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October 12, 2023

The Honorable Janet L. Yellen
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Notice 2023-64

Dear Secretary Yellen:

The Alliance for Competitive Taxation ("ACT") is a coalition of leading American companies from a wide range of industries that supports a globally competitive corporate tax system.

Attached are ACT's comments on the treatment of dividends from foreign corporations for purposes of the corporate alternative minimum tax ("CAMT"), as requested by Section 16.02(3) of Notice 2023-64. We appreciate your consideration of these comments. ACT representatives welcome future discussion of these comments with your staff.

Yours sincerely,

Alliance for Competitive Taxation

cc:Lily Batchelder, Asst. Secretary for Tax Policy, U.S. Department of the Treasury
Michael Plowgian, Deputy Asst. Secretary for International Tax Affairs, U.S. Department of the Treasury
William M. Paul, Principal Deputy Chief Counsel, Internal Revenue Service
Peter Blessing, Associate Chief Counsel – International, Internal Revenue Service

ALLIANCE FOR COMPETITIVE TAXATION RECOMMENDATIONS REGARDING THE TREATMENT OF DIVIDENDS FROM FOREIGN CORPORATIONS UNDER THE CORPORATE ALTERNATIVE MINIMUM TAX (CAMT)

I. INTRODUCTION

Notice 2023-64 (the "Notice") provides helpful guidance on certain important interpretive questions raised by the CAMT. However, as with the prior notices issued under the CAMT,[1] the Notice fails to provide guidance on the treatment of dividends from foreign corporations, an issue of paramount importance to many corporations that are within the scope of the CAMT. The Internal Revenue Service ("IRS") and Treasury requested guidance on this issue in Section 16.02(3) of the Notice.

ACT recognizes that other important issues also require guidance from the IRS and the Treasury Department.[2] However, this comment letter focuses solely on the treatment of dividends, because the lack of guidance in this area is having a significant deleterious effect on the ability of US-headquartered companies to repatriate foreign earnings to the United States. This lack of guidance has resulted, for many companies within the scope of the CAMT, in the re-emergence of the "lockout effect," one of the most widely maligned features of the U.S. tax system prior to 2017. As a result of the potential for material adverse tax consequences under CAMT from repatriating foreign earnings, reinvestment of these earnings in the United States is being hindered.

In the absence of clarifying guidance, companies within the scope of the CAMT face the possibility of the imposition of a 15-percent tax on repatriated earnings. Indeed, to the extent such earnings must be distributed through several tiers of foreign corporations to be repatriated to the United States, companies confront the possibility of multiple impositions of 15-percent tax on such distributions, as the CAMT statutory text does not provide explicit guidance on the appropriate treatment of these sequential distributions. Given these potential adverse tax consequences, many companies have understandably made the decision to impose strict limitations on intercorporate distributions from their foreign affiliates.

[1] Notice 2023-7 and Notice 2023-20.

[2] ACT previously submitted detailed comments on numerous issues raised by the CAMT on September 30, 2022, March 20, 2023, and July 26, 2023.

ACT believes that Congress did not intend to reinstitute rules that lock out foreign earnings of the largest U.S. corporations. There is no evidence from any of the discussions surrounding the CAMT's enactment that Congress intended to impose CAMT on corporate dividends.[3] Further, as discussed in more detail below, the text of section 56A(c)(2)(C) and section 56A(c)(15) strongly indicate otherwise.

II. Relevant Statutory Provisions

Section 56A(c)(2)(C) provides,

> In the case of any corporation which is not included on a consolidated return with the taxpayer, adjusted financial statement income of the taxpayer with respect to such other corporation shall be determined by only taking into account the dividends received from such other corporation (reduced to the extent provided by the Secretary in regulations or other guidance) and other amounts which are includible in gross income or deductible as a loss under this chapter….

This statutory language makes clear that, unless otherwise addressed in guidance from the IRS and Treasury, "dividends" (with the exception of dividends paid within an affiliated group of companies filing a consolidated tax return) are included in adjusted financial statement income ("AFSI"). We note that the term dividends is not defined within the CAMT itself, which we understand has led to questions regarding whether the reference to dividends in section 56A(c)(2)(C) is intended to refer to the tax law concept of a dividend (i.e., a dividend as defined in section 316 of the Internal Revenue Code) or, rather, to the financial accounting concept of a dividend.

