November 10, 2022

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Mr. William M. Paul
Principal Deputy Chief Counsel
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

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

Mr. Brett York
Deputy Tax Legislative Counsel
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

Re: Section 55(b)(2) Corporate Alternative Minimum Tax

Dear Sirs and Madam:

The Energy Infrastructure Council ("EIC") is pleased to submit initial recommendations for guidance with respect to the corporate alternative minimum tax enacted in P.L. 117-169 (known as the Inflation Reduction Act of 2022). The EIC is a non-profit trade association dedicated to advancing the interests of companies that develop and operate energy infrastructure in the United States. As such, the EIC addresses core public policy issues critical to investment in U.S. energy infrastructure. Our members are both public and private traditional and renewable energy infrastructure companies that ensure that energy from a wide variety of sources is delivered efficiently and safely from production facilities and fields to American homes, businesses and communities.

We appreciate the efforts of the U.S. Treasury Department (the "Treasury") and the Internal Revenue Service (the "IRS") to provide taxpayers with guidance on the implementation of the corporate alternative minimum tax and are pleased to offer recommendations that may be of particular interest to our trade association members, including corporations and master limited partnerships (also known as publicly traded partnerships, "MLPs").[1][2]

I. Overview

Section 55(b)(2) imposes a minimum tax of fifteen percent on the adjusted financial statement income ("AFSI"), as defined in Section 56A, of an "applicable corporation," as defined in Section 59(k). Section 59(k) defines an applicable corporation based on a three-year moving average of the AFSI of the corporation (including entities aggregated with the corporation) exceeding $1 billion. In applying this test, Section 59(k)(1)(D) includes all income of persons treated as a single employer with such corporation under Section 52(a) and Section 52(b).

Section 56A and Section 59(k) include a number of regulatory authority grants to the Treasury to carry out the purpose of the corporate alternative minimum tax and resolve technical or policy issues. For example, Section 59(k)(3)(A) provides that the Treasury shall provide regulations or other guidance for the purposes of carrying out Section 59(k), including "(A) providing a simplified method for determining whether a corporation meets the requirements of [Section 59(k)(1)]." In addition, Section 56A(c)(2)(D)(i) provides that "[e]xcept as provided by the Secretary," if the taxpayer is a partner in a partnership, the AFSI of the taxpayer with respect to the partnership shall be adjusted to take into account "the taxpayer's distributive share of adjusted financial statement income of such partnership." Our recommendations are in support of the authority given to the Treasury in these and other provisions to appropriately provide for the implementation of these rules and objectives.

[1] As used herein, the term "MLP" refers to a publicly traded partnership as defined under Section 7704 of the Internal Revenue Code of 1986, as amended (the "Code").

[2] All "Section" references are to the Code, and the "Treasury Regulations §" references are to the Treasury Regulations promulgated thereunder.

II. Summary of Recommendations

1. Priority Guidance on the Definition of a Partnership Distributive Share

A. Allow partnerships, including MLPs, to use a partner's percentage interest of the partnership's Section 704(b) book income as an administratively feasible method of determining a partner's distributive share of the partnership's AFSI.

B. Confirm that basis adjustments under Section 743(b) and Section 734(b) that result in additional depreciation under Section 168 are part of the "depreciation" contemplated under Section 56A(c)(13) and that such depreciation is allocated to the partner that generated the Section 743(b) basis adjustment.

2. Implementing Administration of Any Information Sharing with Partners

A. Provide MLPs with relief with respect to the additional information sharing burden the corporate alternative minimum tax creates.

3. Definition of Applicable Corporation

A. Limit application of downward attribution of income with respect to MLP Corporate Subs (as defined below).

B. Provide a bright-line rule that a corporation is no longer an applicable corporation after failing to meet the AFSI threshold for two consecutive taxable years.

C. Clarify which taxable years are included in a corporation's determination of its average annual adjusted financial statement income under Section 59(k)(1)(B).

