The Tax Law Center NYU LAW

September 28, 2022

The Honorable Lily Batchelder
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

William Paul
Principal Deputy Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Recommendations for Guidance on the Corporate Alternative Minimum Tax

Dear Assistant Secretary Batchelder, Commissioner Rettig, and Principal Deputy Chief Counsel Paul,

Please find enclosed initial recommendations for guidance concerning the corporate alternative minimum tax enacted in P.L. 117-169 (known as the Inflation Reduction Act). The Tax Law Center at NYU Law is a public interest initiative that seeks to improve the integrity of the tax system. Our staff includes tax law experts with experience in tax administration, private practice, and the tax legislative process.

We would be pleased to discuss these recommendations with you or your staff.

Sincerely,

Chye-Ching Huang
Executive Director, Tax Law Center at NYU Law

Enclosure

Introduction[1]

The corporate alternative minimum tax enacted in P.L. 117-169 (known as the Inflation Reduction Act or "IRA" and such tax the "CMT") includes numerous grants of regulatory authority to the Secretary of the Treasury Department. The guidance issued pursuant to this authority will play a critical role in ensuring the successful implementation of the new tax. In some cases, the grants of regulatory authority specifically direct the Secretary to carry out the purposes of the various Code provisions that comprise the CMT; in other cases, the purposes are not explicitly mentioned in the grants of regulatory authority, but Treasury and the IRS may nevertheless rely on them as a guide for resolving difficult technical or policy issues. Given the central role that guidance will play in the implementation of the CMT, we are writing to articulate our understanding of the purposes of sections 56A and 59(k) and their implications for the exercise of regulatory authority granted under those provisions. We also highlight some opportunities for simplification.

Our principal recommendations are:

1. We recommend that guidance issued under section 56A reflect an understanding that the purpose of section 56A is to construct an administrable base for the CMT that generally adheres to the net income or loss set forth on an applicable financial statement ("AFS").
2. We recommend that Treasury and the IRS focus on providing additional adjustments to adjusted financial statement income ("AFSI") as necessary to (i) ensure the proper mechanical functioning of the CMT, (ii) address potential abuse, and (iii) address certain nonrecognition transactions.
3. We recommend that guidance issued under section 59(k) reflect an understanding that the CMT is intended to apply broadly to large corporations with a history of financial statement income above a specified threshold.
4. We recommend that Treasury and the IRS exercise the regulatory authority granted under section 59(k)(3)(B) to interpret the term "change of ownership" by reference to significant corporate-level changes of ownership.
5. We recommend a broad exercise of the regulatory authority in section 59(k)(3)(A) to provide a simplified method for determining whether a corporation is an applicable corporation.
6. We recommend that Treasury and the IRS address the complexities arising from treating an AFS for a group of entities (a "consolidated AFS") as an AFS for a single entity by treating the standalone financial statements taken into account in creating the consolidated AFS as an AFS.

Base of the CMT

Purpose of section 56A and the computation of AFSI

The purpose of section 56A is poised to play a significant role in the implementation of the CMT. The basic function of that Code section is to define AFSI, which serves as the base of the

[1] The principal author of this comment is Peter Richman. Substantial contributions were provided by Sophia Yan.

new regime.[2] The statute specifically authorizes the Secretary to adjust AFSI "as the Secretary determines necessary to carry out the purposes of this section."[3] Similarly, it authorizes regulations generally "to carry out the purposes of this section."[4] Despite these prominent invocations of purpose, Congress did not explicitly describe the purposes of section 56A in the statute. Nevertheless, the overall statutory scheme[5] of section 56A demonstrates that its purpose is to establish an administrable base for the CMT that adheres to financial statement income with limited categories of exceptions. This purpose, and each of the categories of relevant exceptions, is evidenced by the principles embodied in subsections (a) through (c) of section 56A.[6]

Section 56A(a) and (b) – The framework for defining the base

Subsections (a) and (b) of section 56A reflect the most fundamental principle of section 56A, which is that the CMT is directly based on the net income or loss set forth on the AFS. In order for the regime to function, the net income or loss set forth on the AFS must be translated into an amount that can be subject to taxation under section 55(a) and (b)(2). Subsections (a) and (b) of section 56A provide the basic framework necessary for this translation effort by defining AFSI, the base of the CMT, by reference to amounts set forth on a specified AFS. In this regard, these provisions implement the most central aspect of the purpose of section 56A, which is to construct a base for the CMT that is directly derived from financial accounting.