ACT believes that the term "dividends" in section 56A(c)(2)(C) refers to the tax law concept of a dividend. Indeed, the statutory text refers explicitly to "dividends … and other amounts *which are includible in gross income or deductible as a loss under this chapter…*" (emphasis supplied). This language indicates that Congress intends to replace the financial accounting concepts that would otherwise be applicable under this provision of section 56A with applicable tax law concepts. Furthermore, section 316(a) defines the term "dividend" "for purposes of this subtitle," that is, subtitle A-Income Taxes, the subtitle in which section 56A is located. Reading the statute to provide otherwise is not only strained as a textual matter,[4] it also would produce an anomalous policy result – the use of financial accounting concepts for corporate dividends

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[3] Unfortunately, there are no committee reports from either the House Ways & Means Committee or the Senate Finance Committee describing the Congressional intent in enacting the CAMT. However, neither the Treasury Department's General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals ("Greenbook") proposal for a minimum tax on the book income of large corporations nor any of the Senate floor colloquies that were part of the debate preceding the CAMT's enactment support a conclusion that the statute intended to alter the regular tax law treatment of corporate dividends.

[4] There is nothing in the statutory text to suggest that the modifier, "which are includible in gross income or deductible as a loss…" is intended to be limited solely to "other amounts" and the text reads naturally to refer to both "dividends" and "other amounts". Moreover, even if the modifier did apply only to "other amounts", the inclusion of "other" demonstrates Congress's intent that dividends are "amounts which are includible in gross income".

but the use of tax law concepts for gains on sales or other dispositions of the very same corporate stock that gives rise to dividends.

We note that the statutory text explicitly authorizes the Secretary to "reduce" the amount of taxable dividends that are included in AFSI. Indeed, the parenthetical language, "reduced to the extent provided by the Secretary…") comes immediately after the words "dividends received from such other corporation," which provides strong textual support for the notion that Congress intended Treasury to (a) start with *taxable* dividends, and then (b) *reduce* the amount of such dividends as appropriate in determining AFSI.

Not only does the statutory text discussed above provide ample authority for Treasury to address the treatment of corporate dividends in an appropriate manner, Congress also granted Treasury broad regulatory authority in section 56A(c)(15). This provision explicitly authorizes Treasury to provide adjustments to AFSI to carry out the purposes of section 56A, including adjustments "to prevent the omission or duplication of any item." This provision further bolsters Treasury's authority to address the treatment of corporate dividends, including to ensure appropriate coordination between section 56A(c)(2)(C) and section 56A(c)(3) (which requires United States shareholders of controlled foreign corporations ("CFCs") to include a pro rata share of CFC earnings in AFSI).[5]

III. ACT RECOMMENDATIONS

As discussed further below, based on both the underlying policy of the CAMT[6] and the statutory text discussed above, ACT believes sections 56A(c)(2)(C), 56A(c)(3), and 56A(c)(15) should be interpreted to provide, in the case of United States shareholders[7] of foreign corporations: (a) AFSI treatment of dividends that aligns with the regular tax treatment of such dividends, including the section 959 exclusion from gross income for distributions of previously taxed earnings and profits ("PTEP") and the section 245A deduction for certain dividends; and (b) inclusion of a pro rata share of adjusted CFC earnings in AFSI.

As noted, the text of section 56A(c)(2)(C) indicates that Congress intended to utilize the tax law concept of dividends, and Congress further authorized Treasury to provide appropriate reductions to the amount of such dividends. Because section 959 provides an exclusion from gross income for regular tax purposes for amounts that would otherwise be dividends to the

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[5] We note that, in its request for comments in section 16.02(3) of the Notice, Treasury specifically referred to the appropriate coordination between section 56A(c)(2)(C) (describing the treatment of dividends) and Section 56A(c)(3) (providing for the inclusion of a pro rata share of CFC earnings in AFSI).
[6] As noted above, there is very limited legislative history to provide guidance on the underlying policy rationale for the CAMT. However, the CAMT has its origins in a proposal included in the President's Fiscal Year 2022 Budget Proposal. According to the Treasury Greenbook, the CAMT was intended as "a targeted approach to ensure that the most aggressive corporate tax avoiders bear meaningful federal income tax liabilities." The repatriation of dividends from foreign subsidiaries is not in any way indicative of corporate tax avoidance. To the contrary, by repatriating funds to the United States, the payment of such dividends is will be correlated with increased US economic activity, jobs and tax revenue.
[7] As used herein, "United States shareholder" or "U.S. shareholder" refers to the defined term in Section 951(b).

