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Initial impressions on Notice 2018-28, computing business interest expense limitation under section 163(j)

The IRS today released an advance version of Notice 2018-28 that states that the U.S. Treasury Department and IRS will issue proposed regulations as guidance to assist taxpayers in complying with section 163(j) as amended by the new tax law (Pub. L. No. 115-97, enacted December 22, 2017).

[Notice 2018-28](#) [PDF 183 KB] describes the rules that the future proposed regulations will include, and describes the rules as interim guidance until more comprehensive guidance is developed. Today's notice also states that before the proposed regulations are issued, taxpayers may rely on Notice 2018-28.

Future regulatory guidance

Today's notice states that the future proposed regulations will include rules providing that the calculation of the business interest expense limitation will be made at the level of a consolidated group of corporations. Other rules will clarify certain aspects of new section 163(j).

The IRS today also explained that Notice 2018-28:

- Permits interest disallowed under "old section 163(j)" to be carried forward from the taxpayer's last tax year beginning before January 1, 2018, to the taxpayer's first tax year beginning after December 31, 2017. Such interest will be subject to potential disallowance under "new section 163(j)" in the same manner as any other business interest otherwise paid or accrued in a tax year beginning after December 31, 2017.
- States that regulations will address the interaction of section 163(j) with the Base Erosion and Anti-Abuse Tax (BEAT) in section 59A. In particular, the regulations will provide that business interest carried forward from a tax year beginning before January 1, 2018, will be subject to section 59A in the same manner as interest paid

or accrued in a tax year beginning after December 31, 2017, and will clarify how the BEAT will apply to that interest. Notice 2018-28 thus effectively provides that such interest will not be grandfathered for BEAT purposes despite being paid prior to the effective date of section 59A.

- Clarifies that partners in partnerships and S corporation shareholders cannot interpret the newly amended section 163(j) to inappropriately “double count” the business interest income of a partnership or S corporation.

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