Business Roundtable

300 New Jersey Avenue, NW
Suite 800
Washington, DC 20001

Telephone 202.872.1260
Facsimile 202.466.3509
Website brt.org

Jamie Dimon
JPMorgan Chase & Co.
Chairman

Mark Weinberger
EY

Joshua Bolten
President & CEO

August 7, 2017

The Honorable Steven T. Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Mr. Secretary:

On behalf of Business Roundtable, I am writing in response to Notice 2017-38, "Implementation of Executive Order 13789 (Identifying and Reducing Tax Regulatory Burdens)," published by the Department of the Treasury (Treasury) and the Internal Revenue Service (the IRS or the Service) in the Internal Revenue Bulletin on July 24, 2017 (the Notice).[1] Business Roundtable, an association of chief executive officers who lead companies that operate in every sector of the U.S. economy, has serious concerns about the implementation cost, business disruption, and consequent harmful impacts on the economy that would result from a number of the tax regulations identified in the Notice.

Business Roundtable strongly supports the President's policy objectives described in EO 13789, which include that the "Federal tax system should be simple, fair, efficient, and pro-growth" and "[t]he purposes of tax regulations should be to bring clarity to the already complex Internal Revenue Code . . . and to provide useful guidance to taxpayers."[2] EO 13789 directed Treasury to undertake immediately a review of "all significant tax regulations issued by the Department of the Treasury on or after January 1, 2016," and instructed Treasury to identify all significant "regulations that: (i) impose an undue financial burden on United States taxpayers; (ii) add undue complexity to the Federal tax laws; or (iii) exceed the statutory authority of the Internal Revenue Service."[3]

---

[1] *See* Notice 2017-38, 2017-30 I.R.B. 147 (Jul. 24, 2017). The Notice was first released on July 7, 2017, and later published in the Internal Revenue Bulletin on July 24, 2017.

[2] Presidential Executive Order 13789 on Identifying and Reducing Tax Regulatory Burdens ("EO 13789"), 82 Fed. Reg. 19317 (Apr. 21, 2017).

[3] *Id*.

According to the Notice, Treasury determined that 52 regulations were "potentially significant" and subject to review under EO 13789.[4] Following its review of the regulations, Treasury identified eight regulations that "impose an undue financial burden on U.S. taxpayers" and/or "add undue complexity to the Federal tax laws," with respect to which Treasury intends to propose reforms ranging from streamlining problematic provisions to fully repealing the regulations in order to mitigate the burdens of such regulations.[5] These regulations include three of particular concern to Business Roundtable:

- Final and Temporary Regulations under Section 385;[6]
- Final and Temporary Regulations under Section 987;[7] and
- Final Regulations under Section 367.[8]

Business Roundtable agrees with Treasury that these regulations are significant in view of the Presidential priorities for tax regulations outlined in EO 13789, as each imposes an undue financial burden on U.S. taxpayers and/or adds undue complexity to the Federal tax laws. In addition, although not identified by Treasury in Notice 2017-38, Business Roundtable supports the review and modification of the temporary and proposed regulations under section 901(m),[9] which impose an undue financial burden on U.S. taxpayers, add undue complexity to the Federal tax laws, and in some ways exceed the original legislative intent.

As discussed in the attached technical comments, these regulations "effectively increase tax burdens, impede economic growth, and saddle American businesses with onerous fines, complicated forms, and frustration."[10] The four regulations discussed herein will harm the U.S. economy by disrupting business activities, increasing uncertainty, creating disincentives for foreign direct investment, and hindering economic growth and job creation. **Business Roundtable supports the withdrawal or substantial modification of these regulations to**

---

4 The Notice provides the following link for a list of the regulations that Treasury reviewed: https://www.treasury.gov/resource-center/tax-policy/Pages/Executive-Orders.aspx.

5 After examining those regulations, Treasury concluded that the following eight regulations "impose an undue financial burden on U.S. taxpayers" and/or "add undue complexity to the Federal tax laws":
(1) Proposed Regulations under Section 103 on Definition of Political Subdivision (REG-129067-15; 81 F.R. 8870);
(2) Temporary Regulations under Section 337(d) on Certain Transfers of Property to Regulated Investment Companies (RICs) and Real Estate Investment Trusts (REITs) (T.D. 9770; 81 F.R. 36793); (3) Final Regulations under Section 7602 on the Participation of a Person Described in Section 6103(n) in a Summons Interview (T.D. 9778; 81 F.R. 45409); (4) Proposed Regulations under Section 2704 on Restrictions on Liquidation of an Interest for Estate, Gift and Generation-Skipping Transfer Taxes (REG-163113-02; 81 F.R. 51413); (5) Temporary Regulations under Section 752 on Liabilities Recognized as Recourse Partnership Liabilities (T.D. 9788; 81 F.R. 69282); (6) Final and Temporary Regulations under Section 385 on the Treatment of Certain Interests in Corporations as Stock or Indebtedness (T.D. 9790; 81 F.R. 72858); (7) Final Regulations under Section 987 on Income and Currency Gain or Loss With Respect to a Section 987 Qualified Business Unit (T.D. 9794; 81 F.R. 88806); and (8) Final Regulations under Section 367 on the Treatment of Certain Transfers of Property to Foreign Corporations (T.D. 9803; 81 F.R. 91012).

