)</u></p> <p><u>Total Loss Absorption Capacity ("TLAC") (cont'd)</u></p> <p>The amount paid or accrued to FRPs with respect to foreign TLAC securities excluded from BEP is limited to the extent that the interest deducted by a U.S. trade or business or permanent establishment with respect to foreign TLAC securities exceeds the interest expense associated with the foreign TLAC long-term debt required amount generally, applying the scaling ration principles that apply for TLAC securities.</p> <p>The foreign TLAC long-term debt required amount means in the case of a trade or business or a permanent establishment in the United States, the lesser of the specified minimum amount of debt, if any:</p> <ul style="list-style-type: none"> ▪ Required for bank regulatory requirements by the foreign country laws or regulations that are comparable to 12 CFR 252.160-167; or ▪ That would be required pursuant to 12 CFR 252.162(a) if the trade or business or permanent establishment were a U.S. person (as determined under Federal Reserve regulations). If the foreign jurisdiction does not have a specified minimum amount of debt, then the foreign TLAC long-term debt required amount equals this amount. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.59A-3(b)(3)(v)(F)(1) ▪ Treas. Reg. 1.59A-3(b)(3)(v)(F)(2) ▪ Treas. Reg. 1.59A-3(b)(3)(v)(F)(3)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Base Erosion Payment Exceptions (cont'd)

Loss on the Sale or Transfer of Built-in-Loss Property

The Final Regs. provide that, if a taxpayer recognizes a loss on the sale or transfer of property to an FRP, the loss recognized with respect to the sale or transfer is not a deduction that would cause the payment to be treated as a BEP.

However, if a taxpayer uses property to make a payment to an FRP and the payment otherwise meets the definition of a BEP, then the amount of the payment that is treated as a BEP equals the fair market value of the property at the time of the transfer.

- Treas. Reg. 1.59A-3(b)(2)(ix)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis	Resources
<p><u>Base Erosion Payment Exceptions (cont'd)</u></p> <p><u>Specified Nonrecognition Transaction ("SNT")</u></p> <p>The Final Regs. contain an exception to BEPs for any amount transferred to, or exchanged with, an FRP pursuant to an SNT. An SNT is a transaction to which IRC 332, IRC 351, IRC 355 or IRC 368 applies, subject to the other property exception and an anti-abuse rule.</p> <p>This exception does not apply to the transfer of "other property".</p> <p>Other property means "other property or money" as used in IRC 351(b), IRC 356(a)(1)(B), and IRC 361(b), as applicable, including liabilities treated as money under IRC 357(b) (but excluding any amounts to which IRC 361(b)(3) applies) whether or not gain is recognized.</p> <p>Other property also includes liabilities assumed by the taxpayer in an SNT to the extent of the amount of gain recognized under IRC 357(c).</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.59A-3(b)(3)(viii)(A) ▪ Treas. Reg. 1.59A-9(b)(4) ▪ Treas. Reg. 1.59A-3(b)(3)(viii)(B) ▪ Treas. Reg. 1.59A-3(b)(3)(viii)(C) ▪ Treas. Reg. 1.59A-3(b)(3)(viii)(D)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Base Erosion Payment Exceptions (cont'd)

Amounts paid by an insurance company to an FRP that is a regulated insurance company under a reinsurance contract for losses incurred and claims and benefits allocable to required payments to an unrelated party.

The Final Regs. contain an exception to BEPs for any amounts:

- Paid by a taxpayer subject to tax under Subchapter L to an FRP that is a regulated insurance company;
- Under a reinsurance contract between a taxpayer and the regulated foreign insurance company ("RFIC") for losses incurred (as defined in IRC 832(b)(5)) and claims and benefits under IRC 805(a)(1);
- To the extent that the amounts paid or accrued are properly allocable to amounts required to be paid by the RFIC (or indirectly through another RFIC) pursuant to an insurance, annuity, or reinsurance contract, to an unrelated person.

Resources

- Treas. Reg. 1.59A-3(b)(3)(ix)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Base Erosion Tax Benefit ("BETB")

The following are BETBs:

- Any deduction that is allowed in the taxable year with respect to any amount paid or accrued by the taxpayer to a FRP with respect to which a deduction is allowable;
- Any deduction allowed in the taxable year for depreciation or amortization with respect to any amount paid or accrued by the taxpayer to an FRP in connection with the acquisition of depreciable or amortizable property by the taxpayer from the FRP;
- Any reduction under IRC 803(a)(1)(B) in the gross amount of premiums or other consideration on insurance and annuity contracts for premiums and other consideration arising out of indemnity reinsurance, or any deduction under IRC 832(b)(4)(A) from the amount of gross premium written on insurance contracts during the taxable year for premiums paid for reinsurance with respect to any premium or other consideration paid or accrued to a FRP for any reinsurance payments taken into account under IRC 803(a)(1)(B) or IRC 832(b)(4)(A); and
- Any reduction in gross receipts for the taxable year with respect to any amount paid or accrued by the taxpayer that results in a reduction of the gross receipts of the taxpayer if the amount paid or accrued is with respect to:
 - A surrogate foreign corporation as defined in IRC 59A(d)(4)(C)(i) ("SFC") that became an SFC after 11/9/2017; or
 - A foreign person that is a member of the same expanded affiliated group as the SFC.

