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BEATen Up (Again): The IRS Issues Proposed Regulations Under the Base Erosion Anti-Abuse Tax

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When I was in junior high school, I suffered a particularly humiliating beat-down by the class bully over whether he had the right to sit behind me, pull my hair, poke me in the back and kick my chair. After a short but decisive altercation, it turned out that he did, in fact, enjoy these privileges. Many tax practitioners can empathize with my schooldays plight as the US Internal Revenue Service (the "IRS") puts the community on the ropes with a barrage of lengthy guidance implementing the provisions contained in the Tax Cuts & Jobs Act. On December 13, 2018, after having deluged taxpayers with hundreds of pages of proposed regulations under various new provisions of the Internal Revenue Code of 1986, as amended (the "Code"), the IRS followed on with proposed regulations under Code § 59A (the "Proposed Regulations"), the Base Erosion Anti-Abuse Tax or "BEAT."[2] This Legal Update explores the proposed regulations and their impact (pugilistic and otherwise) on potentially affected taxpayers.

Highlights & Takeaways

1. Payments to US branches of non-US taxpayers are not base erosion payments.
2. Qualified derivative payments and services transfer priced under the Services Cost Method ("SCM") are excluded from the denominator of the base erosion percentage.
3. The cost portion of SCM services transfer priced with a markup remains eligible for base erosion payment exception.
4. Swap books may be grossed up in computing the denominator of the base erosion percentage.
5. Excess interest is treated as a base erosion payment to the extent of worldwide related party financing.
6. Qualified derivative payments do not include payments made pursuant to securities lending transactions.

Background

The BEAT functions as a minimum tax in that it only applies if a taxpayer's liability under the BEAT (referred to as "base erosion minimum tax amount" or "BEMTA") exceeds its regular tax liability.[3] The BEAT is applicable only to taxpayers with 3-year average annual gross receipts of at least $500 million and then only if their "base erosion percentage" exceeds a specified threshold (3% for taxpayers other than domestic banks and securities dealers and 2% for domestic banks and securities dealers).[4] Although the BEAT potentially applies to all large taxpayers, it is likely to have the most significant application to banks and insurance companies.

The BEAT adds back most payments to taxable income, made by US taxpayers and US branches of non-US taxpayers to their non-US affiliates, that is, non-US persons connected through 25% or greater common ownership, to arrive at "modified taxable income."[5] The BEAT is then applied to this modified taxable income and if this tax exceeds the taxpayer's regular tax, the excess is an additional tax. Thus, while Congress did not adopt the OECD base erosion rules, it adopted similar, but bespoke, legislation.

The first step in determining whether the BEAT applies to a particular taxpayer is to ascertain whether the taxpayer is an "applicable taxpayer."[6] A taxpayer will be treated as an applicable taxpayer if it meets three tests:

1. The taxpayer must be a corporation, but not a regulated investment company, a real estate investment trust or an S corporation;
2. The taxpayer must have aggregate average gross receipts for the preceding three years of at least $500 million; and
3. The taxpayer's base erosion percentage for the taxable year must be 3% or higher (2% in the case of US banks and registered securities dealers).[7]

Special, and fairly complex, rules apply to determine whether the second and third tests are satisfied.

If a taxpayer meets the definition of an applicable taxpayer, the application of the BEAT provisions begins with the determination of "modified taxable income." Modified taxable income is taxable income determined without regard to any "base erosion tax benefit" with respect to any "base erosion payment."[8] A base erosion payment includes any amount paid or accrued by the taxpayer to a related foreign person and with respect to which a deduction is allowable. In general, a foreign person will be treated as a related party if there is a 25% or greater ownership overlap with the taxpayer. A base erosion tax benefit includes a deduction that is allowed with respect to a base erosion payment.

Base erosion tax benefits generally include deductible payments for services, interest,[9] rents and royalties. Depreciation and amortization deductions with respect to property acquired from related foreign persons are also considered base erosion tax benefits and are disregarded in determining modified taxable income. No amount is generally added back in determining modified taxable income for payments to foreign related persons that are not deductible, but rather reduce gross income, e.g., amounts included in cost of goods sold. The Proposed Regulations generally provide no guidance on the tax accounting treatment of payments as deductible or otherwise, deferring instead to general tax principles. As an example, the Proposed Regulations specifically note that the Proposed Regulations do not address whether royalties are deductible (and thus base erosion tax benefits) or are treated as costs includable in inventory under Code §§ 471 and 261A.