6 T.D. 9790, 81 Fed. Reg. 72858 (Oct. 21, 2016), corrected by 82 Fed. Reg. 8165 (Jan. 24, 2017).

7 T.D. 9794, 81 Fed. Reg. 88806 (Dec. 8, 2016); T.D. 9795, 81 Fed. Reg. 88854 (Dec. 8, 2016).

8 T.D. 9803, 81 Fed. Reg. 91022 (Dec. 16, 2016).

9 T.D. 9800, 81 Fed. Reg. 88103 (Dec. 7, 2016); REG-129128-14 (Dec. 7, 2016).

10 EO 13789.

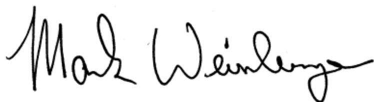
reduce complexity, compliance and financial burdens imposed on U.S. taxpayers, and adverse impacts on the U.S. economy. In addition, certain portions of the regulations exceed Treasury's rulemaking authority and, for that reason alone, should be withdrawn or replaced with more tailored rules that comport with Treasury's scope of authority.

While the withdrawal or substantial modification of these regulations would align with the Administration's goal of reducing regulatory burdens, Business Roundtable believes comprehensive tax reform is the ultimate solution for fixing an outdated tax system that hamstrings the U.S. economy and job creation. Without tax reform, U.S. companies and American workers will lose in global competition and the U.S. economy will lose new investment, leading to more slowly growing wages and living standards for American workers and their families. The significant tax regulations identified in the Notice, which add to the cost of being a U.S.-headquartered company and of U.S. business investment, exacerbate the anticompetitive nature of the U.S. tax system.

Tax reform that provides a competitive statutory rate and a modern international tax system would allow U.S. companies and American workers to compete on a level playing field with the rest of the world. A more competitive tax system would lead to increased investment in the United States and faster economic growth, resulting in increased job creation and higher wages for American workers. The significant tax regulations identified in the Notice, and in particular, the four regulations identified by Business Roundtable, send us down the wrong path.

Business Roundtable applauds the Administration's leadership on regulatory reform and the desire of the Treasury Department to reduce tax regulatory burdens. On behalf of Business Roundtable, I thank you for your consideration of these regulations and would be pleased to provide any information that might further assist you.

Sincerely,



Mark A. Weinberger
Global Chairman & CEO
EY
Chair, Tax and Fiscal Policy Committee
Business Roundtable

Attachment (1)

C: The Honorable David Kautter, Assistant Secretary for Tax Policy, U.S Department of the Treasury; Internal Revenue Service, Notice.Comments@irscounsel.treas.gov

Business Roundtable Technical Comments

I. Final and Temporary Section 385 Regulations[1]

A. Overview

During 2016, the IRS and Treasury issued proposed, final, and temporary regulations under section 385 addressing the characterization of certain related-party financial arrangements. The proposed regulations, issued on April 4,[2] were considered among the most momentous tax regulations proposed in decades. The proposed regulations would have limited the extent to which affiliated group members could use related-party debt by recharacterizing specific types of debt as equity in the event the arrangement either failed to satisfy detailed documentation requirements or ran afoul of one of the broad categories of proscribed transactions set forth in the proposed regulations.

If finalized as proposed, many believed the regulations would have inflicted collateral damage on U.S. businesses and on foreign investment in the United States far in excess of any conceivable policy benefits. Business Roundtable and other interested parties submitted detailed comments in response to the notice of proposed rulemaking and urged the Treasury to withdraw or at least substantially modify the regulations to limit the adverse impact of the rules.[3] In response to these comments, the Final and Temporary Section 385 Regulations were narrowed to better focus on related-party financings that have the potential to erode the U.S. tax base, and incorporate many of the suggestions made throughout the comment process.

Business Roundtable acknowledges and appreciates the IRS and Treasury's efforts to reduce the collateral impact and administrative burdens relating to the regulations. Business Roundtable also appreciates the IRS and Treasury's July 27, 2017, issuance of Notice 2017-36 announcing the intent to amend the documentation regulations to apply only to interests issued or deemed issued on or after January 1, 2019.[4] As indicated therein, the delay in the application of the documentation regulations is in response to concerns raised by taxpayers and in light of further actions concerning the review of the Final and Temporary Section 385 Regulations.

Despite the substantial modifications made to the proposed regulations and the delayed effective date of the documentation requirements, the Final and Temporary Section 385 Regulations remain highly complex, financially and administratively burdensome, and likely to

---

[1] The Final and Temporary Regulations under Section 385 on the Treatment of Certain Interests in Corporations as Stock or Indebtedness (T.D. 9790; 81 Fed. Reg. 72858).

[2] *See* 81 Fed. Reg. 20912 (Apr. 8, 2016). The proposed regulations under section 385 were first made available for public inspection on April 4, 2016, and later published in the Federal Register on April 8, 2016.

[3] Business Roundtable previously submitted comments on July 7, 2016, in response to the request for comments included in the Notice of Proposed Rulemaking under section 385 published by Treasury and the IRS in the Federal Register on April 4, 2016. Many of the comments made therein remain relevant today and should be considered in connection with the comments set forth in this section.