- Treas. Regs. 1.59A-3(b)(1)(i) and 1.59A-3(c)(1)(i)
- Treas. Regs. 1.59A-3(b)(1)(ii) and 1.59A-3(c)(1)(ii)
- Treas. Regs. 1.59A-3(c)(1)(iii)
- Treas. Regs. 1.59A-3(b)(1)(iv) and 1.59A-3(c)(1)(iv)
- Treas. Reg. 1.59A-3(c)(2)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Base Erosion Tax Benefit (cont'd)

BETB exceptions:

- A BETB does not include a payment subject to tax under IRC 871 or 881 when the tax has been deducted and withheld under IRC 1441 or 1442. Instead, the BETB equals the BETB without exclusion multiplied by the difference between the nontreaty rate subtracted from the treaty rate, all divided by the non-treaty rate.
- Certain branch-level interest.

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Waiver of Deductions

The Final Regs. provide that all deductions (and any premium or other consideration paid or accrued by the taxpayer for any reinsurance payments that are taken into account under IRC 803(a)(1)(B) or 832(b)(4)(A)) that could properly be claimed by the taxpayer for the taxable year (determined after giving effect to taxpayer's permissible method of accounting and to any election) are treated as "allowed" deductions for purposes of determining BETBs.

The Final Regs. further provide an election by which a taxpayer can waive certain deductions and reduce its allowed deductions (the "Waiver Election") for purposes of determining its BETBs. Taxpayer may also waive any premium or other consideration paid or accrued by the taxpayer for any reinsurance payments that are taken into account under IRC 803(a)(1)(B) or 832(b)(4)(A) that would be a BETB in accordance with the rules and principles in Treas. Reg. 1.59A-3(c)(6).

- Treas. Reg. 1.59A-3(c)(5)

- Treas. Reg. 1.59A-3(c)(6)(i) and (v)

- Treas. Reg. 1.59A-3(c)(6)(iii)(A)(1)

- Treas. Reg. 1.59A-3(c)(6)(iii)(B)(7)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Waiver of Deductions (cont'd)

To make the election or increase the amount of the deduction waived, the taxpayer must determine that it would be an applicable taxpayer absent the election.

The Final Regs. provide that except as otherwise provided in Treas. Reg. 1.59A-3(c)(6)(iii) any waived deductions are treated as waived for all purposes under the Internal Revenue Code and regulations. There are also some specific rules addressing certain IRC 861 allocations for waived deductions, as well as a rule addressing the effect of the waiver on the stock basis of a consolidated group member.

Special rules apply for partners and partnerships.

- Waiver election is made on an annual basis.
- Not a method of accounting and taxpayer agrees that if the method of accounting for a waived deduction is changed, the amount of adjustment taken into account under IRC 481(a)(2) is determined without regard to the waiver election. As a result, the waiver has no effect on the IRC 481(a) adjustment amount.
- Commissioner consent not needed for decision not to elect for a subsequent year.

- Treas. Reg. 1.59A-3(c)(6)(iii)(A)(2)
- Treas. Reg. 1.59A-3(c)(6)(iii)(A)(3)
- Treas. Regs. 1.861-9 and 1.861-10
- Temp. Regs. 1.861-9T and 1.861-10T
- Treas. Reg. 1.59A-3(c)(6)(iii)(C) and (D) and (iv)
- Treas. Reg. 1.59A-3(c)(6)(ii)(A)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Waiver of Deductions (cont'd)

Taxpayer may elect to waive deductions for purposes of determining its BETBs on its original return.

A taxpayer may increase the amount waived or make a new waiver election:

- On an amended return; or
- During the course of IRS examination.

However, a taxpayer cannot decrease the amount of deductions waived or otherwise revoke a waiver election.

A waiver election is disregarded for the determination of:

- Taxpayer's overall method of accounting, or method of accounting for any item, under IRC 446;
- Whether a change in taxpayer's overall plan of accounting or taxpayer's treatment of a material item is a change in method of accounting under IRC 446(e) and Treas. Reg. 1.446-1(e);
- The amount allowable for depreciation or amortization under IRC 167(c), IRC 1016(a)(2) and (3), and any other basis adjustment under IRC 1016(a);
- Geographic source where Research and Experimental (R&E) activities that account for more than 50% of R&E deduction were performed under the exclusive apportionment rule in Treas. Reg. 1.861-17(b);
- Application of IRC 482;
- Amount of taxpayer's earnings and profits; and
- Any other item as necessary to prevent taxpayer from receiving benefit of waived deduction.