extent such amounts are treated as PTEP, ACT believes Treasury should provide that any amounts treated as PTEP are excluded from AFSI, regardless of whether such amounts are received by a U.S. shareholder directly (section 959(a) distributions) or are received by an intermediate CFC (section 959(b) distributions).[8]

Treatment in this manner is consistent with the relevant statutory text and apparent intent of Congress by aligning the treatment of such distributions for CAMT purposes and regular tax purposes. In addition, by providing that AFSI excludes all distributions of PTEP, Treasury will ensure that the CAMT preserves the coordinated treatment that exists for regular tax purposes between distributions of PTEP and sales of CFC stock. Specifically, for regular tax purposes, Section 961 provides for adjustments to the basis in CFC stock to take into account inclusions in gross income under section 951 or 951A and distributions of PTEP.[9] Taken together, sections 959 and 961 operate for regular tax purposes to avoid double taxation (if distributions of PTEP were taxed but basis was reduced as a result of PTEP distributions) or double non-taxation (if distributions of PTEP were excluded from income but basis was not reduced as a result of PTEP distributions). As described above, Congress explicitly provided that taxpayers are *required* to use regular tax concepts for purposes of determining gain or loss on sales of corporate stock.

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[8] Because PTEP distributions are explicitly excluded from gross income under section 959(a) and section 959(b), they are definitionally excluded from the phrase, "amounts included in gross income or deductible as a loss under this chapter." This interpretation is further bolstered, in the case of PTEP distributions directly to U.S. shareholders, by section 959(d), which explicitly provides that section 959(a) distributions are not dividends. Notably, per the unambiguous statutory language, the exclusion from gross income in section 959(b) applies for purposes of section 951(a) (the operative rule that determines the amounts included in the gross income of a U.S. shareholder). As to the U.S. shareholder of a lower-tier CFC, such a lower tier PTEP distribution is neither "dividends" nor "amounts included in gross income or deductible as a loss under this chapter…." Accordingly, such a distribution cannot be described within section 56A(c)(2)(C). Further, such a distribution should also be excluded from section 56A(c)(3)(A) (which provides for an inclusion in AFSI of a pro rata share of a CFC's income), because section 56A(c)(3)(A) states explicitly that, in applying that provision, "rules similar to those that apply in determining [AFSI]" should be applied. As discussed above, a PTEP distribution from a CFC directly to a U.S. shareholder should be excluded from AFSI. Excluding the lower-tier PTEP distribution from a section 56A(c)(3)(A) inclusion is a straightforward application of the statutory mandate to apply "rules similar" to those that apply directly at the U.S. taxpayer level.

[9] Specifically, section 961(a) provides for an increase to CFC basis as a result of inclusions in income under section 951 or section 951A, and section 961(b) provides for a decrease in basis by the amount of a distribution of PTEP. Section 961(c) further provides for a limited basis adjustment in CFC stock held by another CFC for purposes of determining an amount included in gross income by the U.S. shareholder(s) owning the relevant CFC stock.

If taxpayers are required to utilize regular tax law concepts for purposes of computing gain or loss on stock but are not provided an exclusion from AFSI for PTEP distributions, the result will inevitably be a duplication of income in the computation of AFSI, contrary to Congress's explicit directive in section 56A(c)(15) for the Secretary to address potential "duplications or omissions" of income in the determination of AFSI.[10]

ACT also believes dividends that qualify for the section 245A dividends-received deduction[11] should be eliminated from AFSI. As noted, the text of section 56A(c)(2)(C) indicates Congress's intent to align the CAMT treatment of dividends with the regular tax treatment of dividends. Further, because section 56A(c)(3) already requires a U.S. shareholder of a CFC to include its pro rata share of the CFC's earnings in computing AFSI, including CFC dividends in AFSI will result in a duplication of income in the computation of AFSI, contrary to the apparent directive of Congress in section 56A(c)(15).[12]

