

Comments of the  
Semiconductor Industry Association (SIA)  
on  
“Base Erosion and Anti-Abuse Tax”

83 Fed. Reg. 65956 (Dec. 21, 2018)

REG–104259–18]]

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The Semiconductor Industry Association (SIA) appreciates the opportunity to submit the following comments to Internal Revenue Service (IRS) on the proposal on “Base Erosion and Anti-Abuse Tax.” 83 Fed. Reg. 65956 (Dec. 21, 2018).

SIA is the trade association representing leading U.S. companies engaged in the research, design, and manufacture of semiconductors. Semiconductors are the fundamental enabling technology of modern electronics that has transformed virtually all aspects of our economy, ranging from information technology, telecommunications, health care, transportation, energy, and national defense. Innovations in semiconductor design and manufacturing have resulted in increasingly smaller, more powerful, less expensive, and more energy efficient semiconductors, which has a “multiplier effect” that drives advancements throughout other sectors of the economy, resulting in increased growth, jobs, and productivity. More information about SIA and the semiconductor industry is available at [www.semiconductors.org](http://www.semiconductors.org).

SIA member companies conduct their operations globally. Over 80 percent of revenue of U.S. semiconductor companies is derived from sources outside the U.S. and semiconductors are America’s fourth largest export. Accordingly, the proposed regulations governing the Base Erosion and Anti-Abuse Tax (BEAT) have the potential to have a significant impact on the global competitiveness of the U.S. semiconductor industry

- 1. Definition of Base Erosion Payment & Nonrecognition Transactions (IP and Post-Acquisition Restructuring):** Under section 59A, an “amount paid or acquired” to a foreign related party for the “purchase” of property constitutes a “base erosion payment.” Any amortization or depreciation deduction with respect to such property gives rise to a base erosion tax benefit, which can cause the taxpayer to be subject to the BEAT. The proposed regulations interpret these rules to apply to liquidations, reorganizations, and other nonrecognition transactions. Inbound nonrecognition transactions are often used in post-acquisition restructurings to align a target’s legal structure with that of the acquirer, and in other internal restructurings to better align a multinational’s legal structure with its commercial operations. Notably, they are often used to bring IP into the U.S. By treating such transactions as constituting BEAT

payments, the regulations provide a significant disincentive to move IP and other income-producing assets back to the U.S., which will reduce the U.S. tax base and frustrate the goals of the legislation.

- **SIA Recommendation:** At a minimum, the final regulations should permit companies to engage in post-acquisition restructuring to transfer IP to the U.S. following third-party acquisitions, without giving rise to a base erosion payment. To the extent the basis of IP transferred into the U.S. in a nonrecognition transaction is attributable to a third-party acquisition, amortization of such basis should not constitute a base erosion tax benefit. If this recommendation is not adopted, as an alternative, this provision should only apply if the asset has a built-in loss.

## 2. Definition of Base Erosion Payment & Nonrecognition Transactions (General):

More generally, inbound nonrecognition transactions are U.S. tax base-enhancing in that they bring income-producing assets into the U.S. tax system with no outflow of value. Unlike a purchase, these nonrecognition transactions provide for a carryover basis and do not create a stepped-up U.S. tax basis to depreciate or amortize. The result in the proposed regulations frustrates a significant policy objective of the legislation: to encourage investment in income-producing property in the U.S. economy.

**SIA Recommendation:** Neither the statute nor the legislative history evidence any intent that this provision should apply to nonrecognition transactions. Consistent with the terms of the statute and the policy goals of the legislation, the final regulations should provide that nonrecognition transactions do not give rise to base erosion payments absent a tax avoidance purpose. If this recommendation is not adopted, as an alternative, this provision should only apply if the asset has a built-in loss.

## 3. Definition of Base Erosion Payment and Section 301 Transactions:

The preamble to the proposed regulations states that there is no base erosion payment in an “in-kind distribution subject to section 301.”<sup>1</sup> This language does not appear in the proposed regulations.

- **SIA Recommendation:** The final regulations should explicitly provide that no base erosion payment arises in a distribution to which section 301 applies, including section 302(d) redemptions.

## 4. R&E Payments and Services Cost Exception:

SIA supports the approach of the proposed regulations to the services cost method exception, where base erosion payments do include certain amounts paid or accrued for services. (Prop. Reg. §1.59A-3(b)(3)(i)). The proposed regulations interpret this services exception to apply to the cost component of any amount paid for services that satisfy the

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<sup>1</sup> 83 Fed. Reg. 65,960 (Dec. 21, 2018).

requirements of the services cost method contained in Treas. Reg. § 1.482-9(b) except that: (1) the business judgment rule in Treas. Reg. § 1.482-9(b)(5) does not apply, and (2) a different standard is provided to ensure that the taxpayer maintains adequate books and records. As a result, payments for services on the “excluded activities” list of Treas. Reg. § 1.482-9(b)(4), such as R&E, do not qualify for the BEAT services exception. While legislation may be required to fully align the operation of this rule with the objectives of the BEAT, a regulatory exception should be considered for instances where IP is held in the U.S.

- **SIA Recommendation:** The final regulations should provide that the cost element of payments for R&E by a U.S. person that owns the IP being developed or enhanced do not constitute base erosion payments. The excluded activities list of Treas. Reg. § 1.482-9(b)(4) serves the same purpose in the transfer pricing regulations as the business judgment rule of Treas. Reg. § 1.482-9(b)(5): namely, to identify services that should be subject to more robust transfer pricing analysis. Accordingly, both types of activities should be provided the same treatment under section 59A. Because the services exception is limited to the cost element of any service fee, no U.S. tax base erosion can result from applying the exception to R&E payments. Moreover, if the services exception is limited to R&E fees paid by a U.S. taxpayer that owns the relevant IP, the exception will apply only to U.S. base enhancing arrangements. This supports the policy objectives of the BEAT and the legislation overall.

**5. Option to Decline to Take Deductions:** The proposed regulations do not address whether a taxpayer can decline to take certain deductions for purposes of calculating the base erosion percentage.

- **Recommendation:** The final regulations should clarify that a taxpayer can decline to take deductions that would be considered in the computation of aggregate deductions for BEAT purposes, if those deductions would generate a base erosion percentage of over 3%, causing the taxpayer to incur BEAT liability.

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SIA appreciates the opportunity to submit these comments.