[4] Notice 2017-36, One-Year Delay in the Application of § 1.385-2, (Jul. 27, 2017).

produce collateral consequences out of proportion to the stated goals. For these reasons and those discussed below, Business Roundtable supports the withdrawal of the Final and Temporary Section 385 Regulations and, therefore, strongly recommends that Treasury, in its final report to the President, propose to rescind in full the Final and Temporary Section 385 Regulations.

B. Burdens

The Final and Temporary Section 385 Regulations were issued more than eight months ago and companies continue to struggle with how to account for and comply with the rules. Business Roundtable strongly believes that the Final and Temporary Section 385 Regulations impose financial and administrative burdens on U.S. companies disproportionate to the policy concerns the regulations are intended to address. Business Roundtable also believes the regulations are significant in view of the Presidential priorities for tax regulations outlined in EO 13789 and supports Treasury's conclusion set forth in Notice 2017-38 that the Final and Temporary Section 385 Regulations impose an undue financial burden on U.S. taxpayers and/or add undue complexity to Federal tax laws.[5]

Despite the fact that the scope of the Final and Temporary Section 385 Regulations was significantly narrowed, the regulations continue to impose undue financial burdens on U.S. taxpayers, add undue complexity to the Federal tax laws, and create regulatory uncertainty by overturning decades of case law and settled expectations.[6] The financial burden imposed by the Final and Temporary Section 385 Regulations is due in part to the complicated web of convoluted requirements, exceptions, and limitations, which must be carefully managed and monitored in order to avoid triggering the recharacterization of related-party debt instruments.

Indeed, as Treasury and the IRS recently acknowledged in Notice 2017-36, the implementation of the Final and Temporary Section 385 Regulations has compelled U.S. companies to alter their business practices and incur significant costs to design, develop, and implement the systems,

---

[5] *See* Notice 2017-38, Section III.5. (providing that "[c]ommenters to the documentation rules criticized the financial burdens of compliance, particularly with respect to more ordinary course transactions"; "[c]ommenters also requested a longer delay in the effective date of the documentation rules"; and "[c]ommenters to the final transaction rules criticized the complexity associated with tracking multiple transactions through a group of companies and the increased tax burden imposed on inbound investments.").

[6] With respect to this last point, Business Roundtable does not believe Congress gave Treasury the authority to overturn fundamental principles of U.S. tax law established by courts and prior regulatory guidance. But the Final and Temporary Section 385 Regulations do just that by recharacterizing debt instruments as equity, even though the debt instruments bear the same features as instruments previously held to be debt by both the courts and IRS. *Kraft Foods, Co. v. Comm'r*, 232 F.2d 118 (2d Cir. 1956) (concluding that a purported debt instrument issued in connection with a return of capital constituted indebtedness for U.S. federal income tax purposes); *see also* FSA 199922012 (Jun. 4, 1999) ("We note that cases that have cited the facts that no new capital was introduced as a result of the issuance of debt, and that the holders of the purported debt remained in the [sic] essentially the same position prior to and subsequent to the issuance of the debt, as reasons for determining that the debt should be recharacterized as equity. Nevertheless, in all the cases we have seen there were other factors involved which caused the courts to find that the debt in issue was not real. . . . In sum, we believe that the treatment of the instruments received in partial redemption of shareholder's stock should not be characterized as equity solely by reason of Taxpayer's redemption transaction and continued status as a sole owner of the distributing subsidiary.")

processes, and internal controls necessary to comply with the regulations. These administrative costs compound when combined with the anticipated administrative costs of complying with and monitoring the impact of the Final and Temporary Section 385 Regulations.

The documentation requirements alone require significant diligence and result in increased compliance costs. The burdens imposed on taxpayers to document every intercompany debt instrument, including those arising in the ordinary course of business, no matter the amount, are completely disproportionate to the objectives of the Final and Temporary Regulations. Therefore, Business Roundtable continues to believe that the regulations should, at a minimum, provide an exception from the documentation requirements for ordinary course transactions and de minimis transactions.

Business Roundtable appreciates that Treasury and the IRS acted swiftly in response to comments to issue Notice 2017-36, announcing a delayed effective date of the documentation requirements. Nevertheless, the documentation requirements are not the only aspect of the Final and Temporary Section 385 Regulations that require taxpayers to incur significant costs for systems, processes, and internal controls to ensure compliance with the regulations. Taxpayers will need sophisticated systems for continuous monitoring of attributes of issuers of debt instruments as well as the debt instruments in order to use the exceptions to the transactions rules set forth in Treas. Reg. § 1.385-3 and -3T (*e.g.*, the expanded group earnings exception, the qualified short-term debt exception).

Given the complexity of these exceptions and the systems necessary to ensure compliance, multinationals will not be able to rely on the exceptions to the transactions rules without developing and implementing sophisticated systems. Adding to the complexity is the fact that the transactions rules apply retroactively to debt instruments and transactions undertaken on or after April 5, 2016. The financial, administrative, and compliance burdens imposed by the Final and Temporary Section 385 Regulations are inappropriate for their purported objectives.

In addition to our concerns regarding the financial burdens imposed by the Final and Temporary Section 385 Regulations, Business Roundtable is concerned about the extraordinary complexity of the regulations. The complexity is a product of the effort to limit the scope of the proposed regulations and stems from a myriad of intricate exceptions to the Final and Temporary Section 385 Regulations, many of which are impractical to apply in real-life business situations.

