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International High Technology U.S. Tax Current Developments

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OBBBA

The Basics – GILTI and FDII

- Effective in years beginning after 12/31/2025, the Section 250 deduction is changed.
- **GILTI**: 50% → 40% (becomes a 12.6% tax rate)
- **FDII**: 37.5% → 33.34% (becomes a 14% tax rate)
- Section 960(d) is amended so that 90% of tested foreign income taxes are allowable as a credit.
- Net effect of these changes: the “tax indifferent rate” between GILTI and FDII increases from 13.125% to 14%.
- QBAI also is eliminated, resulting in a re-branding of GILTI as Net CFC Tested Income.

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The Basics - BEAT

- Current BEAT rules (10% rate, use of R&E credits) are made permanent.
- Other changes in the Senate Finance Committee Draft (BEAT high-taxed exception, special rules for capitalized interest expense) were not included in the OBBBA.

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Expense Allocation & Apportionment

GILTI	
TCJA	OBBBA
- Interest expense allocated to GILTI using the asset method with part of CFC stock treated as a tax-exempt asset - R&E not allocated to GILTI, but sales method may reduce or eliminate FSI in other categories - Stewardship allocated based on asset method	- No allocation of interest expense or R&E to GILTI - Only Sec. 250 deduction, tax expense, and other “directly allocable” expenses are allocated to GILTI.

- Expenses that would have been allocated to GILTI are allocated solely to U.S. source income.

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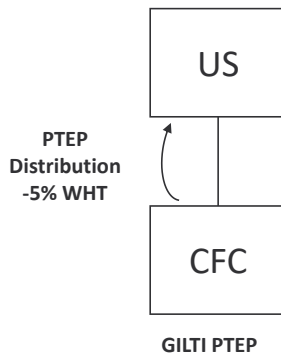
Expense Allocation & Apportionment

FDII	
TCJA	OBBBA
FDII is reduced by expenses “properly allocable” to FDDEI.	- FDII is reduced by expenses “properly allocable” to FDDEI, - However, R&E and interest expense are not allocated to FDDEI.

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Withholding Taxes on PTEP



- Section 960(d) is amended so that withholding taxes on distributions of GILTI PTEP are also subject to the 90% haircut.
- This rule applies to PTEP arising from a GILTI inclusion after June 28, 2025.

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Technical Changes to FTC Provisions

- Section 78 amended to exclude section 960(b) from list of taxes that are subject to gross-up.
- Various TCJA Cross-references were fixed:
 - Section 904(d)(2)(H) (taxes related to base differences are assigned to general basket rather than branch basket),
 - Section 904(d)(4)(C) (income from 10/50 dividends defaults to passive if there is a lack of substantiation), and
 - Section 904(h) (amending Section 951A(f) to clarify that GILTI is treated the same as subpart F income for purposes of US-source income derived from CFCs and other US – controlled foreign subsidiaries).

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FDII Exclusion for Property Sales

- Effective for sales or dispositions occurring after June 16, 2025, FDII will no longer include:

“(VII) except as otherwise provided by the Secretary, any income and gain from the sale or other disposition (including pursuant to the deemed sale or other deemed disposition or a transaction subject to section 367(d)) of—

(aa) intangible property (as defined in section 367(d)(4)), and

(bb) any other property of a type that is subject to depreciation, amortization, or depletion by the seller, over”

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Property Sale Exclusion – Potential Applications

- Business unit sales / divestitures
- Migrating IP out of the U.S.
- Unchecking the box on a foreign DRE
- Third-party licensing transaction and the “all substantial rights” test

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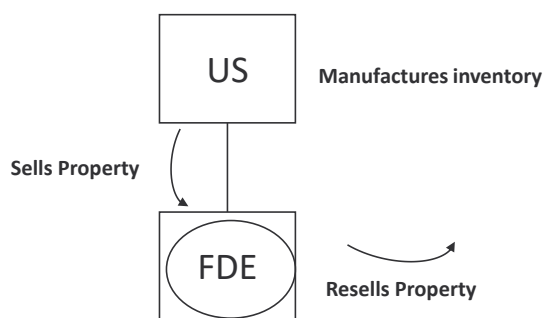
Section 904(b)(6)

- For purposes of Section 904, if a United States person maintains an office or other fixed place of business in a foreign country, the portion of income which
 - a) is from the sale or exchange outside the United States of inventory property (within the meaning of section 865(i)(1)) which is produced in the United States, is for use outside the United States, and to which the third sentence of section 863(b) applies, and
 - b) is attributable (determined under rules similar to the rules of section 864(c)(5)) to such office or other fixed place of business, shall be treated as from sources without the United States,
 except that the amount so treated shall not exceed 50 percent of the income from the sale or exchange of such inventory property.