Additionally, base erosion payments do not include "qualified derivative payments" within the meaning of Code § 59A(h) and payments by a US taxpayer for services that may be accounted for on the "services cost method" under Code § 482 to the extent such amount constitutes the total services cost without markup.[10]

If an applicable taxpayer has modified taxable income in excess of its regular taxable income, that taxpayer pays the BEAT rate on such excess. The BEAT rate varies by year and by whether the taxpayer is a US bank or a registered securities dealer. Specifically, the BEAT rate is 5% in 2018, 10% in 2019 through 2025 and 12.5% thereafter.[11] These rates are increased by one percentage point for US banks and registered securities dealers.[12]

Applicable Taxpayers and Identifying Base Erosion Payments

Code § 59A(e)(3) requires that all persons treated as a single employer under Code § 52 are aggregated in determining if the $500 million threshold and base erosion percentage are met.[13] The statute requires that non-US taxpayers be aggregated as well. This drafting, taken literally, would have rendered the BEAT moot because if non-US taxpayers are included in determining who is an applicable taxpayer, no payments would be considered made to a related foreign person as all payments made within an aggregate group are disregarded.[14] The Proposed

Regulations effectively implement their own technical correction to the statute by excluding non-US taxpayers from the threshold calculations except to the extent gross receipts are taken into account in determining effectively connected income ("ECI") (or treated as business profits under an applicable income tax treaty).[15]

Although related taxpayers are aggregated in determining whether the $500 million and base erosion percentage thresholds are met, taxpayers not filing a consolidated federal income tax return compute their BEMTA on a separate company basis.

Payments between corporations that are aggregated are ignored in determining gross receipts and the base erosion percentage.[16] The IRS favorably resolved another statutory glitch regarding whether payments to a US branch of a non-US taxpayer should be treated as a base erosion payment. After the IRS determined that a non-US taxpayer should be aggregated in determining the $500 million threshold and base erosion percentage only with respect to its ECI, the Proposed Regulations provide that payments to a US branch of a non-US taxpayer should not be treated as base erosion payments.[17] This is a helpful clarification for many non-US headquartered financial institutions that finance their US operations through loans from the US headquarters. These institutions should now consider obtaining financing from the market through their US branches (and for on-lending to any US subsidiaries).

The Base Erosion Percentage Test

The Proposed Regulations provide that if an aggregate group includes a domestic bank or registered securities dealer, the aggregate group must use the 2% base erosion threshold unless the bank and/or securities dealer is *de minimis*.[18] A domestic bank or securities dealer will be considered to be *de minimis* if its gross receipts are less than 2% of total gross receipts of the aggregate group. An aggregate group that includes a non-US bank uses the higher 3% threshold in determining if it is subject to the BEAT.

The Proposed Regulations provide detailed rules in determining if the base erosion percentage is met. The numerator in the base erosion percentage includes all payments to non-US affiliates (other than statutorily excluded payments and payments made to US branches). The denominator includes most deductible payments, but excludes payments statutorily excluded from the numerator, such as qualified derivative and TLAC (defined below) payments.[19] This will hurt most banking institutions seeking to avoid the application of the BEAT tax by coming in at below the 2% base erosion threshold. ECI payments are included in the denominator. If a payment is both statutorily excluded and an ECI payment, the payment will be included in the denominator. Foreign currency gains and losses are excluded from both of the numerator and denominator. Payments made to non-US affiliates that are subject to US withholding tax are excluded, in whole or in part, from the numerator, depending on the level of the withholding. In general, payments that reduce gross income but are not deductions are excluded from the denominator.

Special rules are provided for taxpayers using mark-to-market accounting. Again, the statute as literally drafted would not apply to mark-to-market adjustments because such adjustments are not paid or accrued to a foreign related party.[20] The Proposed Regulations include mark-to-market adjustments in the base erosion percentage, but adjusted to include only a single mark per annum.[21] Furthermore, mark-to-market adjustments and payments on derivatives between related parties are treated as potentially giving rise to base erosion payments and likewise are netted.[22]

Importantly for many financial institutions, except with respect to netting mark-to-market gains and losses and payments with respect to individual positions, income and deductions are not netted across positions in determining the amount of a base erosion payment, even if the parties have a global netting agreement in place.[23]

The Proposed Regulations also make clear that netting of payments between related parties is not taken into account. Where a US taxpayer makes a base erosion payment to a foreign related party and that payment can be offset by amounts due from the foreign related party, the gross amount of the outbound payment is used for BEAT purposes, including determining the base erosion percentage test.

