October 18, 2024

Internal Revenue Service
CC:PA:01:PR (REG-111629-23)
Office of Associate Chief Counsel (International)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

**Re: National Foreign Trade Council Comments on REG-111629-23**

The National Foreign Trade Council (the "NFTC") is writing to provide comments on REG-111629-23, "Guidance Regarding Elections Relating to Foreign Currency Gains and Losses" ("Proposed Regulations") released by the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") on August 20, 2024.

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members support establishing and maintaining international tax norms that provide certainty to enterprises conducting cross-border operations.

**General Comments**

NFTC appreciates the responsiveness to taxpayer comments in providing clarity on making § 1.954-2(g) elections. However, aligning section 988 elections with section 475 is not appropriate in all circumstances. In particular, the Proposed Regulations will add unnecessary complications for many taxpayers by requiring alignment with section 475 for the timing of making the section 988 election. We request that automatic consent be permitted for revocations of these elections and also provide additional suggestions to increase the scope and align Proposed Regulations with other provisions.

**Specific Comments**

*Mark-to-market Prop. Reg. section 1.988-7 Election ("§1.988-7 Election")*

NFTC requests to revert to the approach under 2017 Proposed Regulations for timing of making the §1.988-7 Election. The Preamble to the 2024 Proposed Regulations states that Treasury seeks to align the timing of the §1.988-7 Election to that of the section 475 mark-to-market ("MTM") elections for dealers in commodities and traders in securities. However, there are several key elements in which the section 475 elections differ from a §1.988-7 Election.

First, the §1.988-7 Election applies only to foreign currency ("FX") gains and losses from section 988 transactions, whereas the section 475 elections apply MTM to FX gains or losses on all transactions. Second, the section 475(e) and (f) elections are intended to apply to dealers in commodities or taxpayers that qualify as traders in securities. These taxpayers make an annual MTM election that impacts currency transactions to achieve conformity with financial statements or regulatory reporting. The §1.988-7 Election is only applicable to section 988 transactions and, as indicated in the preamble to the 2017 Proposed Regulations, is aimed at allowing certain domestic and controlled foreign corporations ("CFC") to ensure matching of timing of FX gain or losses from interest bearing liabilities with economically offsetting FX loss or gain. Thus, the election was intended to be helpful and similarly likely to achieve conformity with financial reporting, rather than restrictive, with respect to these types of taxpayers.

Accordingly, taxpayers whose entities are not eligible for the section 475 election, but have positions that would give rise to unrealized section 988 loss or gain after a filing period is closed, without an ability to make the section 1.988-7 Election after the filing date, would not be able to benefit from being able to conform to financial reporting for that period, and would be left to manage issues such as straddles under section 1092.

For example, if a taxpayer's treasury department requests a nonfunctional currency debt issuance out of an entity on April 16, 2025, that will be held over year-end, the taxpayer will not be able to make an election to MTM until the 2025 return filing, which would make the election available for the 2026 year at earliest. This would require the taxpayer to track and manage a potential section 1092 straddle against the same nonfunctional currency at year end 2025, to create a deferral, or otherwise may force the taxpayer to actually exit the position to avoid mismatches with books and records.

While we understand Treasury intends to be helpful from an administrative standpoint and to reduce taxpayer burden, as a result of the election not covering 7.5 months in a given year, as noted above, taxpayers would be required to either track straddles or potentially exit positions. This is an undue burden on a taxpayer that may result in book-to-tax differences and thus be inconsistent with treatment for financial reporting.

The concern with taxpayers having too much flexibility and opportunity to selectively recognize FX gains or losses can be addressed with limitations and restrictions on revoking the elections, rather than restricting taxpayers to filing windows that would cover only the first 4.5 months of potential transaction activity in a relevant year, and that may cause undue burden.

*Revoking §1.988-7 Elections*

With respect to revoking the §1.988-7 Election, we request not to require consent of Commissioner but rather we request that, should the IRS take the view that making or revoking the election is a change in method of accounting, the change may be obtained using the automatic consent procedures consistent with section 475 elections. To address the concerns with taxpayers having the flexibility to selectively recognize losses, we propose to keep the current limitation that does not allow revocation of the election until the 6th year after the year that the election is made.

We request confirmation that taxpayers can follow the 2017 Proposed Regulations for revoking any §1.988-7 Election or §1.954-2(g) elections made for a tax-year ending prior to August 19, 2024. In other words, we request that the process for revoking elections already filed by taxpayers should remain covered under the procedure contemplated in the 2017 Proposed Regulations.

*Scope*

NFTC requests expanding the scope of the §1.988-7 Election to apply also at the section 987 Qualified Business Unit ("QBU") level. This will address the challenge where offsetting nonfunctional currency positions might be in a section 987 QBU but the resulting section 988 gain/loss is at the section 987 QBU's parent. By allowing marking to market of section 988 positions in a section 987 QBU through this election, both legs in an offsetting position held at the section 987 QBU would be recognized for section 988 purposes and avoid complexity such as potential application of section 1092 straddle rules.

*Reportable Transactions*

We request excluding from the definition of "reportable transaction" under Treas. Reg. §1.6011-4 any section 988 FX losses of a corporation that are recognized on a MTM basis pursuant to a §1.988-7 Election, in order to be consistent with treatment of other losses from mark to market positions. In particular, per Rev. Proc. 2013-11 provides:

> The following losses under § 165 are not taken into account in determining whether a transaction is a loss transaction under § 1.6011-4(b)(5): […] (4) A loss arising from any mark-to-market treatment of an item under §§ 475(f), 1296(a), 1.446-4(e), 1.988-5(a)(6), or 1.1275- 6(d)(2), and any loss from a sale or disposition of an item to which one of the foregoing provisions applied, provided that the taxpayer computes its loss by using a qualifying basis (as defined in section 4.02(2) of this revenue procedure) or a basis resulting from previously marking the item to market, or computes its loss by making appropriate adjustments for previously determined mark-to-market gain or loss [...]

We urge the IRS to align the standards and allow marked positions under section §1.988-7 to be similarly eligible for the exception to reportable transactions.

**Conclusion**

Thank you for consideration of our comments. We are happy to answer any questions or clarify any of the comments raised; please contact Anne Gordon, Vice President of International Tax Policy (agordon@nftc.org).