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Section 904(b)(6) (modified office rule)



- In this scenario, Section 904(b)(6) restores (in part) the old 50/50 rule for income “attributable to” the foreign branch.

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CFC Look-Thru Rule

- After retaining its “temporary” status for 20 years, the Section 954(c)(6) look-through rule is made permanent.
- The 1-month deferral election under Section 898 is repealed, effective for CFC tax years beginning after November 30, 2025.
 - Treasury authorized to issue guidance for allocating foreign taxes paid or accrued in the CFC’s resulting short tax year and the immediately following tax year.

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Downward Attribution Fixed

- Section 958(b)(4) is restored, once again preventing downward attribution from foreign shareholders, partners, etc.
- A new Section 951B allows downward attribution in situations where TCJA’s Section 958(b)(4) repeal was originally meant to apply. Section 951B defines two new terms:
 - Foreign controlled U.S. shareholder (FC-USSH): a U.S. person who would be a U.S. shareholder if Sec. 951(b) required 50% ownership and Sec. 958(b)(4) did not apply.
 - Foreign controlled foreign corporation (FC-FC): a foreign corporation that is not a CFC but that would be a CFC if only FC-USSH’s were taken into account as U.S. shareholders and Sec. 958(b)(4) did not apply.

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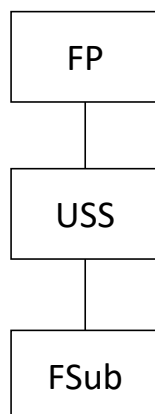
Downward Attribution, cont'd

- Section 951B has two operative rules in the case of FC-USSH's of FC-FC's:
 - Subpart F income and Section 956 apply to the FC-USSH and its FC-FC's separately from their application without regard to Section 951B.
 - GILTI applies to the FC-USSH by treating references to "United States shareholder" in Section 951A as including the shareholder and by treating references to "CFC" as including the FC-FC.

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Downward Attribution, cont'd

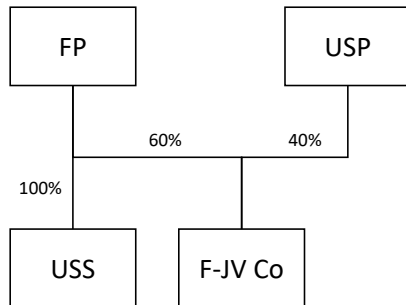


- In this example, new Section 951B should not apply.
- FSub is an actual CFC. Thus, it is not a FC-FC.
- USS is subject to Subpart F and GILTI on FSub's income in the traditional way.

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Downward Attribution, cont'd

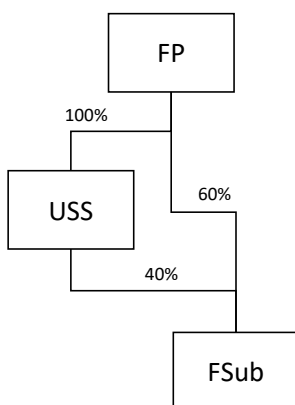


- In this example, USS is a FC-USSH of F-JV Co, but USP is not.
- F-JV Co is a FC-FC. (It's not a CFC due to the restoration of Section 958(b)(4).)
- USP is not subject to Subpart F or GILTI with respect to F-JV Co, because USP is not a FC-USSH of F-JV Co.
- Also, Section 951B does not impose tax on USS, because USS does not own any F-JV Co stock within the meaning of Section 958(a).

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Downward Attribution, cont'd



- In this example, USS is a FC-USSH of FSub, and FSub is a FC-FC.
- Section 951B applies to USS. USS must take into account Subpart F income and GILTI with respect to FSub under the rules described above.