▪ Treas. Reg. 1.59A-3(c)(6)(ii)(A)

- Treas. Reg. 1.59A-3(c)(6)(i)
- Treas. Reg. 1.59A-3(c)(6)(ii)(A)

▪ Treas. Reg. 1.59A-3(c)(6)(iii)(B)(1)

▪ Treas. Reg. 1.59A-3(c)(6)(iii)(B)(2)

▪ Treas. Reg. 1.59A-3(c)(6)(iii)(B)(3)

▪ Treas. Reg. 1.59A-3(c)(6)(iii)(B)(4)

▪ Treas. Reg. 1.59A-3(c)(6)(iii)(B)(5)

▪ Treas. Reg. 1.59A-3(c)(6)(iii)(B)(6)

▪ Treas. Reg. 1.59A-3(c)(6)(iii)(B)(7)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview	
Analysis	Resources
<p><u>Computation of Base Erosion Minimum Tax Amount</u></p> <p><u>BEAT Rate</u></p> <ul style="list-style-type: none"> ▪ 5% for taxable years beginning in calendar year 2018; ▪ 10% for taxable years beginning after December 31, 2018 but before January 1, 2026; ▪ 12.5% for taxable years beginning after December 31, 2025. <p>The BEAT rate is increased by 1% for taxpayers in an affiliated group that includes a bank or registered securities dealer, subject to a de minimis exception.</p>	<ul style="list-style-type: none"> ▪ IRC 59A(b)(1)(A), ▪ Treas. Reg. 1.59A-5(c)(1)(i) ▪ Treas. Reg. 1.59A-5(c)(1)(ii) ▪ Treas. Reg. 1.59A-5(c)(1)(iii) ▪ Treas. Reg. 1.59A-5(c)(2)(i) ▪ Treas. Reg. 1.59A-5(c)(2)(ii)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis	Resources
<p><u>Computation of Base Erosion Minimum Tax Amount (cont'd)</u></p> <p><u>MTI</u></p> <p>MTI = Taxable Income + BETBs + (NOLs x BE%)</p> <p>NOL rules:</p> <ul style="list-style-type: none"> ▪ Allowable NOL deductions not to exceed taxable income before taking into account the NOL deductions; ▪ BE% for the taxable year in which the NOLs arose is used to determine the amount of the NOL deductions to be added back (the “vintage rule”); ▪ The relevant BE% is the BE% for the aggregate group which is used to determine whether the taxpayer is an applicable taxpayer; and ▪ For NOL arising in a taxable year that began before January 1, 2018, the BE% for the taxable year is zero. 	<ul style="list-style-type: none"> ▪ Treas. Regs. 1.59A-4(b)(2) ▪ Treas. Regs, 1.59A-4(b)(2)(i) ▪ Treas. Regs 1.59A-4(b)(2)(ii) ▪ Treas. Reg. 1.59A-4(b)(2)(ii)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Computation of Base Erosion Minimum Tax Amount (cont'd)

BEMTA is calculated for an applicable taxpayer each tax year which is the excess, if any, of:

- BEAT rate multiplied by MTI over
- Regular tax liability (as defined by IRC 26(b)) for the taxable year reduced (but not below zero) by the excess, if any, of
 - Credits allowed under Chapter 1 against regular tax liability over
 - The sum of the following credits (for taxable years beginning on or before December 31, 2025):
 - Credit allowed under IRC 38 for the taxable year that is allocable to the research credit under IRC 41(a);
 - The portion of the applicable IRC 38 credits not in excess of 80% of the lesser of the amount of those credits or the BEMTA (determine without regard to this rule); and
 - Any credits allowed under IRC 33, IRC 37 and IRC 53.
 - The sum of the following credits (for taxable years after December 31, 2025) any credits allowed under IRC 33, IRC 37 and IRC 53.

Applicable IRC 38 credits are those allowed under section 38 for the taxable year that are properly allocable to:

- Low income housing credit determined under IRC 42(a);
- Renewable electricity production credit determined under IRC 45(a); and
- Investment credit determined under IRC 46, but only to the extent properly allocable to the energy credit determined under IRC 48.

- Treas. Reg. 1.59A-5(b)(1)
- Treas. Reg. 1.59A-5(b)(2)(i)
- Treas. Reg. 1.59A-5(b)(2)(ii)
- Treas. Reg. 1.59A-5(b)(2)(ii)(A)
- Treas. Reg. 1.59A-5(b)(3)(i)
- Treas. Reg. 1.59A-5(b)(3)(i)(A)
- Treas. Reg. 1.59A-5(b)(3)(i)(B)
- Treas. Reg. 1.59A-5(b)(3)(i)(C)
- Treas. Reg. 1.59A-5(b)(3)(ii)
- Treas. Reg. 1.59A-1(b)(2)
- Treas. Reg. 1.59A-1(b)(2)(i)
- Treas. Reg. 1.59A-1(b)(2)(ii)
- Treas. Reg. 1.59A-1(b)(2)(iii)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Anti-Abuse Rules