4. General Guidance and Clarifications

A. Issue further guidance and clarification on adjustments for certain book-tax differences.

B. Clarify the application of the financial statement net operating loss carryover rules for purposes of Section 56A(d).

C. Confirm that Section 56A(c)(5) does not require an adjustment for federal non-income taxes, foreign non-income taxes, state taxes and local taxes.

5. Endorsement of AICPA Recommendations

A. Provide guidance consistent with the American Institute of Certified Public Accountants ("AICPA") recommendations set forth in paragraph III.5.A below.

III. Discussion of Recommendations

1. Regulations Regarding Definition of a Partnership Distributive Share

We respectfully request priority guidance providing (A) an administratively feasible method of determining a taxpayer's distributive share of an MLP's AFSI and (B) clarification of the treatment of Section 743(b) and Section 734(b) depreciation deductions.

A. Administratively Feasible Method. Section 56A(c)(2)(D)(i) provides that for purposes of determining the AFSI of an applicable corporation, if a taxpayer is a partner in a partnership, the AFSI of the taxpayer with respect to such partnership shall be adjusted to only take into account the "taxpayer's distributive share of adjusted financial statement income of the partnership." Further, Section 56A(c)(2)(D)(ii) provides that for these purposes, "the adjusted financial statement income of a partnership shall be the partnership's net income or loss set forth on such partnership's applicable financial statement (adjusted under rules similar to the rules of this section)." For purposes of consistency and the sound administration of the "taxpayer's distributive share of adjusted financial statement income" concept related to partnerships under Section 56A(c)(2)(D), we recommend that the applicable guidance specify that a partner's distributive share of a partnership's net income or loss set forth on such partnership's applicable financial statements be (i) determined by allocating each partner its percentage share of the partnership's AFSI, with such percentage share being equal to such partner's percentage share of Section 704(b) book income (*e.g.*, if a partner has a 5% share of the partnership's Section 704(b) book income, then such partner would be allocated 5% of the partnership's AFSI) and (ii) with respect to MLPs, determined without regard to special allocations or partner-specific adjustments, such as Section 743(b) or Section 704(c). A partner's "distributive share" of partnership net income for tax purposes is the income, gain, loss and deductions determined under the rules of Section 704(b) and the accompanying Treasury regulations. For MLPs, this Section 704(b) income is allocated among the existing partners on a proportional basis and, therefore, would be administratively easy to implement.

B. Section 743(b) / Section 734(b) Depreciation Deductions. For passthrough joint ventures in the traditional and renewable energy infrastructure industry, the basis adjustments under Section 743(b) and Section 734(b) in effect when a Section 754 election has been made commonly result in additional depreciation deductions under Section 168 by operation of the basis adjustment rules of Section 755 and the Treasury regulations promulgated thereunder. Because depreciation is a general adjustment to AFSI under Section 56A(c)(13), we would ask that rules clarify or confirm, for non-MLPs, that the additional Section 168 depreciation deductions realized through the operation of the partnership basis adjustment rules are part of the "depreciation" contemplated under Section 56A(c)(13) and that such depreciation will be allocated to the partner that generated the Section 743(b) adjustment.[3]

2. Regulations Implementing the Administration of Any Information Sharing with Partners

A. Relief for MLPs. We would ask that Treasury provide relief to MLPs by limiting the information burdens on MLPs, which are highly unlikely to have partners that are "applicable corporations," other than the controlling sponsors that have ready access to any necessary information. A typical MLP has thousands or tens of thousands of partners who regularly sell or exchange their interests on the NYSE or NASDAQ. In some cases, investors will invest in MLPs through nominee partners, typically a financial intermediary such as a bank or broker. In that instance, the MLP will not have visibility as to the identity of the investors, even though technically they may be partners.

[3] We request further discussions regarding MLPs and Section 743(b) adjustments, including what information is practically available to public unitholders in an MLP because of the manner in which the Section 743(b) basis adjustment rules work in the MLP context (particularly Treasury Regulations § 1.743-1(j)(4)(i)(B)(2), in conjunction with the typical election by MLPs of the remedial method under Treasury Regulations § 1.704-3(d)).