Base Erosion Payments

The statute enumerates four categories of base erosion payments: (i) deductible payments, (ii) deprecation or amortization from acquisitions of depreciable property from a foreign related party in 2018 or thereafter,[24] (iii) certain reinsurance payments made to foreign related parties and (iv) payments to inverted corporations.[25] The Preamble to Proposed Regulations makes clear that if a payment does not fit within one of the categories, but is described in another category, it will be treated as a base erosion payment.[26] The Proposed Regulations also provide that non-cash payments can be base erosion payments.[27] Also, in general, Treasury Regulation § 1.882-4 applies to determine whether a deduction of a US branch of a non-US taxpayer may claimed for US tax purposes.[28] If a non-US taxpayer utilizes an income tax treaty to determine its US deductions, the treaty applies in determining if a payment can be deducted for US tax purposes and be a base erosion payment.[29] Under this rule payments between branches can be treated as base erosion payments.[30]

In the same way that payments to non-US affiliates are excluded from the base erosion percentage if they are ECI in the hands of the recipient, such payments are not treated as base erosion payments.[31] In addition, foreign currency gains and losses are excluded from the definition of base erosion payments.[32]

PARTNERSHIP INTERESTS

In general, the Proposed Regulations treat partnerships as aggregates and not as entities. As a result, a payment by a taxpayer to a partnership is treated as a payment to the partners of the partnership.[33] This rule prevents a payment to a foreign partnership being treated as a base erosion payment to the extent that the foreign partnership has US partners (and vice versa). Concomitantly, a taxpayer's share of partnership income and loss is characterized at the partner level to determine whether it provides base erosion tax benefits.[34] If a partner holds a partnership interest with less than 10% of the capital and profits interest and has a value of less than $25 million, the partner does not look through the partnership interest in determining its base erosion tax benefits.

RULES FOR INTEREST PAYMENTS

Interest paid to a foreign related party in 2018 and after can be a base erosion payment.[35] In general, US branches of foreign banks (and non-banks) determine their US interest expense deduction not with respect to liabilities, but rather with reference to the average amount of US assets held in connection with their US business. A hypothetical amount of equity and liabilities (such hypothetical liabilities, "US connected liabilities") is deemed to be associated with such US assets based on an assumed debt-to-equity ratio or actual debt-to-equity ratio for the entire foreign corporation (and not just the US branch). The great majority of US branches of foreign banks use the assumed ratio. If the amount of deemed "US connected liabilities" exceeds the average amount of indebtedness reflected on the books of the US branch[36] (referred to as "US booked liabilities"), a deemed amount of notional interest is then imputed on the "excess US connected liabilities." This notional interest is based on a hypothetical interest rate that has no direct connection to the interest rate paid on US branch borrowings.[37]

Example: US Assets - $1000

Assumed equity ratio = 95%

<u>US Connected liabilities = $950 (95%*$1000)</u>

US booked liabilities = $800

"Excess liabilities" = 150 ($950-$800)

Average USD borrowing rate outside of US or LIBOR (if elected) = 2%

Excess interest expense = $3 (2%*$150)

To the extent the interest expense deduction determined under the Treasury Regulation § 1.882-5 formula arises from US booked liabilities ($800 in the example above), it is expressly treated as paid by a domestic corporation for all purposes of the Code. Consequently, the Proposed Regulations provide that such interest payment is subject to add back to modified taxable income if paid to a related foreign person.[38] However, Treasury Regulation § 1.882-5 does not treat the notional Excess Interest expense ($3 in the example above) arising from deemed excess liabilities ($150 in the example above) as being paid by a domestic corporation to a foreign related party. Moreover, related authority shows that an exception to the general treatment of Excess Interest as not being paid by a US corporation to a related foreign party only arises if Congress expressly provided for such treatment in the Code or legislative history. Nonetheless, the Proposed Regulations treat such excess interest as being paid to a foreign related party pro rata based on the percentage of its *worldwide* liabilities held by foreign related parties.[39] The treatment of excess interest as a base erosion payment seems to exceed the statutory authority of the IRS and the use of worldwide liabilities, as opposed to US-connected liabilities, appears to be revenue-driven.