- If a taxpayer pays or accrues an amount to an intermediary or intermediaries that would have been a BEP if paid or accrued to an FRP and one or more intermediaries makes (directly or indirectly) corresponding payments to or for the benefit of an FRP as part of a transaction (or series of transactions), plan or arrangement that has a principal purpose of avoiding or reducing a BEP, the role of the intermediary or intermediaries is disregarded or the amount paid or accrued to the intermediary is treated as a BEP, as appropriate.
- A transaction (or component of a transaction or series of transactions), plan, or arrangement that has a principal purpose of increasing the deductions taken into account for purposes of computing the denominator of the BE% is disregarded in computing the BE%.
- A transaction (or series of transactions), plan, or arrangement that occurs among related parties that has a principal purpose of avoiding the rules applicable to certain banks and registered securities dealers is not taken into account for purposes of the lower BE% test and the increased BEAT rate applicable to certain bank and registered securities dealer affiliated groups.
- A transaction (or series of transactions), plan, or arrangement (the first transaction) increases the adjusted basis of property that the taxpayer acquires in a transaction (the second transaction) that qualifies for the SNT exception (or would qualify, but for this rule) and a principal purpose of the first transaction was to increase the taxpayer's depreciation or amortization deductions without increasing the taxpayer's BETBs, then the SNT exception in Treas. Reg. 1.59A-3(b)(3)(viii)(A) does not apply to the property acquired in the second transaction to the extent of the increase in adjusted basis. If the first transaction occurs between related parties within six months of the second transaction, it is deemed to have such a principal purpose.

- Treas. Reg. 1.59A-9(b)(1)
- Treas. Reg. 1.59A-9(b)(2)
- Treas. Reg. 1.59A-9(b)(3)
- Treas. Reg. 1.59A-9(b)(4)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Anti-Abuse Rules (cont'd)

- If a taxpayer acquires a derivative on a partnership interest (or partnership assets) as part of a transaction (or series of transactions), plan, or arrangement that has as a principal purpose of avoiding a base erosion payment (or reducing the amount of a base erosion payment) and the partnership interest (or partnership assets) would have resulted in a base erosion payment had the taxpayer acquired that interest (or partnership asset) directly, then the taxpayer is treated as having a direct interest instead of a derivative interest for purposes of applying section 59A. This rule does not apply to a derivative as defined in the QDP exception on a partnership asset to the extent the payment pursuant to the derivative qualifies for the QDP exception. A derivative interest in a partnership includes any contract the value of which, or any payment or other transfer with respect to which, is (directly or indirectly) determined in whole or in part by reference to the partnership, including the amount of partnership distributions, the value of partnership assets, or the results of partnership operations.
- If a partnership receives (or accrues) an amount from a person not acting in a partner capacity (including a person who is not a partner) and allocates the income or loss with respect to that amount to its partners with a principal purpose of avoiding a base erosion payment (or reducing the amount of a base erosion payment), then the taxpayer transacting (directly or indirectly) with the partnership will determine its base erosion payment as if the allocations had not been made and the items of income or loss had been allocated proportionately. The preceding sentence applies only when the allocations, in combination with any related allocations, do not change the economic arrangement of the partners to the partnership.

▪ Treas. Reg. 1.59A-9(b)(5)

▪ Treas. Reg. 1.59A-9(b)(6)

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Effective Dates of Regulations

The 2018 Prop. Regs.

Taxpayer may rely on the 2018 Prop. Regs. for taxable years beginning after 2017 and before they are finalized, provided that the taxpayer and all its related parties consistently apply the rules for all tax years ending before the issuance of the 2019 Final Regs., subject to rule for QDP reporting.

The 2019 Final Regs.

- Generally applicable for tax years ending on or after December 17, 2018;
- A taxpayer may rely on the 2019 Final Regs. in their entirety for tax years ending before December 17, 2018; and
- A taxpayer may apply the 2018 Prop. Regs. in their entirety for all taxable years ending on or before December 6, 2019.

The 2019 Prop. Regs.

- Generally apply to tax years beginning on or after the date finalized, although certain partnerships rules apply on or after December 2, 2019;
- Taxpayer may apply the 2019 Prop. Regs. in their entirety to tax years beginning after December 31, 2017, and before the final regulations are issued; and
- Note the coordination rule if taxpayer applies both the 2018 Prop. Regs. and the 2019 Prop. Regs.

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Effective Dates of Regulations (cont'd)

The 2019 Prop. Regs. (cont'd)

A taxpayer may apply the 2019 Prop. Regs. to tax year prior to finalization while choosing to apply the Final Regs. to tax years ending after December 6, 2019.

If a taxpayer applies the 2018 Prop. Regs. and decides to also apply the 2019 Prop. Regs., the taxpayer can apply the 2019 Prop. Regs. other than the 2019 Prop. Regs. 1.59A-2(c)(2)(ii) and (c)(4) through (6) to tax years beginning after December 31, 2017, and ending on or before December 6, 2019. These include rules relating to change in the composition of an aggregate group, periods before and after a corporation is a member of an aggregate group, etc.

The 2020 Final Regs.

Treas. Regs. 1.59A-1 through 1.59A-9, other than the provisions described in Treas. Reg. 1.59A-10(b), apply to taxable years ending on or after December 17, 2018. However, taxpayers may apply these regulations in their entirety for taxable years beginning after December 31, 2017, and ending before December 17, 2018.