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Subpart F “Pro Rata Share” Rules

- The Subpart F (and GILTI) “pro rata share” rules are modified so that any U.S. shareholder could have an income inclusion if it owned (within the meaning of Sec. 958(a)) CFC stock on any day of the CFC’s tax year.
 - Under prior law, U.S. shareholders could only have an income inclusion if they owned CFC stock on the last day of the CFC’s tax year on which it is a CFC.
- Transition rule for tax years that include June 28, 2025 – the old pro rata share rule continues to apply, but the transferee’s share of subpart F income is not reduced for dividends (incl. section 1248 deemed dividends) during the year unless they were subject to U.S. tax.

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Section 163(j)

- Effective for 2025 and future years, OBBBA restores the pre-2022 rule that adds back depreciation, amortization and depletion in determining adjusted taxable income.
- The OBBBA makes two significant changes to Section 163(j) for taxable years beginning after December 31, 2025:
 - Amounts included in gross income under Section 951, Section 951A and Section 78 are no longer included in “adjusted taxable income” (ATI).
 - Section 163(j) applies to interest regardless whether it is subject to capitalization under an interest capitalization provision of the Code (other than Section 263(g) or Section 263A(f)).
 - Thus, all interest expense must be run through the Section 163(j) limitation before it is deducted or capitalized.
 - The amount allowed under Section 163(j) is applied to the capitalized interest first.

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Section 174/Section 174A

- Restored expensing of domestic R&D and software development costs in taxable years beginning after December 31, 2024.
 - Foreign R&D remains capitalized.
 - Restores Section 174(b) elective capitalization. Section 59(e) also remains available.
- Section 174A(f) transition rule that allows previously capitalized domestic R&D to be immediately expensed 100% in 2025 or 50% in 2025/50% in 2026.
- Other changes to the existing framework:
 - Section 280C(c)(1) applies to domestic R&D whether deducted or charged to the capital account.
 - Section 1016(a)(14) provides for basis adjustments to the property with respect to deductions under section 174 and section 174A
 - Section 174(d) (rules for dispositions) disallows reductions of amount realized on sale, as well as losses, on sale or disposition of the IP.

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Case Law

Facebook—Section 482 Income Method

- At issue was transfer pricing of platform contribution transaction (PCT) payments owed by Facebook Ireland to Facebook US in respect of a cost sharing agreement.
- The income method was determined to be the best method. In general, the income method values the nonroutine contributions to the CSA (ones for which no market return can be identified) by projecting all expected value in a territory and then subtracting contributions for which market returns may be identified (routine contributions).
 - The Tax Court rejected the use of the residual profit-split method (RPSM) because it concluded that Facebook Ireland did not make nonroutine contributions.
- The Tax Court rejected the argument that the income method itself was invalid, stating that the court must apply a method listed in the regulations unless it concludes that it cannot apply because it is invalid (which it did not do).

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Facebook—Section 482 Income Method

- The Tax Court rejected the argument that where there are no uncontrolled comparables, the arm's length standard requires a method that is expected to most closely approximate the way in which unrelated parties price transactions.
 - The court stated that a focus on internal allocations that follow economic activity is an appropriate method to reach an arm's length result.
 - The court stated that the discount rate is intended to replicate a return to an investor on the funding that it provides, approximating the cost of capital adjusted for systemic risk.
 - The court stated that the arm's length standard does not require a preferred return, but rather a return comparable to returns on other similar investments.
- The Tax Court summarized the operation of the income method by stating that it divides the Irish company's contribution to the CSA into two separate buckets: (1) The Irish company funds the development of the cost shared intangibles with the PCT Payment and by making CSA contributions, for which it is compensated like a passive co-owner via a discount rate return for its funding activities, and (2) the Irish company exploits the cost shared intangibles via its operating contributions and operating cost contributions for which it is compensated like an entrepreneur.

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Facebook—Section 482 Income Method

- In applying the income method, the Tax Court rejected a number of IRS arguments, stating the IRS implemented the income method unreasonably, by failing to adhere to the methodology set forth in the regulations by selecting the wrong inputs.
 - The court held that the IRS used revenue projections that included “other revenue” and was unreliable. The other revenue was an aspirational goal with no underlying projections to support it.
 - The second key disputed income-method input was the discount rate for Facebook Ireland’s participation in the CSA. The parties disputed how to estimate beta in a way that reliably reflects Facebook Ireland’s systematic risk of participating in the CSA. This fight is familiar. Facebook was not a publicly traded company as of the transaction date; therefore, its beta was not able to be observed directly by comparing its stock’s historical price movement to the market. The court held that the IRS discount rate does not “reliably reflect the market-correlated risks” of participating in the CSA because it captures the systematic risk of a private company in an unsupported manner.