Section 56A(c)(1) through (14) – Statutory adjustments to AFSI

The statutory adjustments to AFSI in section 56A(c) demonstrate two additional principles that inform the purpose of section 56A – the CMT must be administrable, and decisions to alter the base relative to financial statement income are generally within the purview of Congress.

First, Congress recognized that a number of mechanical adjustments are required in order to harmonize items that appear on the AFS with the structure of the CMT. For example, a corporation's AFSI must be adjusted when the AFS covers a period that does not align with the taxable year.[7] This rule reflects the general principle that adjustments to AFSI should be made as necessary to ensure the basic functioning and administrability of the CMT.[8]

Second, Congress provided a number of non-mechanical adjustments where it determined that the base of the CMT should diverge from the net income or loss set forth on the AFS. For

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[2] AFSI is also relevant to section 59(k), which defines the scope of entities potentially subject to the CMT. *See* section 59(k)(1)(B). While we primarily address adjustments to AFSI by reference to their potential impact on the base of the CMT, we note that many such adjustments could also impact the scope of the new regime.

[3] Section 56A(c)(15).

[4] Section 56A(e).

[5] *See generally* Congressional Research Service, Statutory Interpretation: Theories, Tools, and Trends (May 18, 2022).

[6] Section 56A(d) generally provides for the use of financial statement net operating losses. This provision appears to reflect a desire to ameliorate some of the effects of an annual system of financial accounting, in which income and loss may arise unevenly. Section 56A(d) does not, however, alter the purpose of section 56A that is articulated in this comment.

[7] Section 56A(c)(1).

[8] The grants of regulatory authority in section 56A(c)(2)(C) similarly demonstrate that Congress contemplated some mechanical adjustments to AFSI would be provided by guidance.

example, the statute reduces AFSI for tax deductions arising from amortization of wireless spectrum.[9] These adjustments show that Congress purposefully identified those circumstances in which the separate policy rationale for a particular item justifies a narrowing or broadening of the CMT base relative to financial statement income. The deliberate itemization of these non-mechanical adjustments suggests that, absent clear instruction from Congress, the base of the CMT should generally adhere to the net income or loss set forth on the AFS.

Section 56A(c)(15)(A) – Omission or duplication

The delegation of authority to the Secretary to provide additional adjustments to AFSI as necessary to carry out the purposes of section 56A specifically mentions adjustments "to prevent the omission or duplication of any item."[10] This provision, which is drawn directly from the so-called book undertaxed reported profits adjustment (the "BURP adjustment") to the former corporate alternative minimum tax,[11] reinforces the principle described above that adjustments should be made as necessary to ensure that the CMT is administrable. For example, in the 1990 final regulations implementing the BURP adjustment, Treasury and the IRS relied on this grant of regulatory authority to address situations in which a prior year's AFS is restated.[12] Absent these regulatory adjustments, certain items could be improperly accounted for in a manner that would clearly depart from the purpose of using financial statement income as an alternative to the typical corporate income tax base.

Section 56A(c)(15)(A), and particularly the reference to the "omission" of items, also reflects the principle that the CMT base must be guarded against abuse. Taxpayers seeking to minimize their CMT liability may undertake transactions or otherwise structure their affairs to eliminate items of income, duplicate items of loss, shift items between reporting years, or shift items between entities. In some instances, this planning may be respected; in others, however, the Secretary may determine that a taxpayer has inappropriately omitted or duplicated an item and must make corrective adjustments. These adjustments could be implemented by reference to the standards used in preparing the AFS. For example, if a taxpayer's interpretation of a financial accounting standard varies significantly from year-to-year in a manner that reduces their CMT liability, but the variance cannot be explained other than by reference to tax planning motivated by the CMT, the Secretary may determine that an amount of income has been inappropriately omitted from AFSI. More broadly, the grant of authority to the Secretary to make such adjustments

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[9] Section 56A(c)(14).