In lieu of applying Treas. Regs. 1.59A-1 through 1.59A-9, taxpayers may apply the provisions matching Treas. Regs. 1.59A-1 through 1.59A-9 from the 2018 Prop. Regs. their entirety for all taxable years beginning after December 31, 2017, and ending on or before December 6, 2019.

Detailed Explanation of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Analysis

Resources

Effective Dates of Regulations (cont'd)

The 2020 Final Regs. (cont'd)

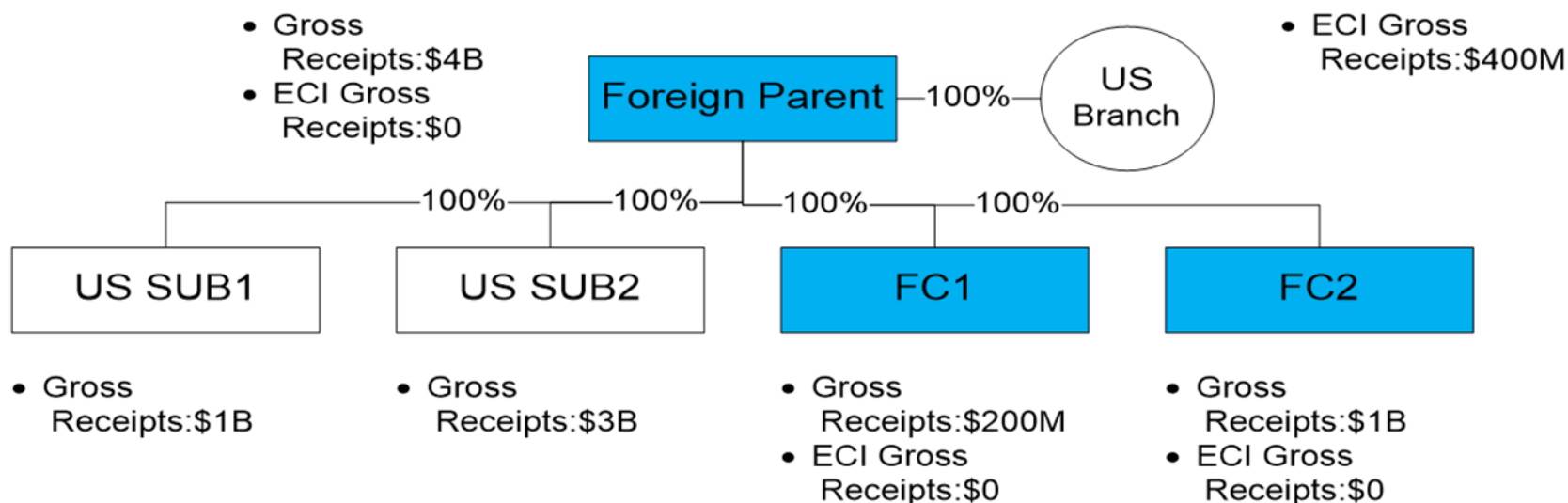
Treas. Regs. 1.59A-2(c)(2)(ii) and (c)(4) through (6), 1.59A-3(b)(3)(iii)(C), 1.59A-3(c)(5) and (6), and 1.59A-9(b)(4) apply to taxable years beginning on or after October 9, 2020, and Treas. Regs. 1.59A-7(c)(5)(v) and 1.59A-9(b)(5) and (6) apply to taxable years ending on or after December 2, 2019. Taxpayers may apply those regulations in their entirety for taxable years beginning after December 31, 2017, and before their applicability date, provided that, once applied, taxpayers must continue to apply them in their entirety for all subsequent taxable years. Alternatively, taxpayers may apply only Treas. Regs. 1.59A-3(c)(5) and (6) for taxable years beginning after December 31, 2017, and before their applicability date, provided that, once applied, taxpayers must continue to apply Treas. Regs. 1.59A-3(c)(5) and (6) in their entirety for all subsequent taxable years.

Examples of the Concept

IRC 59A Base Erosion Anti-Abuse Tax Overview

Examples

Example 1 - Determination of the Aggregate Group



Facts:

- US Branch of Foreign Parent, US SUB1 and US SUB2 have a calendar year end and are not banks or registered security dealers. None of them has a short year, and the ownership has not changed during the taxable year.
- The relevant tax year is the period ended December 31, 2020.
- Foreign Parent (other than the US Branch), FC1, and FC2 have no income that is, or is treated as, ECI, and they do not determine their income under an income tax treaty.
- There are no transactions between members of the aggregate group.
- Assume that the gross receipts are the same gross receipts for the tax periods ended December 31, 2017, December 31, 2018, and December 31, 2019.
- The aggregate group consists of the US Branch of Foreign Parent, US SUB1 and US SUB2.

Examples of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Examples

Example 2 – Gross Receipts Test

Facts are the same as those in Example 1.

	Foreign Parent - US Branch to Extent of ECI	US SUB1	US SUB2	Total
Tax Period				
2017	\$400M	\$1B	\$3B	\$4.4B
2018	\$400M	\$1B	\$3B	\$4.4B
2019	\$400M	\$1B	\$3B	\$4.4B
Total for the Aggregate Group				\$13.2B
Three Year Average Gross Receipts for the Aggregate Group				\$4.4B

- The aggregate group has average annual gross receipts of at least \$500M for purposes of Treas. Reg. 1.59A-2(d)(1).