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Medtronic—CUT, CPM or Unspecified Method?

- *Medtronic v. Commissioner* (No. 23-3063) has turned into a ping pong match between the Tax Court and the Eighth Circuit. In the latest move, the Eighth Circuit sent the case back to the Tax Court for a second time.
- The case involves the transfer of intangibles from the U.S. to a Puerto Rican manufacturing subsidiary.
- In *Medtronic I*, the Tax Court endorsed the taxpayer’s use of the CUT method in respect of similar IP and similar licensing circumstances (albeit with significant adjustments) and rejected the IRS’s use of the CPM. The Tax Court found, among other things, that the CPM downplayed the PR entity’s role in ensuring quality, that it used an incorrect return on assets approach, that it improperly aggregated the transactions.
- The Eighth Circuit remanded *Medtronic I* to the Tax Court and stated that the Tax Court did not address in sufficient detail whether the CUT was comparable and created in the ordinary course of business (since it was part of a litigation settlement). Also, it stated that the Tax Court did not analyze the degree of comparability.
- The Tax Court in *Medtronic II* used a new unspecified transfer pricing method that increased the royalty rate based on assessment that the royalty rate in *Medtronic I* did not account for the profit potential in the transferred IP. The Tax Court continued the use the uncontrolled transaction that formed the basis of the CUT in *Medtronic I* as a reference.

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Medtronic—CUT, CPM or Unspecified Method?

- On appeal the Eighth Circuit stated that the Tax Court’s decision in *Medtronic II* was not based on reliable data and therefore once again rejected use of the uncontrolled transaction.
- The Eighth Circuit also concluded that the Tax Court applied an incorrect standard in rejecting the CPM. The general comparability standard of §1.482-1(d)(2) does not require that proposed comparable companies produce the same products as the tested party, but requires only that the comparable companies are “sufficiently similar” to the tested party to provide “a reliable measure of an arm’s length result.” The Eighth Circuit directed the Tax Court to evaluate use of the CPM on this standard.
- The IRS proposed the “return-on-assets” profit level indicator to determine the profitability of the comparable parties. The Tax Court concluded that the comparable companies “have fundamentally different asset bases and involve different functions and risks.” The Eighth Circuit took issue with the Tax Court’s rejection of the Commissioner’s proposed comparable companies on the basis of their fundamentally different asset bases. On remand, the Tax Court should make findings as to what were the purported differences in asset bases, what effect any differences had on the amount of profit allocated to Medtronic Puerto Rico, and, if necessary, whether adjustments can be made to account reliably for any material differences that negatively impacted Medtronic Puerto Rico’s profit allocation.

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Perrigo—Economic Substance, Business Purpose, and CWI

- The district court rejected the IRS’s broad use of the economic substance doctrine and other judicial sham doctrines to disregard intercompany transactions and thus reallocate income from Perrigo’s Israeli affiliate to Perrigo’s domestic entities. The court also rejected the IRS’s alternative Section 482 adjustment.
- The taxpayer contracted with an unrelated Israeli drug company to bring a generic pharmaceutical product to the U.S. market, and as part of an international expansion assigned the rights and the risks of that contract to its Israeli affiliate.
- The IRS argued that the transactions did not have economic substance or business purpose; that the Israeli entity itself should be disregarded as a sham entity; and that the assignment of income doctrine requires the court to disregard Perrigo’s intercompany transactions.
- The Court held that the common law theories all coalesce around the same basic point—making sure that a taxpayer can’t create an alternative reality simply for tax purposes. There must be some real economic substance and purpose to the transactions and structure, and there must be some indicia that the taxpayer honored that structure. If these things are honored, it is permissible for the taxpayer to structure things with both the motive and effect of minimizing taxes.