[10] Section 56A(c)(15)(A).

[11] *See* former section 56(f)(2)(H) as enacted in section 701(a) of the Tax Reform Act of 1986, Pub. L. 99-514 (the "TRA of 1986"), 100 Stat. 2085, 2328. The grant of regulatory authority under the BURP adjustment to adjust financial statement income (referred to as adjusted net book income under former section 56(f)) was narrower than the grants contained in section 56A(c). In the TRA of 1986, Congress delegated authority to address the omission or duplication of items under the BURP adjustment, but did not address adjustments necessary to carry out the purposes of former section 56(f) or the principles of certain nonrecognition provisions. Nevertheless, these changes should not be construed as broadly expanding the scope of delegated authority. The first change, reflected in the introductory language of section 56A(c)(15), is bounded by the purpose of section 56A, as discussed herein. The second change is a narrow expansion of regulatory authority to address specifically identified subject matter, as discussed in further detail below.

[12] *See* Treas. Reg. § 1.56-1(d)(4)(iv) in Corporate Alternative Minimum Tax Book Income Adjustment, TD 8307, 55 Fed. Reg. 33671 (August 17, 1990) ("TD 8307").

demonstrates a key aspect of the purpose of section 56A, which is that the base of the CMT must be guarded against the improper manipulation of AFSI.

Section 56A(c)(15)(B) – Consideration of certain nonrecognition principles

The delegation of authority to the Secretary to provide additional adjustments to AFSI as necessary to carry out the purposes of section 56A also references certain nonrecognition provisions. Specifically, section 56A(c)(15)(B) describes adjustments to AFSI to carry out the principles of part II of subchapter C (relating to corporate liquidations), part III of subchapter C (relating to corporate organizations and reorganizations), and part II of subchapter K (relating to partnership contributions and distributions). This provision suggests an expectation that the nonrecognition principles underlying these parts of the Code be reconciled with, but not necessarily prioritized over, the purposes of section 56A. In some cases, this grant of regulatory authority may support decreasing a corporation's AFSI. For example, regulations may subtract from a corporation's AFSI the financial statement gain on a transaction which is afforded nonrecognition for federal income tax purposes. In other cases, this grant of regulatory authority may support increasing a corporation's AFSI. For example, in an asset transaction that is afforded nonrecognition for federal income tax purposes, the acquiror may receive a stepped-up basis in the assets for financial accounting purposes. The principles of nonrecognition referenced in section 56A(c)(15)(B) may require adjustments to ensure that this stepped-up basis does not result in an inappropriate reduction to the corporation's AFSI in the current or future years.[13] In any event, section 56A(c)(15)(B) demonstrates that Congress viewed the separate policy rationales for some nonrecognition transactions as sufficiently compelling to justify a departure in the computation of AFSI from amounts reported on the AFS.[14] Accordingly, this provision underscores the general principle described above that the base of the CMT should generally not be broadened or narrowed relative to financial statement income, except as specifically provided or contemplated by Congress.

Conclusion concerning purpose of section 56A

The statutory scheme of section 56A reveals that its purpose is to construct an administrable base for the CMT that departs from the net income or loss set forth on a specified AFS in narrowly prescribed circumstances. Section 56A(c), in particular, highlights the instances in which such departures appear to be warranted: (i) to mechanically harmonize the AFS with the CMT base, (ii) to prevent abuse, and (iii) to narrow or widen the base of the CMT as specifically provided or contemplated by Congress. This understanding of the purpose of section 56A is supported by several extra-textual sources, which are discussed in further detail below. Moreover, alternative

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[13] *Cf.* OECD/G20 Base Erosion and Profit Shifting Project, Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two) ("Pillar Two Model Rules"), Article 6.3.2 (permitting the exclusion from GLoBE Income or Loss of gain or loss from the disposition of assets in a GLoBE Reorganisation, but also requiring the use of carryover basis for determinations of GLoBE Income or Loss of the acquiror after the acquisition); section 56A(e) (seemingly specifically contemplating the necessity of "parallel" basis tracking in the subchapter K context in authorizing "guidance relating to the effect of the rules of this section on partnerships with income taken into account by an applicable corporation").