ACT recognizes that some dividend distributions that are eligible for section 245A for regular tax purposes will be attributable to earnings that arose prior to the effective date of the CAMT. Requiring the tracking of CFC earnings for the purpose of including such earnings in AFSI would impose a significant administrative burden on both taxpayers and the IRS, with very little effect on the amount of tax collected under the CAMT, as taxpayers would simply avoid distributions of section 245A dividends that were attributable to pre-CAMT earnings. This would both be contrary to Congress's intent in eliminating the lockout effect of pre-2017 law and inconsistent with the apparent intent of Congress in section 56A(c)(2)(C) to align the CAMT treatment of dividends with the regular tax treatment of dividends.[13]

In addition, if section 245A distributions that are attributable to pre-CAMT periods are included in AFSI, the result will be systemic double taxation of such earnings. Specifically, the CAMT

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[10] In addition, as discussed further below in the context of section 245A dividends, the income that gives rise to PTEP will already be included in AFSI under section 56A(c)(3) to the extent such income arises after the effective date of the CAMT. Accordingly, failure to exclude PTEP from AFSI will result in significant duplications of income that was already included within the CAMT base under section 56A(c)(3).

[11] Section 245A provides for a deduction equal to the foreign-source of dividends received by a U.S. shareholder from a specified 10-percent owned foreign corporation.

[12] ACT believes that this treatment should apply regardless of whether the dividends are received directly by the U.S. shareholder (and thus directly qualify for section 245A for regular tax purposes) or are distributed from a lower-tier CFC to an upper-tier CFC. As discussed above, this treatment of such lower-tier dividends is supported by section 56A(c)(3)(A), which provides that the amount included in AFSI by a United States shareholder from CFCs should be the United States shareholder's pro rata share of the CFC's net income, "(as adjusted under rules similar to those that apply in determining adjusted financial statement income)…." It is also consistent with the approach taken for regular tax purposes in Treas. Reg. sec. 1.952-2, which generally provides that the gross income of a foreign corporation is determined by treating the foreign corporation as a domestic corporation.

[13] Including such section 245A dividends in AFSI would effectively amount to retroactive, partial repeal of section 245A for CAMT taxpayers, despite the fact that there is nothing in the text or history of the CAMT to indicate that section 245A was in any way associated with the "aggressive tax avoid[ance]" that the CAMT is intended to address.

statute does not provide a basis for claiming a foreign tax credit for foreign taxes attributable to these section 245A distributions out of pre-CAMT earnings.[14] However, Congress did explicitly provide a foreign tax credit in section 59(l) for foreign taxes paid with respect to other amounts that are included in AFSI, and there is nothing in the text or available legislative history to suggest that Congress intended to impose double taxation on any corporate dividends. Indeed, legislating to impose double taxation on these earnings would be contrary to longstanding U.S. government policy and would appear to be inconsistent with U.S. income tax treaty obligations. Moreover, as already noted, such an approach would run counter to the apparent intent of Congress to align the CAMT and the regular tax treatment of corporate dividends, as reflected in section 56A(c)(2)(C).

IV. Conclusion

As noted at the outset, the current uncertainty surrounding the treatment of corporate dividends has resulted, for many companies, in the effective reinstitution of a form of lockout effect, preventing these companies from repatriating foreign earnings to the United States. This is both inefficient from a company cash management perspective and, more importantly, contrary to the interests of the United States. ACT believes that Congress did not intend and could not have intended this result. To the contrary, as discussed above, the text of the relevant CAMT provisions strongly indicates that Congress intended to align the treatment of dividends for regular tax purposes and the CAMT. We respectfully urge Treasury and the IRS to provide prompt guidance consistent with ACT's recommendations on this important issue.

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[14] Section 59(l) generally provides for a foreign tax credit for taxes paid directly by a domestic corporation (section 901 taxes), as well as for a U.S. shareholder's pro rata share of foreign taxes paid or accrued by CFCs and reflected on the CFC's applicable financial statement. Foreign taxes attributable to pre-CAMT earnings that are distributed as dividends are not described in Section 59(l).