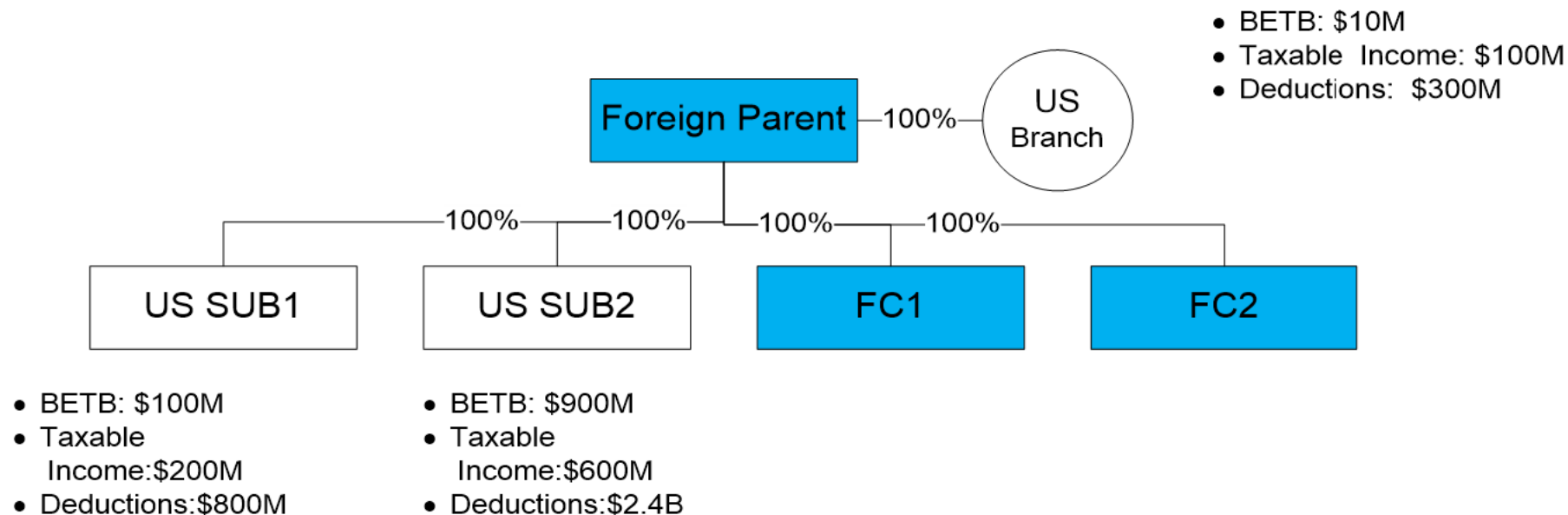
Examples of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Examples

Example 3 – BE%

Facts are the same as in Example 1 and include:



All of the BETBs are deductions.

Examples of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Examples

Example 3 – BE% (cont'd)

	Foreign Parent - US Branch to Extent of ECI	US SUB1	US SUB2	Total
BETB's	\$10M	\$100M	\$900M	\$1.01B
Allowed Deductions	\$300M	\$800M	\$2.4B	\$3.5B
BE% for the Aggregate Group				28.8571%

- As the BE% (28.8571%) for the aggregate group is three percent or higher for purposes of Treas. Reg. 1.59A-2(e)(1) and the aggregate group has average annual gross receipts of at least \$500M for purposes of Treas. Reg. 1.59A-2(d)(1), the Foreign Parent, US SUB1 and US SUB2 are all applicable taxpayers under Treas. Reg. 1.59A-2(b).

Examples of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Examples

Example 4 - MTI

Facts are the same in Example 3. However, assume that US SUB2 used a \$400M NOL from the 2018 tax year when its aggregate group had a BE% of 4.5%.

The MTI of the Foreign Parent, US SUB1 and US SUB2 are computed below.

	Foreign Parent	US SUB1	US SUB2
Gross Income	\$400M	\$1B	\$3B
Deductions	\$300M	\$800M	\$2.4B
Taxable Income	\$100M	\$200M	\$600M
BETB's	\$10M	\$100M	\$900M
Add Back of NOL's	\$0	\$0	\$18M
MTI	\$110M	\$300M	\$1,518M
A The add back of the NOL from 2018 under			
Treas. Reg. 1.59A-4(b)(2)(ii) is:		2018 NOL	\$400M
		x 2018 BE%	4.5%
			\$18M