[14] *Cf.* Treas. Reg. § 1.56-1(b)(7), *Example (1)* in TD 8307 (providing that financial statement gain attributable to a stock transfer is included in net book income, notwithstanding that, for federal income tax purposes, the transferor recognizes no gain or loss because the transaction qualifies as a section 368(a)(1)(B) reorganization).

approaches to understanding the purpose of section 56A would lead to results that are inconsistent with the text and framework of the statute, also as discussed in further detail below.

Recommendations concerning purpose of section 56A and adjustments to AFSI

In exercising the grants of regulatory authority in section 56A, we recommend that Treasury and the IRS adhere to the understanding of the purpose of section 56A articulated above. Accordingly:

- Regulatory adjustments should be provided as necessary to ensure the basic functioning and administrability of the CMT.[15]
- Regulatory adjustments should be provided to prevent abuse. Such anti-abuse adjustments could, for example, target inappropriate omissions or duplications on an item-by-item basis. The authority in section 56A(b) could also support requiring the use of an AFS other than one defined in section 451(b)(3).
- Regulatory adjustments should be provided as necessary to carry out the nonrecognition principles referenced in section 56A(c)(15)(B), while simultaneously carrying out the purposes of section 56A (as required by the introductory language of the delegation of authority). While this guidance is being developed, the Secretary may consider extending transitional relief to certain transactions publicly announced, described in a private letter ruling ("PLR") request, or entered into pursuant to a binding corporate action prior to a given date (e.g., the date of passage of the IRA).

Treasury and the IRS should otherwise generally refrain from issuing guidance that would narrow or widen the base of the CMT.[16] Instead, regulatory guidance under section 56A(c) should focus on following the statutory edict "to carry out the purposes of this section" – that is, to construct an administrable base for the CMT that generally adheres to financial statement income.[17]

Consideration of certain arguments for other adjustments to AFSI

In the course of requesting additional adjustments to AFSI, commenters may seek to identify a common thread that underlies the non-mechanical statutory adjustments in section 56A(c), revealing a purpose that should inform the guidance process in support of their request. However, the statute does not provide an alternative to the purpose articulated above. A plain reading of section 56A(c) suggests that the non-mechanical statutory adjustments to AFSI cannot

[15] Such adjustments could include those necessary to prevent omission or duplication of items, as anticipated by section 56A(c)(15)(A), as well as other narrower grants of regulatory authority, such as those in section 56A(c)(2)(C).

[16] Treasury and the IRS may nevertheless need to address situations that would give rise to absurd or other patently inappropriate outcomes. *See generally supra* footnote 5, at 47-48.

[17] *See also* TD 8307, 55 Fed. Reg. at 33672 (providing that, for purposes of the BURP adjustment, the only permissible adjustments to net book income are those specifically provided by Congress, and the grant of regulatory authority to prevent the omission or duplication of items should be construed narrowly because "Congress considered and rejected a number of adjustments that would be permissible if a broad rule were adopted").

be explained by a single, over-arching principle.[18] Their only commonality is that each was deliberated and determined by Congress. Thus, efforts to establish a unifying theme in support of a particular base-altering adjustment would not be rooted in the text.