For example, in order to determine whether an instrument satisfies the exception for short-term funding arrangements, which the IRS and Treasury believed "substantially reduces the compliance burden of applying the per se funding rule during the 36-month testing periods",[7] it is necessary to separately record and monitor on an ongoing basis (i) all loans of more than 270 days; (ii) all ordinary course and interest-free loans; (iii) all demand deposits received by a

---

7 T.D. 9790, 81 Fed. Reg. 72858, 72895 (Oct. 21, 2016); *see also id*. at 72901 (providing that "these tests generally rely on mechanical rules that will provide taxpayers with more certainty, and be more administrable for the IRS, as compared to a facts-and-circumstances approach that was suggested by some comments.").

qualified cash pool header; (iv) the entirety of a covered member's borrowing and lending transactions (both in the aggregate with members of the issuer's expanded group, and with respect to particular lenders); and (v) whether the covered member or any member of the expanded group is in a borrowing position for more than 270 days (both total days during a taxable year and consecutive days). This is just one of the qualified short-term debt exceptions. Rather than creating complicated exceptions, IRS and Treasury should have done wholesale surgery to the regulations removing the need for numerous and complicated exceptions. They failed to do so. As a result, the regulations run contrary to the President's policy objective that the "Federal tax system should be simple, fair, efficient, and pro-growth" and "[t]he purposes of tax regulations should be to bring clarity to the already complex Internal Revenue Code . . . and to provide useful guidance to taxpayers."[8]

The practical import of the Final and Temporary Regulations is that it is more difficult for U.S.-based multinationals to deploy their capital efficiently, reducing their competitiveness in the global marketplace, particularly with respect to acquiring U.S. and foreign businesses and financing their worldwide operations. The regulations also discourage foreign investment in the United States by restricting foreign investors' ability to recover returns on and of their investments, by significantly increasing the cost of doing business in the United States, and by imposing administrative and operational burdens. Congress recognized the importance of foreign investment and the repatriation of U.S. dollars, and crafted a legislative balance between encouraging foreign investment[9] and preventing abuse.[10] The Final and Temporary Section 385 Regulations disrupt this careful balance by recharacterizing significant amounts of related-party debt, thereby denying the tax benefits put in place by Congress to stimulate the same investments which Treasury seeks to recharacterize.

C. Recommendations

Business Roundtable believes the Final and Temporary Section 385 Regulations represent an inappropriate revision to the definition of debt in an effort to prevent earnings stripping and to "further limit the benefits of post-inversion tax avoidance transactions." Rather than adopting a focused and targeted approach to address earnings stripping, the Treasury adopted an expansive and complex set of rules that impose substantial burdens on U.S. taxpayers yet are only moderately effective at achieving the primary goal and are arbitrary in their application to similarly situated taxpayers. Business Roundtable believes specific targeted legislation would be a more effective way to combat the structural issues giving rise to inversions and earnings stripping by inverted companies.

Given the significant financial, administrative, and compliance burdens imposed on taxpayers by the Final and Temporary Regulations, Business Roundtable believes the appropriate course of action is for Treasury and the IRS to leave this effort to the legislative process. In light of

[8] EO 13789, 82 Fed. Reg. 19317 (Apr. 21, 2017).

[9] *See, e.g.,* section 892 (exempting income from inbound investments made by foreign governments from U.S. federal income tax); sections 871(h) and 881(c) (portfolio interest exception).

[10] *See, e.g.,* section 163(j) (limiting the deductibility of outbound interest payments).

impending comprehensive tax reform, Business Roundtable strongly recommends that Treasury, in its final report to the President, propose to rescind in full the Final and Temporary Section 385 Regulations, and if not rescind in full, at a minimum, delay the effective date of the Final and Temporary Section 385 Regulations to January 1, 2021.

II. Final Section 367 Regulations[11]

A. Overview

The Final Section 367 Regulations, which were issued on December 15, 2016, address the treatment of outbound transfers of certain property.[12] Among other things, the Final Section 367 Regulations deny the tax-free treatment of outbound transfers of foreign goodwill and going concern value that had existed under prior law for over 30 years.[13]

Business Roundtable applauds Treasury for identifying the Final Section 367 Regulations as significant in view of the Presidential priorities for tax regulation outlined in EO 13789 and as imposing an undue financial burden on U.S. taxpayers and/or adding undue complexity to Federal tax laws.[14] In addition, Business Roundtable recognizes the significant complexity involved in interpreting and applying the rules under section 367 and in valuing and defining concepts such as goodwill and going concern value, and we appreciate Treasury and the IRS's consideration of these issues. Business Roundtable also recognizes, however, that the tax-free treatment of outbound transfers of foreign goodwill and going concern value has long been part of the tax law and that the Final Section 367 Regulations' denial of such treatment significantly and detrimentally changes the application of the law. Such a change in effect imposes a punitive exit tax on the transfer of any operating business to a foreign corporation without any support in the statute or legislative history for such a position. To the extent Treasury is concerned with tax avoidance, Business Roundtable urges it to adopt a tailored and measured approach. For these and other reasons discussed herein, Business Roundtable respectfully recommends that Treasury, in its final report to the President, propose to rescind the Final Section 367 Regulations.