In general, MLPs do not gather information necessary for tax reporting directly from their partners. Instead, Treasury Regulations § 1.6031(c)-1T(a) require the brokers through whom partners hold their interests to report to the MLP certain information about the identity and tax status of the partner (*e.g.*, U.S. person, foreign person, or tax exempt entity) and certain details about the broker's acquisition of the partnership interest.

Such information must be reported on or before the last day of the first month following the close of the partnership's taxable year.[4] Thus, other than general information provided on a website (*e.g.*, qualified notices to brokers and nominees pursuant to Treasury Regulations § 1.1446-4(b)(4)), MLPs are not able to provide taxpayer-specific information to their partners until after the close of a taxable year. Hence, providing taxpayer-specific information of any nature on a less than annual basis is administratively impractical under the current reporting requirements under the Code. To the extent future guidance requires MLPs to provide individualized information to each of its thousands or tens of thousands of partners, such information would have to be included in their annual schedule K-1 package.

Consistent with our recommendation in paragraph III.1.A above, we further suggest that an MLP be able to satisfy its information sharing requirements by providing, in its annual schedule K-1 package, each partner with its percentage share of such MLP's AFSI and that such percentage share be equal to such partner's percentage share of Section 704(b) book income. The schedule K-1 could easily be amended to include a single additional box to input each partner's AFSI. As discussed above, this approach would significantly reduce MLP's administrative burden with respect to the additional reporting required due to the corporate alternative minimum tax.

In the alternative, for purposes of determining a partner's distributive share of an MLP, a five percent or less holder of such MLP (determined using common attribution rules), should be able to use the amount listed on Line 1 of such partner's schedule K-1 as their distributive share. We strongly believe that very few, if any, applicable corporations are less than five percent holders in MLPs. In the unlikely event than an applicable corporation did own less than five percent of an MLP, the total amount of such applicable corporation's distributive share would be immaterial. Further, given the makeup of MLP ownership, under any reasonable simplified

[4] Treas. Reg. § 1.6031(c)-1T(b).

methodology the total amount of such applicable corporation's distributive share would be immaterial. Thus, providing this specific relief for MLPs will reduce a costly administrative burden without materially impacting Treasury's collection of tax.

In the few instances in which an MLP has a greater than five percent holder, we expect such MLP would be able to provide annual distributive share calculations for purposes of the book minimum tax in the annual schedule K-1 package.

3. Regulations Regarding the Definition of Applicable Corporation

A. Downward Attribution of Income. The current statutory provisions in Section 59(k)(1)(D) that require a corporation to include in its AFSI all AFSI of persons treated as a single employer with such corporation under Sections 52(a) and (b) are overly broad in application, particularly for MLPs. It is very common for MLPs to have a very limited number of corporate subsidiaries that conduct immaterial amounts of business that do not generate qualifying income under Section 7704. Currently under Treasury Regulations § 1.52-1(c) the definition of "parent—subsidiary group under common control" causes even an immaterial corporate subsidiary to be attributed all of the partnership income of the entire MLP group, and thus turns a corporate subsidiary into an applicable corporation—clearly increasing the number of applicable corporations beyond the widely reported estimate of 125 applicable corporations. In this case, the game may not be worth the candle.

We would suggest Treasury limit the attribution rules to require a corporate subsidiary where fifty percent or more of such corporate subsidiary's stock (by value) is owned directly or indirectly by an MLP (an "MLP Corporate Sub") to include AFSI from only its direct or indirect subsidiaries (*i.e.*, AFSI would be attributed up but not down). In the alternative, we suggest only treating an MLP Corporate Sub as an applicable corporation in the event that the average annual adjusted financial statement income of all MLP Corporate Subs (determined without regard to income of any partnerships in such single employer group (to the extent such partnerships' income is not allocated to corporations in the single employer group)) for the 3-taxable-year-period ending with such taxable year is $100,000,000 or more.