If a non-US taxpayer uses the separate currency pool method, the amount of debt that is considered to be held by foreign related parties is determined on a pool-by-pool basis.[40] If a non-US taxpayer uses a tax treaty method in lieu of Treasury Regulation § 1.882-5 to determine its interest (and other) expenses attributable to its US branch, the US branch will trace its deductions to determine if they are base erosion payments.[41]

The Proposed Regulations contain a coordination rule with the interest limitation rule contained in Code § 163(j). Under this coordination rule, Code § 163(j) first applies to determine the applicable interest deduction. If interest deferred under Code § 163(j) becomes available in a year subsequent to the year in which the deduction arose, the deduction is treated as a base erosion payment based upon whether it would have been so treated in the year the deduction arose, not the subsequent year in which it is claimed.[42] The Proposed Regulations track Code § 59A(c)(2)(B)(II) and treat interest disallowed under Code § 163(j) as first applying to interest paid to unrelated persons. As a result, interest expense passing through the rigors of Code § 163(j) is subject to the BEAT to the maximum possible extent. This will require year-by-year tracking of related and unrelated party interest in order to determine what portion of deductible interest each year is a base erosion payment.

APPORTIONED EXPENSES

The Proposed Regulations provide that if expenses are apportioned pursuant to an applicable income tax treaty, the apportioned expenses are not base erosion payments.[43] In contrast, payments between branches (which are generally disregarded for US federal income tax purposes) are regarded for purposes of determining if a base erosion payment has been made.

THE SERVICES COST METHOD EXCEPTION

Base erosion payments do not include payments or accruals for costs of services to foreign related parties that qualify for the services cost method ("SCM") of Treas. Reg. §1.482-9(b), determined without regard to the "business judgement test" requirement that services do "not contribute significantly to fundamental risks of business success or failure" (the "SCM Exception").[44] Although US transfer pricing rules do not require a markup on services that qualify for the SCM, transfer pricing rules in other jurisdictions frequently do. Further, the SCM Exception also extends to certain services that cannot be charged at cost-plus no markup even under the US transfer pricing rules because they fail the business judgment test requirement for the SCM. Although the statute was arguably ambiguous on this point, the Proposed Regulations make clear that the addition of a markup on services eligible for the SCM Exception does not prevent the exclusion of such services from being treated as base erosion payments. The Proposed Regulations, however, treat the markup itself as a base erosion payment. The Preamble also clarifies that separate accounts are not required to isolate the cost element and the markup. The cost portion will qualify for the SCM exception as long as the taxpayer can identify the separate components of the payment.

QUALIFIED DERIVATIVE PAYMENTS

"Qualified derivative payments" are not base erosion payments.[45] Such payments are defined as any payments made by a taxpayer to a foreign related party pursuant to a derivative for which the taxpayer uses the mark-to-market method of accounting and any gain, loss, income or deduction is treated as ordinary.[46] The Proposed Regulations do not address the limitations on qualified derivative payments that exclude non-derivative components of derivatives, such as embedded loans, and payments that would be treated as base erosion payments if not made pursuant to a derivative. The Proposed Regulations exclude securities lending transactions from the definition of a derivative.[47] Thus, if a US branch acts as a securities borrower with a foreign related party, substitute interest and dividend payments will constitute base erosion payments. In addition, a taxpayer must meet new reporting requirements in order to benefit from the qualified derivative payments exclusion.

TLACS (TOTAL LOSS ABSORBING CAPACITY SECURITIES)

The Federal Reserve requires subsidiaries and branches of global systemically important banking organizations ("GSIBs") to issue TLACs to their head office and not have any significant amount of liabilities outstanding to third parties, so that if the GSIB is placed into receivership, the GSIB can be "resolved" at a single level. The IRS recognized that TLAC structures do not create the opportunity for tax avoidance because such structures are mandated by law. Accordingly, the Proposed Regulations provide that TLAC interest payments will not be treated as base erosion payments to the extent that the amount of TLACs issues by a GSIB does not exceed the amount of TLACs mandated by the Federal Reserve.[48]