B. Burdens

The Final Section 367 Regulations largely finalize proposed regulations issued on September 14, 2015[15] without fundamental change, despite numerous comments recommending

---

[11] Final Regulations under Section 367 on the Treatment of Certain Transfers of Property to Foreign Corporations (T.D. 9803; 81 F.R. 91012).

[12] T.D. 9803, 81 Fed. Reg. 91012 (Dec. 16, 2016).

[13] *See* P.L. 98-36, Deficit Reduction Act of 1984, § 131(a)(3); Treas. Reg. § 1.367(d)-1T(b); *see also* Notice 2017-38, Section III.8. (explaining that the "final regulations eliminate the ability of taxpayers under prior regulations to transfer foreign goodwill and going concern value to a foreign corporation without immediate or future U.S. income tax.").

[14] *See* Notice 2017-38, Section III.8. (providing that "[s]ome commenters stated that the final regulations would increase burdens by taxing transactions that were previously exempt, noting in particular that the legislative history to Section 367 contemplated an exception for outbound transfers of foreign goodwill and going concern value.").

[15] Notice of Proposed Rulemaking, "Treatment of Certain Transfers of Property to Foreign Corporations," 80 Fed. Reg. 55568 (Sept. 16, 2015). The proposed regulations were first made publicly available on September 14, 2015.

modifications and questioning Treasury's authority to issue the regulations. In addition, the Final Section 367 Regulations finalize, amend, or remove certain temporary regulations issued on May 16, 1986,[16] and generally apply retroactively to transfers occurring on or after September 14, 2015, the date the proposed regulations were issued.[17]

Under the Final Section 367 Regulations, an outbound transfer of foreign goodwill or going concern value is ineligible for tax-free treatment and, instead, would be subject to either current gain recognition under the general rule of section 367(a)(1) or, alternatively, periodic income inclusion under section 367(d).

Business Roundtable believes that the Final Section 367 Regulations alter a statutory regime under which property is permitted to be transferred outbound tax-free unless explicitly carved out.[18] The Final Section 367 Regulations, in effect, invert the statutory structure by subjecting outbound transfers of property to taxation unless explicitly permitted under a narrow definition of qualified property, which does not include goodwill or going concern value. Changes of this nature should only be effectuated through legislation.

Such a change to the section 367 statutory structure disregards clear Congressional intent that outbound transfers of goodwill and going concern value ordinarily will be tax-free either under section 367(a) or section 367(d) and, as a result, gives rise to concerns relating to the validity of the regulations. With the validity of the Final Section 367 Regulations in question, there is significant uncertainty as to which rules to follow (*i.e.*, the statutory structure that Congress intended or the inverted regime presented in the Final Section 367 Regulations) and the potential for significant taxes on transactions not motivated by tax avoidance.

The tax imposed on taxpayers can be significant because every incorporation of a foreign branch—a routine event for businesses of all sizes—could result in a significant exit tax. In many industries, such as financial services, telecommunications, and utilities, whether to incorporate or operate in branch form may not be a choice for the taxpayer, but instead may be mandated by local regulation. In these cases, thirty-five percent of the unrealized present value of what may be the business's most valuable asset—the prospect of future earnings with respect to which the business has no readily available cash—becomes an immediate cash expenditure based on what frequently is an event with no economic commercial significance.

The problems attributable to the Final Section 367 Regulations are further exacerbated by the changing landscape of international tax laws, as foreign jurisdictions consider enacting laws such as the anti-hybrid rules based on recommendations from the OECD pursuant to its Base Erosion and Profit Shifting (BEPS) initiative. If a foreign jurisdiction enacts BEPS anti-hybrid

---

[16] *See* T.D. 8087, 51 Fed. Reg. 17936 (May 16, 1986).

[17] We note that the regulations' retroactive applicability to transfers occurring on or after the date the rules were first proposed (*i.e.*, September 14, 2015) violate the requirement under the Administrative Procedure Act for a 30-day delay in effective date. Administrative Procedure Act of 1946 (P.L. 79-404), 60 Stat. 237. This denied taxpayers their right to notice of the substance of the regulations before the provisions became effective.

[18] *See* section 367(a)(3) (providing that all active trade or business assets are eligible for the active trade or business exception unless explicitly excepted).

legislation,[19] U.S. multinational enterprises operating in that jurisdiction through branches or entities treated as partnerships for U.S. tax purposes may have to decide whether it is feasible to mitigate the impact of the anti-hybrid rules by incorporating the foreign operations and voluntarily subjecting assets that do not qualify for the active trade or business exception under the Final Section 367 Regulations (*e.g.*, goodwill and/or going concern value) to taxation under section 367. The adverse impacts of the Final Section 367 Regulations may also be accentuated by unintended consequences of adoption of a foreign dividend exemption system under comprehensive tax reform legislation. While not included in more recent proposals, some previous proposals suggest a deemed CFC approach with respect to the treatment of foreign branches, which absent special rules to the contrary would result in the deemed incorporation of a foreign branch to be subject to section 367.[20] In either case, the taxpayer would be required to monetize business asset value in order to pay the income tax, which is in direct conflict with Congressional intent in the section 367 legislative history.