In the absence of an alternative purpose, some stakeholders may simply argue for adjustments on a case-by-case basis, invoking the separate policy rationale for a specific tax benefit as a reason for Treasury and the IRS to protect that benefit from the application of the CMT. In a similar vein, some may request that AFSI be increased to reflect the federal income tax treatment of certain items, such as business interest or certain provisions regarded as "negative tax expenditures."[19] In general, such arguments imply that for every requested adjustment, Treasury and the IRS should evaluate whether the separate policy rationale for the federal income tax treatment of a particular item is sufficiently compelling to warrant a new adjustment to AFSI.[20] In addition to imposing significant administrative burden, this approach is fundamentally inconsistent with the basic concept of the CMT.[21] Differences between federal income tax and financial accounting ("book-tax differences") are the raison d'être for the new regime; they cannot be said to also support adjustments that could undermine it.[22] Moreover, section 56A(c)(15) does not delegate authority to provide adjustments on an ad hoc basis by reference to the separate policy rationale of a particular item; rather, adjustments must carry out the purpose of section 56A. As described above, the statute demonstrates both the purpose of section 56A and the adjustments to AFSI that are consistent with that purpose. Treasury and the IRS should thus reject alternative articulations of purpose and generally avoid adopting a case-by-case evaluation of the separate policy rationales underlying each requested adjustment.

Scope of the CMT

Purpose of section 59(k) and the identification of an applicable corporation

The purpose of section 59(k) will likely meaningfully influence the scope of entities potentially subject to the CMT. Although the statute provides the basic rules for identifying an applicable corporation, it delegates regulatory authority to the Secretary to address a number of important

[18] On the contrary, the non-mechanical adjustments to AFSI in section 56A(c) are diverse in scope, subject matter, and scale. For example, the adjustment for depreciation deductions allowed under section 167 will apply to a broad range of corporations, while the adjustment for amortization deductions allowed under section 197 with respect to qualified wireless spectrum will apply to only a handful of telecommunications companies. Similarly, the adjustment for amounts attributable to the direct payment of certain credits will have a major impact on the CMT base, while the impact of the adjustments regarding Alaska Native Corporations will be relatively minor.

[19] *See generally* Joint Committee on Taxation, JCX-23-20, Estimates of Federal Tax Expenditures For Fiscal Years 2020-2024 (November 5, 2020).

[20] Alternatively, stakeholders might argue that Congress specifically contemplated a difference in the financial accounting and federal income tax treatment of an item at the time it enacted the relevant tax provision, and that it intended its policy determination regarding that difference to survive the enactment of the CMT.

[21] *Cf.* Treas. Reg. § 1.56-1T(b)(2)(iii) in TD 8138 ("Net book income includes income or loss that is reported on a taxpayer's applicable financial statement regardless of whether such income or loss is taken into account for other Federal income tax purposes.").

[22] Under a case-by-case determination, the base of the CMT could theoretically converge with the typical corporate income tax base. While there is no reason to think that Treasury and IRS would, in fact, provide adjustments to AFSI to address every book-tax difference, the possibility of such a convergence highlights the flaws of this approach.

issues. In several instances, these grants explicitly require an understanding of the purposes of section 59(k). For example, section 59(k)(1)(C) contemplates a determination by the Secretary as to whether it is "appropriate" to continue to treat a corporation as an applicable corporation in certain circumstances (as discussed further below), while section 59(k)(2)(D) authorizes rules addressing foreign-parented multinational groups based on "the principles of this section."[23] In addition, the general grant of regulatory authority in section 59(k)(3) more broadly delegates significant discretion to the Secretary to determine the scope of corporations potentially subject to the CMT. In exercising this authority, Treasury and the IRS will likely require an understanding of the purpose of section 59(k).

The statutory scheme indicates that the purpose of section 59(k) is to implement an expansive scope for the CMT within the parameters fixed by Congress. This purpose can be inferred from several rules in the statute that are intended to maximize the pool of applicable corporations, including: (i) the default treatment of any corporation that has satisfied the numerical test of section 59(k)(1)(B) in a year ending after 2021 as an applicable corporation indefinitely;[24] (ii) the statutory emphasis on ensuring that if a corporation is excepted by Treasury and the IRS from applicable corporation status, such exception is not permanent;[25] and (iii) the modifications to the numerical test to ensure that it can be satisfied even by corporations with short histories, transactional backgrounds that resulted in predecessor-successor entities, or short taxable years.[26] This understanding of the purpose of section 59(k) is further supported by several extra-textual sources, which are discussed in further detail below.