B. Termination of Applicable Corporation Status. Due to the volatility of earnings in the traditional and renewable energy infrastructure industry, we strongly suggest practical guidance on the Section 59(k)(i)(C) rules determining when it is appropriate to no longer treat a corporation as an applicable corporation on a prospective basis. Because of the high administrative costs of performing the complex calculations necessary to determine the amount of alternative minimum tax due under Section 55(b)(2), we recommend that applicable corporation status terminate after such corporation has failed to meet the AFSI threshold set forth in Section 59(k)(1)(B) for two consecutive taxable years.

C. Average Annual AFSI Test. Section 59(k)(1)(A) provides that "the term 'applicable corporation' means, with respect to any taxable year, any corporation (other than an S corporation, a regulated investment company, or a real estate investment trust) which meets the average annual adjusted financial statement income test of subparagraph (B) for one or more taxable years which—(i) <u>are prior to such taxable year</u>, and (ii) end after December 31, 2021." (Emphasis added.) However, Section 59(k)(1)(B) describes the average annual AFSI test as applying to "<u>the 3-taxable-year period ending with such taxable year</u>." (Emphasis added.) We respectfully request guidance clarifying that the average annual AFSI test for a taxable year includes the AFSI of the three preceding taxable years. For example, to determine whether X Corporation is an applicable corporation in 2024, X Corporation will average its AFSI for its 2021, 2022 and 2023 taxable years.

4. General Guidance and Clarifications

A. Book Tax Differences. We recommend that Treasury provide guidance that clarifies how to address common differences between financial statement reporting under GAAP versus tax reporting under the Code. Some common items that we have identified initially include, but are not limited to, the treatment of (i) asset impairments (and the timing differences), (ii) gains and losses on the disposal of assets, (iii) casualty losses, (iv) application of the dividends received deduction in a non-consolidated group context, (v) hedging transactions and assets that require mark to market accounting for GAAP purposes, and (vi) tax-free contributions or distributions that result in book gains or losses (which should not be taken into account in determining AFSI).

B. Net Operating Loss Carryover. We recommend that Treasury provide guidance regarding how financial statement net operating loss carryovers are applied to future years when a corporation is not an applicable corporation. In particular, we suggest that the guidance clarify whether the financial statement net operating loss carryovers must be sequentially applied, in whole or in part, to years in which the corporation is not an applicable corporation (thereby reducing the amount of carryover available to reduce AFSI in future years), and, if so, whether the restrictions under Section 56A(d)(1)(B) apply on a hypothetical basis when determining the amount of financial statement net operating loss carryover that accrue during the intervening years between the taxable year in which such loss arises and the taxable year in which such corporation is determined to be an applicable corporation.

For example, assume in 2020 X Corporation had a $4 billion AFSI net loss (generating a $4 billion financial statement net operating loss carryover), in 2021 X Corporation had $0 AFSI, in 2022 X Corporation had $1 billion AFSI net income, in 2023 X Corporation had $3 billion AFSI net income, and in 2024 X Corporation had $5 billion AFSI net income. Thus, X Corporation was not an applicable corporation until the 2024 taxable year.[5] When determining X Corporation's 2024 AFSI for purposes of calculating the amount of alternative minimum tax due, X Corporation will apply any available financial statement net operating loss carryovers in accordance with Section 56A(d). Because X Corporation was not an applicable corporation in 2022 and 2023, is the entire $4 billion financial statement net operating loss carryover from 2020 available to apply to X Corporation's 2024 AFSI (subject to the Section 56A(d) limitation), reducing 2024 AFSI from $5 billion to $1 billion?[6] If X Corporation has to apply the net operating loss carryover from 2020 to 2022 and 2023 (even though X Corporation was not an applicable corporation in 2022 or 2023), because of the limitation in Section 56A(d)(1)(B), is only $800 million of the carryover treated as applied to X Corporation's 2022 AFSI (rather than the full $1 billion, because the carryover is limited to 80% of X Corporation's 2022 AFSI) and, likewise, only

[5] The three year average AFSI for 2020, 2021 and 2022 = negative $1 billion ((-$4 billion + $0 + $1 billion) / 3). The three year average AFSI for 2021, 2022 and 2023 = positive $1.33 billion (($0 + $1 billion + $3 billion) / 3).