The financial burdens imposed on U.S. taxpayers by the Final Section 367 Regulations are more severe for some than others, because the application of the regulations affects similarly situated taxpayers unequally. Taxpayers with insignificant tangible assets but significant residual business value (*e.g.*, many service providers) are hit hard while taxpayers that derive greater value from tangible assets (*e.g.*, manufacturers, transportation businesses, leasing business, etc.) may not be affected. This is the case despite the fact that both conduct active trades and businesses and despite Congress drawing no such distinction in the statutory language or legislative history of section 367.

The Final Section 367 Regulations are neither appropriate nor in furtherance of the President's policy objectives described in EO 13789 that "[t]he Federal tax system should be simple, fair, efficient, and pro-growth," and run contrary to the policy objective that "[t]he purposes of tax regulations should be to bring clarity to the already complex Internal Revenue Code".

Business Roundtable believes that the Final Section 367 Regulations exceed Treasury's authority to issue regulations under section 367(a) and section 367(d). The Final Section 367 Regulations contradict clear legislative intent manifested in the statutory structure of section 367 and expressed in legislative history with respect to the tax-free treatment of outbound transfers of foreign goodwill and going concern value.

The Final Section 367 Regulations fail to address Treasury's stated concern relating to the valuation of goodwill and going concern value. The tax avoidance addressed by the Final Section 367 Regulations stems from valuations, not the transfers to which Treasury's regulatory authority is expressly related. Business Roundtable recognizes the significant complexity

---

[19] *See* OECD, "Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 -- 2015 Final Report," OECD/G-20 Base Erosion and Profit Shifting Project (2015). The enactment of such legislation would, in essence, eliminate the deduction of intercompany payments for interest and royalties when the taxpayer structures their foreign operations as flow-through structures for U.S. purposes.

[20] *See, e.g.,* Staff of the Joint Committee on Taxation, "Options to Improve Tax Compliance and Reform Tax Expenditures," JCS-02-05 (Jan. 27, 2005) at 191; Ways and Means Committee Chairman Dave Camp (R-MI) international tax reform discussion draft, Section 301(b)(2), October 26, 2011.

involved in interpreting and applying the rules under section 367 and in valuing and defining concepts such as goodwill and going concern value, but does not believe that section 367 is the appropriate channel for achieving Treasury and the IRS's intended result, no matter how difficult valuation issues have been for them to litigate.[21]

C. Recommendations

For the foregoing reasons, Business Roundtable believes that Treasury has exceeded the permissible scope of its administrative power in the case of the Final Section 367 Regulations by denying the favorable treatment of outbound transfers of goodwill and going concern value under long-standing law based on reasons that do not bear on the legislative policy underlying such treatment. In addition, Business Roundtable believes that the Final Section 367 Regulations import uncertainty into the application of Federal tax law with respect to the treatment of goodwill and going concern value while at the same time imposing undue financial burdens on U.S. taxpayers that may be required to undertake transactions involving the transfer of such items that are not motivated by U.S. tax avoidance. Therefore, Business Roundtable strongly recommends that Treasury, in its final report to the President, propose that the Final Section 367 Regulations be rescinded. To the extent Treasury is concerned with tax avoidance, Business Roundtable urges it to adopt a tailored and measured approach and replace the regulations with rules that comport with Treasury's permissible scope of authority.

III. Final Section 987 Regulations[22]

A. Overview

The Final Section 987 Regulations were issued on December 7, 2016,[23] providing long-awaited tax accounting rules for determining foreign currency translation gains or losses that arise in situations in which a qualified business unit (QBU) conducts business using a functional currency different from that of its owner. The Final Section 987 Regulations are largely based on the paradigm set forth in the 2006 proposed regulations.[24] Accompanying the final regulations was a set of temporary[25] and proposed regulations,[26] which set forth anti-abuse rules applicable to certain section 987 QBU terminations, an alternative "hybrid method" to the foreign exchange exposure pool (FEEP) method set forth in the Final Section 987 Regulations and other special rules.

Business Roundtable appreciates the time and effort that the IRS and Treasury put into the drafting of the Final Section 987 Regulations but also applauds Treasury for identifying the Final

---

[21] See, e.g., Eaton Corp. v. Comm'r, T.C. Memo. 2017-147; Amazon.com, Inc. v. Comm'r, 148 T.C. No. 8 (2017); Veritas Software Corp. v. Comm'r, 133 T.C. 297 (2009), nonacq. AOD-2010-05.

[22] Final Regulations under Section 987 on Income and Currency Gain or Loss With Respect to a Section 987 Qualified Business Unit (T.D. 9794; 81 F.R. 88806).

[23] 81 Fed. Reg. 88806 (December 8, 2016).

[24] *Id.*

[25] *Id.* at 88854.

[26] *Id.* at 88882.

Section 987 Regulations as one of the regulations it is reconsidering pursuant to EO 13789.[27] Business Roundtable is cognizant of the concerns that motivated Treasury to withdraw the 1991 proposed regulations and understands the level of detail needed in order to prevent abuses that may arise. Nonetheless, Business Roundtable believes that the level of complexity associated with the Final Section 987 Regulations is intolerable and the financial and administrative burdens imposed on taxpayers are excessive. Consequently, we strongly recommend that Treasury, in its final report to the President, propose to rescind in full the Final Section 987 Regulations (including the proposed and temporary regulations) or otherwise propose modifications to reduce the complexity and to alleviate the compliance burdens and undue financial burdens imposed on U.S. taxpayers.