Recommendation concerning purpose of section 59(k)

We recommend that guidance under section 59(k) reflect an understanding that the purpose of that provision is to ensure that the CMT applies widely to corporations that, on a standalone or aggregated basis, have a history of financial statement income above the applicable threshold. Accordingly, so long as a corporation satisfies the numerical test provided in the statute,

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[23] Presumably, the focus is intended to be on section 59(k) rather than section 59 more broadly. While section 59(k)(2)(D) references "principles," for simplicity, we refer to the "purpose" of section 59(k) to describe the underlying standards that should guide the various grants of authority under that subsection.

[24] Section 59(k)(1)(A). This can be contrasted with the rules under the Pillar Two "global minimum tax" with which the CMT is sometimes compared, which apply for a group's year only if the group has satisfied the tax's numerical tests in two of the four preceding years. Pillar Two Model Rules, Article 1.1.1. It can also be contrasted with the base erosion and anti-abuse tax, which has a comparable average three-year test for determining whether the minimum tax will apply but requires the test to have been satisfied for the preceding taxable year. Section 59A(e)(1)(B).

[25] Section 59(k)(1)(C) flush language. This language might be understood to mean that once a corporation (or its predecessor) is excepted from applicable corporation status, it may never be excepted again, although it could be reasonable to clarify this issue and provide a less restrictive interpretation in guidance. *Cf.* Amanda Athanasiou, *Corporate AMT Rules Take Common-Sense Approach, Tax Counsel Says*, Tax Notes Today International (September 21, 2022) (reporting that Jonathan Goldman, senior majority tax counsel on the Senate Finance Committee, "cautioned that the rules are designed to prevent corporations from 'ping-ponging' in and out of the regime. Companies that are going to be in should *generally* stay in, and if they're going to be out long term, Treasury should determine a process for them, he said, adding, 'We shouldn't really be seeing corporations pop in and out.'" (emphasis added)).

[26] Section 59(k)(1)(E).

Treasury and the IRS should adhere to a general policy of designating it as an applicable corporation.

Recommendation concerning definition of a change of ownership

As indicated above, the statute provides that in certain circumstances, the Secretary may determine that it is appropriate to discontinue the treatment of a corporation as an applicable corporation if the applicable corporation either undergoes a change in ownership or has a specified number of consecutive taxable years in which it fails the numerical test of section 59(k)(1)(B).[27] Regarding the former, we recommend that the term "change of ownership" generally be interpreted to refer to a change occurring upon a disposition or divestiture by or of an applicable corporation. For example, a change of ownership might be considered to occur upon the distribution or sale of a corporate subsidiary. The Secretary may then determine whether the target corporation should retain or shed its status as an applicable corporation. A change of ownership should not, however, generally be defined by reference to a change in the composition of the applicable corporation's shareholder base. Such a definition would generally be too broad, introduce significant additional complexity (such as that found under section 382), and depart from the purpose of section 59(k), which functions to determine the scope of the CMT at the corporate level without regard to the identity of shareholders.

Legislative Development of the CMT

Several extra-textual sources support our recommended interpretations regarding the purposes of sections 56A and 59(k). While there is no official legislative history addressing the CMT, lawmakers and other officials involved in its introduction, alteration, and enactment have made the following comments that pertain to its purpose:

- The Administration's budget proposal for fiscal year 2022 provided that the CMT "is a targeted approach to ensure that the most aggressive corporate tax avoiders bear meaningful federal income tax liabilities."[28] It also stated that the CMT "would work to reduce the significant disparity between the income reported by large corporations on their federal income tax returns and the profits reported to shareholders in financial statements."[29]
- Senators Warren, King, and Wyden stated that an earlier version of the CMT would (i) prevent large, profitable companies from paying zero federal income tax,[30] and (ii) ensure

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[27] Section 59(k)(1)(C). These determinations could be implemented, at least initially, by providing for a PLR process that would allow the IRS to proceed cautiously in granting exceptions while gathering more information about the circumstances in which exceptions are appropriate. The PLR process could ultimately be replaced with bright-line rules in binding regulatory guidance that ensure continuity.