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Perrigo—Economic Substance, Business Purpose, and CWI

- The court stated that what the taxpayer can't do is generate an income stream and then construct an artificial and alternate reality to reach back and assign the income to some entity that doesn't pay taxes.
- The court stated that didn't happen and rejected the IRS's reliance on the common law judicial doctrines. The court found that Perrigo had a genuine business purpose and motivation—beyond tax planning—in diversifying and expanding its international footprint.
- Under the IRS's alternative Section 482 adjustment, the court held that Perrigo met its threshold burden of showing the reallocation of income by the IRS was arbitrary, capricious or unreasonable. The Court stated that to base arm's length pricing on actuals in all instances, rather than projections, even for intangibles, would be to eviscerate the arm's length standard.
- The Court stated that projections should guide the application of the arm's length standard unless other real-time information provides a basis for rejecting them. This is something that IRS rulemaking itself recognizes. The court cited the cost-sharing regulations for the perspective that the ex-ante perspective is "fundamental to achieving arm's length results."
- Cf. AM 2005-001 where the IRS pronounces that the CWI standard implemented through the mechanics of the periodic adjustments in and of itself achieves a result consistent with the arm's-length standard.

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3M—Section 482 and Loper Bright

- At issue is the validity of Treas. Reg. 1.482-1(h)(2), which governs when foreign legal restrictions are considered for transfer pricing purposes in respect of an assessed royalty under section 482. A plurality of Tax Court concluded that Treas. Reg. 1.482-1(h)(2) was valid, and that the Brazilian legal restriction at issue would not prevent the IRS's section 482 adjustment. (Two concurring judges thought the statute *required* the IRS to make the adjustment, regardless of what the regulation said.)
- Section 482 permits the IRS to make adjustments to prevent tax avoidance or to clearly reflect income.
- The Eighth Circuit reversed the Tax Court, holding that the blocked income regulation was invalid under *Loper Bright*. It cited the Supreme Court's decision in *First Security Bank* and held that attributing income under section 482 that could not be received under foreign law is "inconsistent with . . . reality" and would not clearly reflect income as the statute requires.
- Even acknowledging that the statute delegates authority to Treasury and the IRS, the court stated that it is the court's job to fix the boundaries of that delegated authority based on the statute's text.
- The court rejected the IRS's argument that the commensurate with income sentence of section 482 supported its argument, stating that the "income" referred to in the second sentence of section 482 is the same income referred to in the first sentence of section 482, and that the power of reallocation always depends on the taxpayer's complete dominion over funds.

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Liberty Global—Economic Substance

- The government argued that an entity conversion should be disregarded under the economic substance doctrine. The entity conversion at issue was of a Belgian limited liability company that was treated as a disregarded entity (DRE) into an entity that was treated as a CFC. The conversion was treated as a section 351 transaction with boot that created earnings and profits. The E&P was not taxed as subpart F or GILTI.
- In an earlier case, the court invalidated the temporary section 245A regulations that would have prevented the application of the DRD. The government did not like the outcome of that case and filed a different lawsuit claiming that the ESD and step transaction doctrine applied.
- The court determined that the “transaction” to be analyzed under the ESD is not just the LLC to C corporation conversion, but the conversion combined with other relevant steps. The court rationalized that it had authority to aggregate or disaggregate interrelated transactions. It also determined that the transaction was not a basic business transaction that is exempt from the application of the ESD.
- The court also determined that the non-tax consequences of the transaction were insufficient to meaningfully change the taxpayer’s position.

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Liberty Global—Section 904(f)

- The Tenth Circuit affirmed a Tax Court decision that Section 904(f) did not recharacterize gain on sale of CFC stock in excess of the OFL recapture amount as foreign source.
- Section 904(f)(3)(A)(i) provides, that “notwithstanding any other provision of this chapter” gain on the disposition of foreign business property is foreign source in an amount equal to the lesser of (i) the excess of the fair market value of the property over its adjusted basis, and (ii) the remaining amount of the taxpayer’s OFL account. This gain then recaptures the taxpayer’s OFL account under section 904(f)(1), without regard to the 50% limitation.
- The Tenth Circuit looked to the statute’s plain text which limited the foreign source income to be recaptured to the **lesser of** the gain realized and the balance of the taxpayer’s OFL account. The Tenth Circuit stated that the statute was silent about the sourcing of gain recognized in excess of the OFL account. The Tenth Circuit accordingly looked to the normal sourcing provisions, and the background rule of section 865(a), to source this gain as US source.