B. Burdens

Section 987 was enacted in the Tax Reform Act of 1986,[28] as part of a comprehensive consideration of the tax rules regarding foreign currency transactions and translation. It was nearly five years until Treasury and the IRS issued guidance in 1991.[29] The 1991 proposed regulations were similar to (although not identical to) the financial accounting rules[30] but incorporated a "remittance" timing convention as required by the section 987 statute.[31]

On September 7, 2006, Treasury and the IRS issued a new set of proposed regulations[32] and withdrew the 1991 proposed regulations.[33] The rationale for rejecting the method set forth in the 1991 proposed regulations was that the imputation of section 987 gain or loss to non-financial assets (such as land, buildings, inventory, other tangible property and stock) combined with a remittance based timing convention allowed taxpayers to trigger section 987 losses that were not economically realized or were realized inappropriately.[34]

---

[27] *See* Notice 2017-38, Section III.7. (providing that "[c]ommenters on the regulations stated that the transition rule in the final regulations imposes an undue financial burden on taxpayers because it disregards losses calculated by the taxpayer for years prior to the transition but not previously recognized. Commenters also stated that the method prescribed by the final regulations for calculating foreign currency gain or loss was unduly complex and costly to comply with, particularly where the final regulations differ from financial accounting rules.").

[28] Public Law 99-514, 100 Stat. 2085 (October 22, 1986), 1986-3 C.B. Vol 1, 1.

[29] 56 Fed. Reg. 48457.

[30] *See*, FASB Accounting Standards Codification Topic 830, Foreign Currency Matters ("ASC 830") (formerly referred to as FAS 52).

[31] Section 987(3). Many taxpayers adopted a version of the 1991 Proposed Regulations known as the "earnings only" method. Under the earnings only method, section 987 gain or loss was imputed under the principles of the 1991 Proposed Regulations to the earnings of a section 987 QBU but not its capital. Pursuant to the preamble to the 2006 Proposed Regulations, the earnings only method is considered a reasonable method of complying with the section 987 statute in the absence of final regulations.

[32] 71 Fed. Reg. 52876 (Sept. 7, 2006), corrected 71 Fed. Reg. 77654 (Dec. 27, 2006).

[33] 71 Fed. Reg. 52876 (Sept. 7, 2006), page 52876, see section titled, Withdrawal of Noticed of Proposed Rulemaking. The preamble to the 2006 Proposed Regulations provided that the equity pool method of the 1991 Proposed Regulations was a reasonable method of complying with the section 987 statute in the absence of final regulations. Thus, the 1991 Proposed Regulations had continuing vitality notwithstanding the fact that they were withdrawn, as did an "earnings only" variant of such method.

[34] The preamble also noted that under the 1991 Proposed Regulations, taxpayers that had to make remittances or terminated section 987 QBUs (for example, in a restructuring) were potentially required to include in income an inappropriately large amount of section 987 gains.

Because the 1991 proposed regulations were similar to the financial accounting rules in many material respects, the adoption of a new method set forth in the 2006 proposed regulations represented a deviation from those rules and a compliance burden for taxpayers. The 2006 proposed regulations set forth two principal calculations – one involving the determination of the net income or loss of a section 987 QBU and the other involving the computation of section 987 gain or loss. Both computations require taxpayers to develop and maintain historic data that is not employed for financial statement purposes. As such, these calculations create book-tax differences that impose serious compliance burdens on taxpayers. The Final Section 987 Regulations adopted the approach and material rules of the 2006 proposed regulations.

This background illustrates a lack of clear and administrable guidance that has existed in this area for over 30 years. While some taxpayers did their best to anticipate Treasury and the IRS's next steps and future final regulations, others relied on the 1991 proposed regulations for administrative ease due to the similarities to the financial accounting rules. With the promulgation of the Final Section 987 Regulations, most taxpayers must now navigate an extremely complex set of regulations that differ significantly from financial accounting rules. The Final Section 987 Regulations impose excessive compliance burdens by requiring that taxpayers create (retroactively, in some instances) and maintain onerous tax reporting records with detailed information relating to each section 987 QBU, gather information for transitioning into a prescribed method, and assess the financial accounting impact due to potential tax-book disparities embedded in the prescribed method.

The transition rule in the final regulations is punitive to many taxpayers. In some instances, the transition to the methods set forth in the Final Section 987 Regulations from previously permitted approaches, which have been used for nearly 30 years, may result in the permanent denial of large amounts of true economic losses. Business Roundtable believes that the financial burden imposed on taxpayers by the transition rule is extremely harsh. When combined with the recent resurgence of the U.S. dollar, which appreciated to elevated levels in the 2015-2017 period relative to the preceding 10-year period against most other currencies, these provisions would significantly increase U.S.-based multinationals' tax liability as it relates to these true economic losses. Business Roundtable believes that the compliance burdens associated with the complex rules prescribed in the Final Section 987 Regulations for calculating foreign currency gains or losses will require that U.S. companies alter their business practices in light of the differences from financial accounting rules and incur significant costs to design, develop, and implement the systems necessary to comply with the regulations.