[28] Department of the Treasury, General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals 21 (May 2021).

[29] *Id*.

[30] *See* Press Release, *Senators Warren, King, and Wyden Announce Updated Proposal to Prevent the Biggest and Most Profitable Corporations from Paying Nothing in Federal Taxes* (October 26, 2021) (the "Warren-King-Wyden Press Release"). *See also* Remarks by President Biden on the Passage of H.R. 5376, the Inflation Reduction Act of 2022 (September 13, 2022) ("The days of billion-dollar companies paying zero in taxes is over").

that companies that report over $1 billion in profits to shareholders would pay at least a 15% tax rate on those profits.[31]

- After passage of the IRA, Senate Democrats announced that under the CMT, large corporations with multibillion dollar profits and low effective tax rates will "pay their fair share."[32]

Together, these statements illuminate a general intent that the CMT raise revenue[33] from large, profitable corporations that otherwise pay low or no federal income tax.[34] Clearly, the CMT, as enacted, does not meet all of the specific targets expressed by lawmakers, as the adjustments to AFSI in section 56A(c) preserve the ability for certain corporations to continue achieving tax rates below 15% of their financial statement income.[35] Nevertheless, these statements reflect a clear directional goal, which is that the CMT serve to compress the gap between the income subject to federal taxation and the income reported on an AFS.

This understanding of lawmakers' intent is consistent with the purposes of sections 56A and 59(k) articulated above. In order to limit the divergence between the income subject to federal taxation and that reported for financial accounting purposes, the base of the CMT should generally maintain a high level of fidelity to the net income or loss set forth on the AFS. In addition, to appropriately target those companies that raised lawmakers' concerns, the CMT should apply broadly within the fixed parameters established by Congress. Accordingly, while our recommended interpretations of the purposes of sections 56A and 59(k) may be established by the text alone, they are also consistent with the statements of lawmakers and other extra-textual sources.

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[31] *See* the Warren-King-Wyden Press Release.

[32] Senate Democrats, *Summary: Closing Tax Loops in the Inflation Reduction Act of 2022* (August 10, 2022).

[33] It is unclear what uses of regulatory authority JCT assumed in its final estimate that the CMT would raise approximately $222 billion of revenue from 2022 through 2031 (the "Final Estimate"). *See* JCT, JCX-18-22, Estimated Budget Effects Of The Revenue Provisions Of Title I – Committee On Finance, Of An Amendment In The Nature Of A Substitute To H.R. 5376, "An Act To Provide For Reconciliation Pursuant To Title II Of S. Con. Res. 14," As Passed By The Senate On August 7, 2022, And Scheduled For Consideration By The House Of Representatives On August 12, 2022 (August 9, 2022). However, it is clear that in estimating the revenue effects of the bill introduced by Senators Schumer and Manchin on July 27, 2022 (the "July 27 Estimate"), JCT did not assume that regulatory guidance would reduce AFSI to reflect depreciation deductions and deductions for the amortization of wireless spectrum (i.e., the deductions described in section 56A(c)(13) and (14) of the enacted CMT), given the approximately $91 billion difference between the revenue estimate in the July 27 Estimate and the Final Estimate. *See* JCT, Estimated Budget Effects of the Revenue Provisions of Title I – Committee on Finance, of an Amendment in the Nature of a Substitute to H.R. 5376, The "Inflation Reduction Act of 2022" (July 28, 2022).

[34] Similarly, the Joint Committee on Taxation ("JCT") explained that in enacting the BURP adjustment (which, as indicated above, served as a model for the CMT), "Congress concluded that there must be a reasonable certainty that, whenever a company publicly reports significant earnings, that company will pay some tax for the year." JCT, JCS-10-87, General Explanation of The Tax Reform Act of 1986 434 (May 4, 1987). JCT further explained that "Congress concluded that it was particularly appropriate to base minimum tax liability in part upon book income … in order to ensure that the Act will succeed in restoring public confidence in the fairness of the tax system." *Id. See also* Daniel Shaviro, *What Are Minimum Taxes, and Why Might One Favor or Disfavor Them?*, NYU Law and Economics Research Paper No. 20-38, at 9-21 (July 2020) (discussing the intellectual foundations of minimum tax approaches).