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Liberty Global—Section 904(f)

- The court disagreed with Liberty Global’s argument that Section 904(f)(3)’s “notwithstanding” clause overrode the sourcing rules of section 865. The use of “notwithstanding” in statutory drafting signals the drafter’s intention that the provisions of the “notwithstanding” clause override conflicting provisions. So, the notwithstanding clause displaced the general source rules, but only if the two provisions were in conflict. The court found no conflict between section 904(f)(3), which was silent as to the sourcing of excess gain, and the background rules of section 865(a) for sourcing that gain.
- Liberty also argued that the regulations provided for a broader resourcing; however, the Tenth Circuit found the statutory text to be plain. Since an agency’s regulations can only implement the statute’s commands, the Tenth Circuit interpreted the regulations to harmonize with the statute.

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Fed Ex—Regulatory Interpretation

- The district court (WD-TN) had previously held that reg. section 1.965-5(c)(1)(ii) was invalid and granted FedEx a tax refund for improperly denied foreign tax credits.
- FedEx argued, and the court agreed, that section 960(a)(3) provides an FTC for foreign taxes paid on offset earnings because the offset earnings are never included in income under section 951 and FedEx never received a credit under section 960(a)(1). It held the regulation to be invalid under the *Chevron* doctrine that the Supreme Court discarded in *Loper Bright*.
- The government argued that this decision should be reconsidered in light of *Loper Bright*.
- The district court stated that the Supreme Court’s decision in *Loper Bright* did not intend to call into question prior decisions upholding or invalidating regulations.
- In any event, the court stated that it would reach the same conclusion invalidating the regulation under *Loper Bright* because its original decision found the regulation invalid at step one of *Chevron*, therefore did not defer to the IRS interpretation, rendering *Loper Bright* without effect on its analysis.

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Brueya—Treaty Application to NIIT

- The Court of Federal Claims held that the US-Canada Treaty (“Treaty”) allows a foreign tax credit in respect of the 3.8% net investment income tax (NIIT).
- The Code does not allow a foreign tax credit against the NIIT.
- The Treaty allows “as a credit against the United States tax on income ... the appropriate amount of income tax paid or accrued to Canada....” The NIIT, on its face, constitutes a “United States tax on income.”
- The government argued, however, that by locating the NIIT in different Chapters of the Code, Congress modified the Treaty under the later-in-time principle and that the Treaty's foreign tax credit was “subject to” this limitation. But the court stated that prior interpretations of the later-in-time rule, both in the tax and non-tax context, held that treaty overrides must be explicit and that “legislative silence is not sufficient to abrogate a treaty.” It stated that locating the NIIT in a different chapter of the code is not explicit enough to override the Treaty.

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Brueya—Treaty Application to NIIT

- The Treaty also states that a foreign tax credit will be granted “[i]n accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time)”
- The government argued that the “subject to the limitations” language was an independent reason why the Treaty did not grant a foreign tax credit. The government made this argument despite it conceding that the NIIT was tax on income and thus at least nominally covered by the Treaty.
- The court disagreed, treating the “subject to the limitations” clause as providing that U.S. law would govern the computations of the credit (e.g., the section 904 limitation), but not itself override the Treaty’s granting of credits.
- The Federal Circuit has held similarly (*see Xerox Corp v. United States*), but the Tax Court seems to take a more restrictive view of the applicability of treaties (*see Toulouse v. Commissioner*)

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Exxon—De Facto Partnership and Economic Substance

- Taxpayer conducted a natural gas project with the government of Qatar per a contract where the parties contributed assets and agreed to share profits. An amendment covered additional production capacity where Qatar provided additional capital in return for “production payments” that were assignable separately by Qatar and which the taxpayer deducted as interest on debt.
- Court holds that the initial deal between taxpayer and Qatar was a partnership for tax purposes, stressing the parties’ joint sharing of profits and joint control over all significant operational decisions.
- As to the taxpayer’s deductibility of the production payments, the taxpayer looked to section 636, which effectively treats a production payment as interest.
- The IRS disallowed the interest deduction under the economic substance doctrine.
- The Court disagreed with the IRS, citing--
 - Debt/equity is an area where the taxpayer’s motives are irrelevant
 - The statute (section 636) clearly calls for debt treatment
 - The production loan figured in a larger business transaction that indisputably had economic substance
 - The production loan itself was a key business term that the Court found had economic substance

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Regulation and De-Regulation