C. Recommendations

Business Roundtable believes that the Final Section 987 Regulations impose undue financial and administrative burdens on taxpayers and add undue complexity to the federal tax laws. Despite the fact that taxpayers already maintain separate books and records for U.S. GAAP and U.S. tax purposes, the regulations would require taxpayers to maintain yet another separate set of books and records solely for section 987 purposes in order to track historical basis and historical deductions (*e.g.*, depreciation and amortization expense). In most cases, the historical data

necessary to comply with the regulations is not readily maintained by taxpayers. As a result, given the potential significant undue financial burdens as well as the compliance and administrative burdens imposed by the Final Section 987 Regulations, Business Roundtable strongly recommends that Treasury, in its final report to the President, propose to rescind in full the Final Section 987 Regulations (including the proposed and temporary regulations) or otherwise propose substantial modifications thereto in order to alleviate the compliance burdens imposed on U.S. taxpayers and the denial of true economic losses.

If modified or withdrawn, however, Business Roundtable recommends that the regulations as issued should be treated as an acceptable method for the benefit of any taxpayer that has begun implementation and wishes to rely on them. Some of our membership have already expended significant resources to prepare for compliance with the Final Section 987 Regulations. These include companies with fiscal years beginning before January 1, 2018, that have elected to "early adopt" the regulations and have already based financial reporting on this election. Addressing change of law issues can be very complex. U.S. generally accepted accounting principles ("GAAP") typically require that law changes be accounted for in the period in which the new rules are enacted (not in the first period for which the rules are effective). That is why Treasury's release of the Final Section 987 Regulations on December 7, 2016, just before many calendar year public companies had to start preparing their 2016 annual reports, created enormous administrative difficulties last year. If Treasury repeals the final regulations but does not allow the aforementioned companies to rely on them from the date they were promulgated, then these companies will be forced to, again, measure the impact of the change and communicate that change in a very compressed timeframe.

IV. Temporary and Proposed Section 901(m) Regulations

A. Overview

The Temporary and Proposed Section 901(m) Regulations were issued on December 7, 2016, to provide guidance with respect to the application of section 901(m), which disallows foreign tax credits (FTCs) incurred in transactions (referred to as covered asset acquisitions or CAAs) that generate foreign income without corresponding U.S. income.[35] Congress gave Treasury authority to both expand and narrow the scope of section 901(m), including, for example, adding to the list of transactions treated as CAAs,[36] exempting transactions from treatment as CAAs,[37] or providing exemptions from recordkeeping requirements.[38]

---

[35] *See* Joint Comm. on Tax'n, Technical Explanation of the Revenue Provisions of the Senate Amendment to the House Amendment to the Senate Amendment to H.R. 1586, Scheduled for Consideration by the House of Representatives on August 10, 2010, JCX-46-10, at 10-13 (Aug. 10, 2010).

[36] Section 901(m)(2)(D).

[37] Section 901(m)(7).

[38] *Id.*

The temporary regulations implement the rules set forth in Notice 2014-44[39] and Notice 2014-45[40] relating to the so called "disposition rule" without material change. In addition, the temporary regulations contain a few additional rules that are favorable to taxpayers, such as a rule excluding foreign withholding taxes from the pool of potential disqualified foreign taxes.

While the Temporary and Proposed Section 901(m) Regulations were not included in Notice 2017-38, Business Roundtable believes that the Temporary and Proposed Section 901(m) Regulations, most notably the proposed regulations, are contrary to the President's policy objectives that the "Federal tax system should be simple, fair, efficient, and pro-growth" and "[t]he purposes of tax regulations should be to bring clarity to the already complex Internal Revenue Code . . . and to provide useful guidance to taxpayers."[41] Treasury should review and modify the Temporary and Proposed Section 901(m) Regulations, focusing predominantly on the proposed regulations, to eliminate the burden imposed on U.S. taxpayers and to reduce the substantial complexity that arises from these regulations.

B. Burdens

The proposed rules, overall, represent an expansion of the reach and complexity of section 901(m) that exceeds the original legislative intent. The proposed regulations set forth detailed rules, including several anti-abuse rules, that expand the scope of section 901(m), and address the determination of each component in the section 901(m) calculation of foreign taxes that may not be claimed as a credit. For the most part, Treasury did not accept Congress's invitation to narrow the scope of the statute where appropriate. The proposed regulations set forth highly complex rules for calculating the disallowed amount and overly broad carryover provisions that encumber U.S. taxpayers relative to their foreign competitors.

C. Recommendations

In order to reduce the burdens imposed on U.S. multinationals, Business Roundtable urges Treasury to withdraw the proposed section 901(m) regulations due to the added complexity the regulations impose, the associated financial burden, and their regulatory overreach. If Treasury declines to fully withdraw the proposed regulations, Business Roundtable urges Treasury to make modifications to the proposed section 901(m) regulations in order to eliminate or reduce the unnecessary expansion of the statute, burdensome tracking requirements, and complex calculations. To that end, Business Roundtable further supports Treasury's exercise of its authority to narrow the application of section 901(m) by exempting certain ordinary course business transactions from treatment as CAAs and expanding de minimis rules.

---

[39] 2014-32 I.R.B. 270 (Jul. 21, 2014).

[40] 2014-34 I.R.B. 388 (Jul. 30, 2014).

[41] *Id.*