[35] Earlier versions of the CMT introduced and debated in Congress would similarly not have achieved all of the targets expressed by lawmakers.

Recommendations Concerning Opportunities for Simplification

In addition to ensuring that the exercise of regulatory authority under sections 56A and 59(k) is consistent with the purposes of those provisions, we also recommend that Treasury and the IRS consider opportunities for simplification of the CMT in the development of guidance. We do not, in this letter, aim to address all of the means by which Treasury and the IRS might simplify the new regime; rather, we focus on two recommendations that pertain to fundamental issues which should be addressed, if at all, early in the guidance drafting process.

Aggregation of related persons

A significant issue that will shape the scope and administrability of the CMT is the application of the section 52 aggregation rules in the identification of an applicable corporation. The changes to section 59(k)(1)(D) during the legislative process prompted public commentary on several issues arising under section 52 that could be addressed through changes to the regulations under that section.[36] However, given the complexity of section 52 and the numerous other Code provisions that rely on its mechanics, Treasury and the IRS should also consider using the statutory authority in section 59(k)(3)(A) to address these concerns. The explicit congressional invitation for Treasury and the IRS to provide a "simplified method" for determining applicable corporation status would strongly support the provision of simplifying assumptions for the application of the section 52 aggregation mechanics.

Use of standalone financial statements as an AFS

Another significant issue that will shape the administrability of the CMT is the selection of the starting point for translating the net income or loss set forth on the AFS into AFSI.[37] Section 56A appears to provide that the process of determining the AFSI of a corporation whose results are reflected on a consolidated AFS begins with the consolidated AFS.[38] However, this approach would require disaggregating the consolidated AFS among the consolidated entities and reversing adjustments made in consolidation in order to determine the "net income or loss of the taxpayer" as required by section 56A. In lieu of requiring such adjustments, we recommend that Treasury and the IRS consider the use by a corporation of pre-consolidation, standalone financial statements as an AFS.[39] In comparison to starting with the consolidated AFS, this approach could entail less of a regulatory drafting burden by avoiding the need to describe the rules and procedures for disaggregating the consolidated AFS and reversing adjustments. This approach

[36] *See* Peter Richman, *All for One or None for All: Aggregating Entities for the Corporate Minimum Tax*, The Tax Law Center at NYU Law (August 17, 2022); Lee Sheppard, *Private Equity's Book Income Tax Problem,* Tax Notes Today Federal (August 15, 2022).

[37] *See, e.g.,* Cross-border Tax Talks, *The IRA and Book Minimum Tax: Not a Pillar Two Podcast*, PwC, at 16:02 (August 17, 2022).

[38] *See* sections 56A(c)(2)(A) and 451(b)(5).

[39] *Cf.* Treas. Reg. §1.451-3(h)(3) (requiring the use of source documents used to create a consolidated AFS if necessary to determine non-separately listed items); Revenue Procedure 2019-40, section 3.01 (authorizing the use of standalone financial statements and prescribing a hierarchy for them consistent with that in section 451(b)(3)). *See also* Jasper L. Cummings, *The 2022 Corporate AMT*, Tax Notes Federal (September 26, 2022).

would also mitigate administrative and compliance burden by allowing both taxpayers and the IRS to essentially duplicate the process used to create the consolidated AFS.[40]

The use of the standalone financial statements taken into account in creating the consolidated AFS as the starting point for the determination of AFSI would be consistent with the requirement of section 56A(c)(2)(A). This approach, which may be coupled with a requirement that the standalone financials be reconciled with the consolidated AFS, could also be supported by the grant of regulatory authority in section 56A(b).

[40] It would also simplify the process of making adjustments to partnership-related items, as required by section 56A(c)(2)(D).