Major Regulations Created and Removed in Last 12 Months

New Regulations	Modifications / Limitations via De-Regulations
CAMT Proposed Regulations (Nov. 2024)	- ES Penalty Waivers (Notice 2025-27) - Special partnership rules (Notice 2025-28) - Modified reliance rules / New Rules (Notice 2025-49)
Section 987 Final & Proposed Regulations	In effect for 2025. PGP notes potential for modification / suspension
DCL / DPL	- Notice 2025-44 withdraws DPL regulations and related DCL changes - Requests for comments on other topics
Cloud Final Regulations Cloud Proposed Sourcing Regulations	Proposed regulations heavily criticized and remain proposed
PTEP Proposed Regulations	Heavily criticized. Proposed only
Public Company F Reorgs / Domestications	N/A – Notice attempts to “de-regulate”

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De-Regulation and the PGP

- A number of industry groups and other commentators submitted comments on the IRS’s annual Priority Guidance Plan (“PGP”). Notice 2025-19 notes that the criteria laid out in the Executive Order on De-Regulation (14219) should be considered in requests for guidance as part of the PGP. Perhaps for the first time, this year saw more requests to remove tax regulations than add regulations.
- Many commentators requested that the IRS and Treasury withdraw the 2022 Foreign Tax Credit (“FTC”) regulations, which added the so-called “attribution” requirement to Section 901. Pursuant to Notices 2023-55 and 2023-80, these regulations are currently suspended until further guidance is issued. However, commentators reiterate their prior comments that these regulations exceed regulatory authority and should be withdrawn.

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De-Regulation and the PGP

- Commentators requested withdrawal or modification of certain parts of the section 482 regulations. For example, SVTDG recommended the withdrawal of Reg. § 1.482-7(d), requiring sharing of stock-based compensation, due to the Tax Court’s holding this regulation invalid in *Altera*.
- In the cross-border M&A area, many commentators Several commentators requested removal of the funding regulations under Section 385.
- Similarly, commentators recommend removal of “Killer B” regulations, which add undue complexity to inbound liquidations in an environment where foreign earnings generally have been fully taxed when earned or would be eligible for the Section 245A exemption.

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- Similarly, commentators recommend removal of “Killer B” regulations, which add undue complexity to inbound liquidations in an environment where foreign earnings generally have been fully taxed when earned or would be eligible for the Section 245A exemption.
- Commentators also reiterated concerns with the “funding rule” in the Proposed Regulations on stock buyback excise tax, as well as various aspects of the Proposed Regulations under CAMT.

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De-Regulation and the PGP

- The PGP includes a section of projects focused on “De-regulation and Burden Reduction” – i.e., withdrawing or modifying existing regulations.
- This includes recent actions, such as withdrawal of the DPL regulations and the interim notices issued under CAMT.
- In the international area, the PGP lists other interesting candidates for “de-regulation”: the recently issued final and proposed regulations under Section 987 and the stock buyback excise tax regulations.
- The remainder of the PGP is devoted to implementing the OBBBA, with almost all other guidance plan items removed from the plan.

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CAMT

- Regulations were proposed in November 2024 (Prop. Regs. §§ 1.56A-1 through 1.56A-27) providing a full-scale implementation of CAMT.
- Some international highlights of the Proposed Regulations:
 - Stock basis and asset basis adjustments generally follow regular tax – basis of assets is adjusted in case of an acquisition only if there is a Section 338(g) election or similar covered asset acquisition.
 - Dividends etc. also are included in AFSI only to the extent included in regular taxable income (e.g., Section 245A applies).
 - Applies Section 482 and Section 367 for CAMT
 - For purposes of the CAMT FTC, incorporates most of the regular tax disallowances from Section 901 to determine what foreign taxes are creditable.

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Notice 2025-49

- This Notice responds to a wide range of taxpayer criticisms of the complexity of the Proposed Regulations and the complex of effective dates.
 - The Proposed Regulations have some immediately effective sections (“Specified Regulations”), which would be effective for 2024 tax years.
 - Other sections are prospective only, but early adoption requires the taxpayer to also consistently apply all of the Specified Regulations and certain other sections.
- The New Notice modifies the effective dates to make clear that none of the Proposed Regulations will be effective for years before finalization.
- In addition, the modified reliance rules will allow taxpayers to early adopt individual sections of the Proposed Regulations on a section-by-section basis.
 - Exception: If taxpayer early adopts the international sections (Prop. Reg. 1.59-4, 1.59-6, or 1.59-8), the taxpayer generally is required to adopt those sections in their entirety.