[6] Section 56A(d)(1) provides that adjusted financial statement income may only be reduced by the lesser of (A) the aggregate amount of financial statement net operating loss carryovers to the taxable year ($4 billion), or (B) 80 percent of adjusted financial statement income computed without regard to the deduction allowable under this subsection ($4 billion ((*i.e.*, $5 billion * 80%)).

$2.4 billion of the carryover treated as applied to X Corporation's 2023 AFSI?[7] As a result, does X Corporation still have $800 million in financial statement net operating loss carryover from 2020 that can be applied to its 2024 AFSI, which reduces its AFSI from $5 billion to $4.2 billion?

C. Adjustment for Taxes. Section 56A(c)(5) makes adjustments for certain federal and foreign income taxes, but does not include an adjustment for other federal taxes, other foreign taxes, or any state and local taxes (collectively, "Other Taxes"). Please confirm that such Other Taxes are not subject to adjustment under Section 56A(c)(5). Moreover, we respectfully request guidance on defining Other Taxes to include items such as federal excise tax, employment tax, state current and deferred income tax, etc.

5. Endorsement of AICPA Recommendations

A. Endorsement. The EIC is pleased to endorse the comments of the AICPA set forth in the letter dated October 14, 2022 RE: Corporate Alternative Minimum Tax Immediate Guidance under the headings (i) Applicable Corporation Test and Distributive Share Rule Issue #1, (ii) Applicable Corporation Test and Distributive Share Rule Issue #2, (iii) Balancing Guidance on Adjustments to AFSI that Carries Out Both the Purposes of CAMT and the Principles of Subchapter K, (iv) Consider Excluding Extraordinary Items for Purposes of Determining Whether an Applicable Corporation, (v) For Purposes of Computing AFSI, Clarify the Rule for Entities Not Included in the Consolidated Tax Return, (vi) Depreciation Recovered Through COGS, (vii) Bonus Depreciation Taken Prior to the Effective Date, and (viii) Impact of Nonrecognition Transactions on AFSI.

IV. Conclusion

Making the corporate alternative minimum tax regime provisions efficient for the IRS, partnerships, and taxpayers without disrupting long standing partnership tax principles and investor expectations will require a continuing open dialogue. We look forward to continuing to work together to help create a set of rules that works for all parties.

---

[7] In 2023, the Section 56A(d)(1) limitation would provide that AFSI can only be reduced by the lesser of (A) $3.2 billion, the remaining carryover and (B) $2.4 billion (*i.e.*, $3 billion * 80%).

*   *   *

If you have any questions, please do not hesitate to contact Lori Ziebart at lori@eic.energy or 202-747-6570.

Sincerely,

Lori E. L. Ziebart
President & CEO
Energy Infrastructure Council
300 New Jersey Avenue, NW
Suite 900
Washington, DC 20001

Enclosure:

cc: Thomas West, Deputy Assistant Secretary (Tax Policy), Department of the Treasury

Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury

Robert Wellen, Associate Chief Counsel (Corporate), Internal Revenue Service

Marie Milnes-Vasquez, Special Counsel, Office of the Associate Chief Counsel (Corporate), Internal Revenue Service

Catherine Hughes, Attorney-Advisor, Department of the Treasury

Holly Porter, Associate Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service

Melissa C. Liquerman, Branch Chief, Associate Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service

Karlene Lesho, Senior Technician Reviewer, Branch 4, Associate Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service

Scott Vance, Associate Chief Counsel (Income Tax & Accounting), Internal Revenue Service

Kathryn Zuba, Associate Chief Counsel (Procedure & Administration), Internal Revenue Service

Erin Collins, National Taxpayer Advocate, Internal Revenue Service