



441 G St. N.W.
Washington, DC 20548

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September 29, 2020

The Honorable Chuck Grassley
Chairman
The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate

The Honorable Richard Neal
Chairman
The Honorable Kevin Brady
Ranking Member
Committee on Ways and Means
House of Representatives

Subject: *Department of the Treasury, Internal Revenue Service: Limitation on Deduction for Business Interest Expense*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of the Treasury, Internal Revenue Service (IRS) entitled "Limitation on Deduction for Business Interest Expense" (RINs: 1545-BO73; 1545-BP07). We received the rule on September 14, 2020. It was published in the *Federal Register* as final regulations on September 14, 2020. 85 Fed. Reg. 56686. The stated effective date of the regulations is November 13, 2020.

According to IRS the final regulations provide guidance about the limitation on the deduction for business interest expense after amendment of the Internal Revenue Code by the provisions commonly known as the Tax Cuts and Jobs Act (TCJA), and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). TCJA, Public Law 115-97, 131 Stat. 2054 (Dec. 22, 2017); CARES Act, Public Law 116-136, 134 STAT. 281 (Mar. 27, 2020). IRS asserts that the final regulations provide guidance to taxpayers on how to calculate the limitation; what constitutes interest for purposes of the limitation; which taxpayers and trades or businesses are subject to the limitation; and how the limitation applies in consolidated group, partnership, international, and other contexts.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). As noted above the final regulations were published in the *Federal Register* on September 14, 2020; however, the Senate did not receive the final regulations until September 21, 2020. 166 Cong. Rec. S5830 (daily ed. Sept. 23, 2020). To date, the *Congressional Record* does not reflect the date of the receipt by the House of Representatives. The final regulations have a stated effective date of November 13, 2020, and do not state that IRS found good cause to waive the 60-day delay for any provisions other

than section 1.163(j)-1(b)(22)(iv) of the Internal Revenue Code, which is discussed below. Therefore, to the extent IRS did not claim good cause to waive the 60-day delay requirement for the other portions of the final regulations, those portions do not have the required 60-day delay in effective date.

The 60-day delay in effective date can be waived if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. § 808(2). IRS determined, for good cause, that a 60-day delay in the effective and the applicability date for the anti-avoidance rules in section 1.163(j)-1(b)(22)(iv) of the Internal Revenue Code is unnecessary and contrary to the public interest. According to IRS, sections 1.163(j)-1(b)(22)(iv) serve an anti-abuse function and, because sections 1.163(j)-1(b)(22)(iv) provide a clear scope of abusive transactions that could otherwise be executed prior to the effective date of the section, immediate application of section 1.163(j)-1(b)(22)(iv) is necessary as of the publication of these final regulations.

Enclosed is our assessment of IRS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink, reading "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Carrie Mudd
Chief, Legal Processing Division
Department of the Treasury

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
ENTITLED
“LIMITATION ON DEDUCTION FOR BUSINESS INTEREST EXPENSE”
(RINs: 1545–BO73; 1545–BP07)

(i) Cost-benefit analysis

The Department of the Treasury, Internal Revenue Service (IRS) conducted an economic analysis for the final regulations. According to IRS the final regulations provide certainty and clarity to taxpayers. IRS stated in the absence of this clarity, the likelihood that different taxpayers would interpret the rules regarding the deductibility of business interest expense differently would be exacerbated. IRS stated that overall economic performance is enhanced when businesses face more uniform signals about tax treatment. Certainty and clarity over tax treatment also reduce compliance costs for taxpayers. IRS stated further that for those situations where taxpayers would generally adopt similar interpretations of the statute even in the absence of guidance, the final regulations provide value by helping to ensure that those interpretations are consistent with the intent and purpose of the statute. IRS noted, for example, that the final regulations may specify a tax treatment that few or no taxpayers would adopt in the absence of specific guidance but that nonetheless advances congressional intent.

According to IRS the final regulations will have an annual economic effect greater than \$100 million. IRS stated that this determination is based on the substantial volume of business interest payments in the economy and the general responsiveness of business investment to effective tax rates, one component of which is the deductibility of interest expense. IRS stated further that, based on these two magnitudes, even modest changes in the deductibility of interest payments (and in the certainty of that deductibility) provided by the final regulations, relative to the no-action baseline, can be expected to have annual effects greater than \$100 million.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

IRS certified that the final regulations will not have a significant economic impact on a substantial number of small entities. According to IRS this certification can be made because it has determined that the final regulations may affect a substantial number of small entities, but IRS has also concluded that the economic effect on small entities as a result of the final regulations is not expected to be significant.

IRS prepared a Final Regulatory Flexibility Analysis. IRS stated that the burden on small entities is expected to be the same as other entities because certain requirements under the final regulations apply equally to all taxpayers. According to IRS, the average annual burden on all business, including small businesses, is \$23.75 per business.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

IRS determined that the final regulations do not include any federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of \$100 million, adjusted for inflation.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On December 28, 2018, IRS published the notice of proposed rulemaking “Limitation on Deduction for Business Interest Expense.” 83 Fed. Reg. 67490. IRS stated that it held a public hearing related to this proposed rule on February 27, 2019. IRS stated further that it received approximately 120 written comments in response to the notice of proposed rulemaking. According to IRS, in response to these comments the agency substantially modified the rules contained in proposed section 1.163(j)-7 of the Internal Revenue Code. IRS stated that because of these modifications, it chose not to finalize this provision of the final regulations. Instead, IRS published a notice of proposed rulemaking concurrently with the publication of the final regulations. 85 Fed. Reg. 56846. IRS stated further that it adopted the other provisions of the proposed regulations as revised in response to comments and testimony and addressed such comments and testimony in the final regulations.

Relatedly, on September 10, 2019, IRS also published the notice of proposed rulemaking “Regulations Under Section 382(h) Related to Built-In Gain and Loss.” 84 Fed. Reg. 47455. According to IRS, no formal comments were received on this proposed rule during the comment period, thus IRS found it appropriate to finalize the provisions of the proposed rule in the final regulations.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

IRS determined that the final regulations contain information collection requirements (ICR) under the Act. IRS stated that the ICRs under the final regulations contained were submitted to the Office of Management and Budget (OMB) for review. The OMB control number for the ICRs associated with the final regulations are: 1545-0123 (in the case of filers of Form 1120, Form 1065 and Form 990); 1545-0074 (in the case of individual filers); and 1545-0123 (in the case of filers under Revenue Procedure 2020-1). IRS estimated the burden for each ICR.

Statutory authorization for the rule

IRS promulgated the final regulations pursuant to sections 163, 263, 382, 383, 860, 1502, 7805 of title 26, United State Code.

Executive Order No. 12866 (Regulatory Planning and Review)

IRS stated that OMB has designated the final regulations as economically significant under the Order.

Executive Order No. 13132 (Federalism)

IRS determined that the final regulations do not have federalism implications and do not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Order.