Payments Subject to Withholding

The Proposed Regulations contain special rules for payments to non-US affiliates that are subject to withholding. If the payment is subject to the full 30% US withholding payment, the payment is not considered to give rise to a base erosion tax benefit.[49] To the extent that the payment is eligible for a reduced rate of withholding tax due to the application of a US income tax treaty, the payment is considered to give rise to a base erosion tax benefit in proportion to the amount of reduction in withholding taxes.[50]

Modified Taxable Income

The Proposed Regulations require that the computation of modified taxable income be done on an entity-by-entity basis, even though the determination of whether a taxpayer is subject to the BEAT is undertaken on a group basis. In addition, the Proposed Regulations start the computation with regular taxable income and then add back base erosion tax benefits. If the taxpayer has a current loss in a taxable year, its starting point is a negative number equal to the current year loss.

If, however, current taxable income is a positive number and the taxpayer has a net operating loss ("NOL") carryover, taxable income is floored at zero.[51] NOLs arising before 2018 may be claimed without limitation. NOLs arising in 2018 and after must be reduced by the base erosion percentage applicable to such NOL.[52] The base erosion percentage is based upon the year in which the NOL arose, not the year in which it is utilized.[53] In addition, if the taxpayer is part of an aggregate group, the base erosion percentage of an NOL is determined based on the group's base erosion percentage.

Real estate mortgage investment conduit ("REMIC") excess inclusion income that has acted as a floor on a taxpayer's income is ignored in determining the taxpayer's taxable income for BEAT purposes. This rule prevents taxpayers that are subject to the BEAT from being able to acquire REMIC residual interests without a net tax cost.

Anti-Abuse Rules

The Proposed Regulations contain a series of anti-abuse rules. Under the first anti-abuse rule, if (i) a taxpayer makes a payment to a third party, (ii) the third party makes a payment to a foreign related party that would have been a base erosion payment if made directly by the taxpayer and (iii) the plan has a principal purpose of avoiding a base erosion payment, the intermediary will be disregarded.[54] Second, an anti-abuse rule disregards deductions with respect to transactions undertaken for the purpose of increasing the denominator of the base erosion threshold percentage (the 2% test for banks and securities dealers and 3% more generally).[55] Last, the IRS has reserved the right to disregard transactions undertaken for the purpose of causing banks and securities dealers to be outside an aggregate group.[56] An example illustrates that the last anti-abuse rule does not prevent restructuring intercompany debt to become outside debt.[57]

Rules for Affiliated Groups (Consolidated Returns)

The Proposed Regulations require affiliated taxpayers filing a consolidated federal income tax return to apply the BEAT on a consolidated basis, that is, as a single taxpayer.[58] Accordingly, intercompany transactions are ignored for all BEAT purposes, including the calculation of the denominator in the base erosion percentage. The Proposed Regulations also provide rules for allocating the BEMTA among members of an affiliated group. The Proposed Regulations eschew tracing, however, and allocate related party interest deductions based upon the interest paid or accrued by each member.

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Endnotes

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[2] REG-104259-18 (Dec. 13, 2018).

[3] Code § 59A(b).

[4] Code § 59A(e).

[5] Code § 59A(c).

[6] Code § 59A(a).

[7] Code § 59A(e)(1).

[8] Code § 59A(c).

[9] The Proposed Regulations adopt the expansive definition of interest employed in the Code § 163(j) regulations. Prop. Treas. Reg. § 1.59A-1(b)(6).

[10] Code § 59A(d)(5).

[11] Code § 59A(b).

[12] Code § 59A(b)(3).

[13] The Proposed Regulations refer to all corporations included in the calculation of the $500 million and base erosion percentage thresholds as the "aggregate group." Prop. Treas. Reg. § 1.59A-1(b)(1).

[14] See REG-104259-18, *Regulatory Planning and Review – Economic Analysis* § B, p. 79.

[15] Prop. Treas. Reg. § 1.59A-1(b)(1)(ii); Prop. Treas. Reg. § 1.59A-1(d)(3).

[16] Prop. Treas. Reg. § 1.59A-1(c).

[17] Prop. Treas. Reg. § 1.59A-3(b)(iii).

[18] Prop. Treas. Reg. § 1.59A-1(e)(2)(ii).

[19] Prop. Treas. Reg. § 1.59A-1(e)(3)(ii).

[20] *See* Code § 59A(d)(1).

[21] Prop. Treas. Reg. § 1.59A-2(e)(3)(vi).