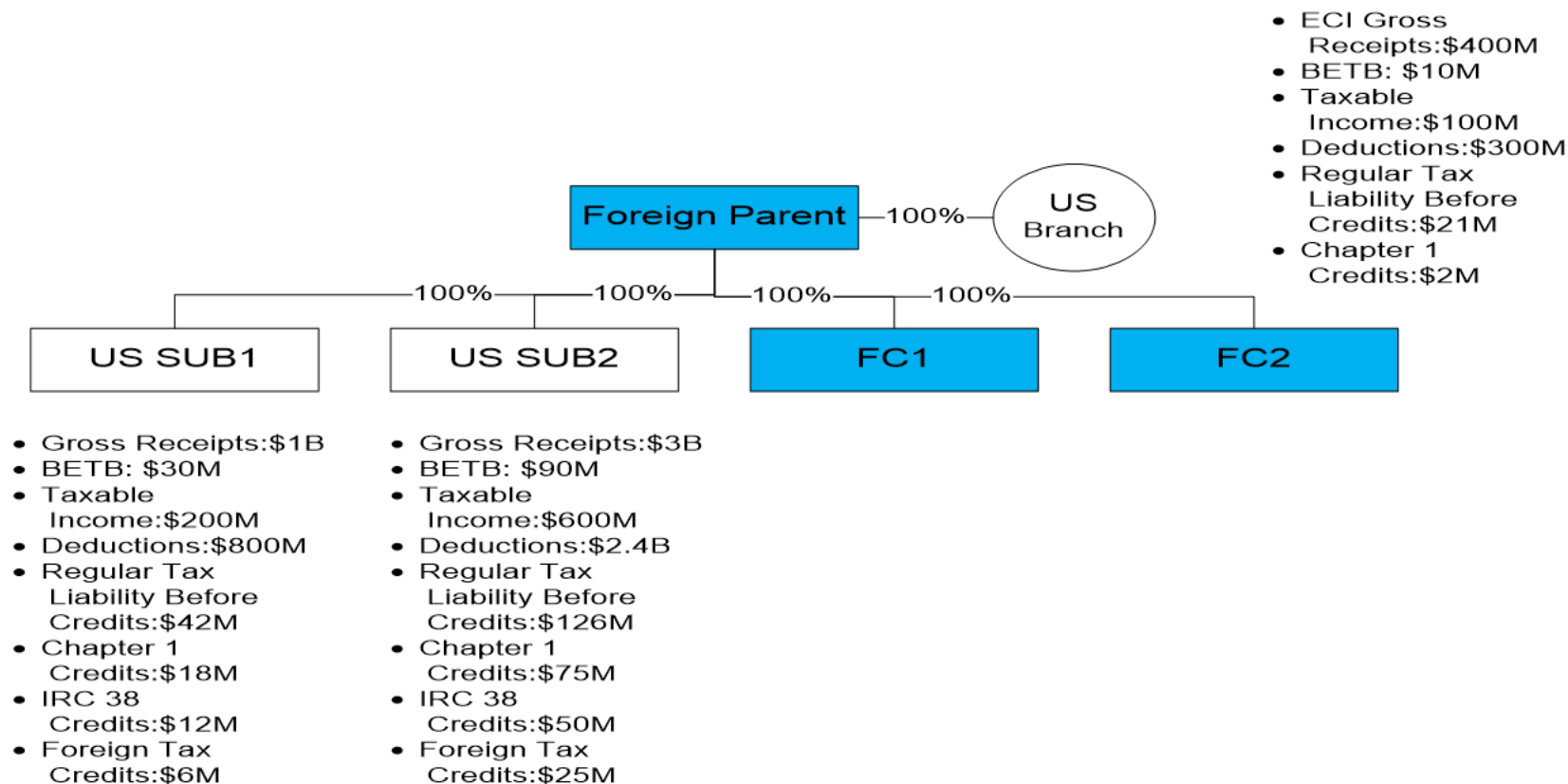
Examples of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Examples

Example 5 - BEMTA

Facts are the same as in Example 4 and include:



The IRC 41 credits are research credits under section 41(a). There are no applicable section 38 credits.

Examples of the Concept (cont'd)

IRC 59A Base Erosion Anti-Abuse Tax Overview

Examples

Example 5 – BEMTA (cont'd)

		Foreign Parent	US SUB1	US SUB2
(1)	Taxable Income	\$100M	\$200M	\$600M
(2)	Regular Tax Rate	21%	21%	21%
(3)	Regular Tax Liability Before Credits [(1)*(2)]	\$21MM	\$42MM	\$126MM
(4)	Foreign Tax Credits	\$0	\$6MM	\$25M
(5)	IRC 41 Credits	\$0	\$12M	\$50M
(6)	Total Chapter 1 Credits [(4)+(5)]	\$0	\$18M	\$75M
(7)	Regular Tax Liability After Credits [(3)-(6)]	\$21M	\$24M	\$51M
(8)	MTI	\$110M	\$300M	\$1,518M
(9)	BEAT Rate	10%	10%	10%
(10)	Minimum Tax Amount [(8) x (9)]	\$11M	\$30M	\$151.8M
(11)	Adjusted Regular Tax Liability {(3)-[(6)-(5)]}	\$21MM	\$36M	\$101M
(12)	BEMTA [(10)-(11)]	\$0	\$0	\$50.8M

- Foreign Parent has BEMTA of \$0;
- US SUB1 has BEMTA of \$0; and
- US SUB2 has BEMTA of \$50.8M

Tax Reporting Forms

IRC 59A Base Erosion Anti-Abuse Tax Overview

Tax Reporting Forms

Form 8991- Tax on Base Erosion Payments of Taxpayers with Substantial Gross Receipts

- Schedule A Base Erosion Payments and Base Erosion Tax Benefits
- Schedule B Waiver of Deductions
- Schedule C Credits Reducing Regular Tax Liability in Computing Base Erosion Minimum Tax Amount (BEMTA)

Form 5471- Information Return of U.S. Persons With Respect to Certain Foreign Corporations

- Schedule G Questions 4a-4c

Form 5472- Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business

- Part VIII Base Erosion Payments and Base Erosion Tax Benefits Under Section 59A

Form 8858- Information Return of U.S. Persons With Respect to Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs)

- Schedule G Questions 6a-6c and 7a-7c

Index of Referenced Resources

IRC 59A Base Erosion Anti-Abuse Tax Overview

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TD 9885

TD 9910

IRC 26

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IRC 805

IRC 832

IRC 988

IRC 1016

IRC 1221

IRC 1563

IRC 6038A

IRC 7701

Treas. Reg. 1.59A-1

Treas. Reg. 1.59A-2

Treas. Reg. 1.59A-3

Treas. Reg. 1.59A-4

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Treas. Reg. 1.482-9
Treas. Reg. 1.861-9
Treas. Reg. 1.861-10
Treas. Reg. 1.861-17
Treas. Reg. 1.1502-59A
Treas. Reg. 1.1502-76
Treas. Reg. 1.6038A-2
Temp. Reg. 1.448-1T
Temp. Reg. 1.861-9T
Temp. Reg. 1.861-10T
<i>Securities Exchange Act of 1934</i>
12 CFR 252.161

Training and Additional Resources

IRC 59A Base Erosion Anti-Abuse Tax Overview	
Type of Resource	Description(s)
Saba Meeting Sessions	<ul style="list-style-type: none">▪ <i>TCJA-IRC 59A International Provisions – 2019 Saba Meeting</i>▪ <i>Tax Cut and Jobs Act IRC 59A Advanced Training Summer 2020</i>
Databases / Research Tools	International KB, Base Erosion and Anti-Abuse Tax (BEAT) Book https://portal.ds.irsnet.gov/sites/vl008/SitePages/59A_BEAT.aspx#InplviewHashadc6eb30-9cc2-477f-9bda-1a108dc69054=

Glossary of Terms and Acronyms

Term/Acronym	Definition
AMT	Alternative Minimum Tax: Defined in IRC 55(a).
BE%	Base Erosion Percentage: Defined in IRC 59A(c)(4) and Treas. Reg. 1.59A-2(e)(3).
BEAT	Base Erosion Anti-Abuse Tax: See section 14401 of P.L. 115-97.
BEMTA	Base Erosion Minimum Tax Amount : Defined in IRC 59A(b)(1) and Treas. Reg. 1.59A-5(b).
BEP	Base Erosion Payment: Defined in IRC 59A(d) and Treas. Reg. 1.59A-3(b)(1).
BETB	Base Erosion Tax Benefit: Defined in IRC 59A(c)(2) and Treas. Reg. 1.59A-3(c)(1).
EAG	Expanded Affiliated Group: Defined in IRC 59A(d)(4)(C)(ii), IRC 7874(c)(1) and Treas. Reg. 1.7874-12(a)(7).
ECI	Effectively Connected Income: See IRC 864 and regulations thereunder.
FRP	Foreign Related Party: Defined in IRC 59A(f), IRC 59A(g) and Treas. Regs. 1.59A-1(b)(12), 1.59A-1(b)(17).
MTI	Modified Taxable Income: Defined in IRC 59A(c)(1) and Treas. Reg. 1.59A-4(b)(1).

Glossary of Terms and Acronyms (cont'd)

Term/Acronym	Definition
NOL	Net Operating Loss: Defined in Treas. Reg. 1.172-1(a). See also IRC 172.
QDP	Qualified Derivative Payment: Defined in IRC 59A(h)(2)(A) and 1.59A-6(b)(1).
R&E	Research and Experimental
REIT	Real Estate Investment Trust: Defined in IRC 856(a) and Treas. Reg. 1.856-1(a).
RFIC	Regulated Foreign Insurance Company: Defined in Treas. Reg. 1.59A-3(b)(3)(ix)(B)
RIC	Regulated Investment Company: Defined in IRC 851(a) and Treas. Reg. 1.851-1(a).
SCM	Services Cost Method: Defined in Treas. Regs. 1.59A-3(b)(3)(i).
SFC	Surrogate Foreign Corporation: Defined in IRC 59A(d)(4)(C)(i).
SNT	Specified Nonrecognition Transactions: Defined in Treas. Reg. 1.59A-3(b)(3)(viii).
TCJA	Tax Cuts and Jobs Act of 2017: See P.L. 115-97.
TLAC	Total Loss Absorption Capacity

Index of Related Practice Units

Associated UIL(s)	Related Practice Unit
	None at this time.