[22] *Id*.

[23] Prop. Treas. Reg. § 1.59A-3(b)(2)(ii); *See* Treas. Reg. § 1.59A-2(f)(Ex. 1).

[24] The Preamble makes clear that only property placed in service after the effective date of the legislation is relevant for determining when depreciation or amortization is a base

erosion payment. As a result, depreciation incurred in 2018 and beyond on property acquired before the effective date is not a base erosion payment. However, the Proposed Regulations apply to depreciation and amortization deductions, even if the property is contributed to the taxpayer in a non-taxable contribution to capital. Concomitantly, losses on dispositions of property to foreign related parties are base erosion payments.

[25] Code § 59A(d).

[26] Prop. Treas. Reg. § 1.59A-3(b)(2)(iv).

[27] Prop. Treas. Reg. § 1.59A-3(b)(2)(i).

[28] Prop. Treas. Reg. § 1.59A-3(b)(4)(ii).

[29] Prop. Treas. Reg. § 1.59A-3(b)(4)(v)(A).

[30] Prop. Treas. Reg. § 1.59A-4(b)(4)(B).

[31] Prop. Treas. Reg. § 1.59A-3(b)(3)(iii).

[32] Prop. Treas. Reg. § 1.59A-3(b)(3)(iv).

[33] Prop. Treas. Reg. § 1.59A-7(b)(1).

[34] Prop. Treas. Reg. § 1.59A-7(b)(2).

[35] The IRS reversed the position it had taken in Notice 2018-28, 2018-16 IRB 492, that the year in which the interest was deductible determined whether it was a base erosion payment. Instead, under the Proposed Regulations, it is the year in which the interest incurred that determines whether it is a base erosion payment.

[36] Interbranch amounts are excluded.

[37] Taxpayers can elect to base the excess interest deduction on 1) 30-day LIBOR, 2) the entire foreign corporation's average US dollar cost of funds or 3) the entire foreign corporation's average cost of funds in each foreign currency in which the US branch's assets are denominated.

[38] Prop. Treas. Reg. § 1.59A-3(b)(4)(i)(1).

[39] Prop. Treas. Reg. § 1.59A-3(b)(4)(i)(A)(2).

[40] Prop. Treas. Reg. § 1.59A-3(b)(4)(i)(B)(2).

[41] Prop. Treas. Reg. § 1.59A-3(b)(4)(v)(A).

[42] Prop. Treas. Reg. § 1.59A-3(B)(4)(vi).

[43] Prop. Treas. Reg. § 1.59A-3(b)(4)(v)(B).

[44] Code § 59A(d)(5). Under Treas. Reg. §1.482-9, services qualify for the SCM if they constitute either (1) "specified covered services," which are controlled services transactions that the Commissioner specifies by revenue procedure (see Rev. Proc. 2007-13), or (2) "low margin covered services," which are controlled services transactions for which the median comparable markup on total services costs is no greater than 7%. Treas. Reg. § 1.482-9(b)(3)(ii). To apply the SCM, the covered services must satisfy three additional requirements: first, it must not contribute significantly to fundamental risks of business success or failure of either the renderer or the recipient, Treas. Reg. § 1.482-9(b)(5); second, the taxpayer must maintain adequate books and records, Treas. Reg. § 1.482-9(b)(6); and third, the services must not constitute an excluded transaction under Treas. Reg. § 1.482-9(b)(4).

[45] Code § 59A(h).

[46] Code § 59A(h)(1)(A).

[47] Prop. Treas. Reg. § 1.59A-6(d).

[48] Prop. Treas. Reg. § 1.59A-3(b)(3)(i)(v).

[49] Prop. Treas. Reg. § 1.59A-3(c)(2).

[50] Prop. Treas. Reg. § 1.59A-3(c)(3).

[51] *But see* GCM 39701.

[52] Prop. Treas. Reg. § 1.59A-4(b)(2)(ii).

[53] *Id*.

[54] Prop. Treas. Reg. § 1.59A-9(b)(1).

[55] Prop. Treas. Reg. § 1.59A-9(b)(2).

[56] Prop. Treas. Reg. § 1.59A-9(b)(3).

[57] Prop. Treas. Reg. § 1.59A-9(c)(Ex. 3).

[58] Prop. Treas. Reg. § 1.1502-59A(b).