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Notice 2025-49 – Other rules

- Immediately effective (and taxpayer favorable) rules for the following sections:
 - Excluding fair value adjustments with respect to assets not marked to market for tax purposes
 - Conforming AFSI goodwill amortization to Section 197 from acquisitions completed before 2021 publication date of CAMT legislation
 - Adjusting pre-2020 AFS NOLs to remove “embedded depreciation deductions”

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DPL Regulations Finalized and Then Withdrawn

- Finalization of Regulations
 - Proposed regulations released August 6 (REG-105128-23) address the interaction between dual consolidated loss (DCL) rules and Pillar 2. The proposed regulations greatly expand the scope of the DCL rules, including the introduction of a “disregarded payment loss” regime and a general antiavoidance rule.
 - The goal of the DCL rules is to prevent a multinational group from using the same economic loss to offset income both within a U.S. consolidated group and under the tax law of a foreign jurisdiction. Losses that would be deductible under the tax law of a foreign jurisdiction can only be used in the United States if the taxpayer certifies that there has not been and will not be a foreign use of the loss.
 - Unlike DCLs, which are described in section 1503, no statute refers to disregarded payment losses (DPLs), a new term introduced in these proposed regulations. DPLs are losses arising from payments of interest or royalties or structured payments that are regarded for foreign tax purposes but not for U.S. tax purposes.
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DPL Regulations Finalized and Then Withdrawn cont’d

- The preamble to hybrid entity proposed regulations promulgated in 2018 asserts that such payments “raise significant policy concerns that are similar to those relating to the [deduction/no inclusion] outcomes addressed by sections 245A(e) and 267A, and the double deduction outcomes addressed by section 1503(d).” Congress has not addressed these policy concerns; however, now Treasury and the IRS have asserted that they have the power to write rules to address them.
- Under the new DPL rules, a domestic owner must keep track of the use of DPLs during a certification period that extends 60 months after the end of the tax year of the foreign entity in which the DPL is incurred. If a triggering event occurs during that period, the domestic owner generally must include in gross income an amount that offsets the DPL. A triggering event is either a foreign use of the DPL or a failure of the domestic owner to fulfill certification requirements establishing that no foreign use has occurred.

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DPL Regulations Finalized and Then Withdrawn cont'd

- The IRS and Treasury are also proactively expanding their authority by proposing new regulations under section 7701 that would deem a domestic corporation that directly or indirectly owns interests in a disregarded “specified eligible entity” as automatically consenting to be subject to the DPL rules. A specified eligible entity is an eligible entity that is a foreign tax resident or is owned by a domestic corporation that has a foreign branch. An eligible entity is a business entity that is not a per se corporation. Consent to the application of the DPL rules is deemed to occur regardless of whether the specified eligible entity becomes a disregarded entity via a check-the-box election.
- An example in the proposed regulations involves a payment of interest by a hybrid entity, DE1X, to its U.S. parent. Under a Country X group relief regime, the interest deduction is available to offset income of a corporation owned by DE1X, a foreign use of the DPL. As a result, the U.S. parent is required to include the amount of the interest in its income as a DPL inclusion. The inclusion is treated as ordinary interest income.
- Deemed consent to application of the DPL rules would begin on the date that is 12 months after the date that the DPL rules are finalized.

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DPL Regulations Finalized and Then Withdrawn cont'd

- Withdrawal of DPL Regulations
 - As predicted by many commentators, the IRS and Treasury announced in Notice 2025-44 that the disregarded payment loss (“DPL”) regulations will be withdrawn via future proposed regulations. The Notice also extends the period in which loss sharing under the Pillar 2 rules will not give rise to a “foreign use” of a DCL to January 1, 2028. Taxpayers may rely on the Notice pending the issuance of Proposed Regulations.
 - As stated in Section 3.01 of the Notice, commentators were critical of the DPL rules on several grounds, including complexity, uncertainty, and the costs of complying with the rules or unwinding structures that give rise to DPLs. Commentators also questioned the regulatory authority for the DPL rules. In light of these comments, the IRS and Treasury have reconsidered the rationale of the DPL rules and decided to withdraw the DPL rules.

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DPL Regulations Finalized and Then Withdrawn cont'd

- In addition to withdrawing the DPL rules, the Notice also undoes the change to the ordering rules for determining the “foreign use” of a DCL. See Reg section 1.1503(d)-3(c)(3). Prior to amendment by the 2025 DPL regulations, this regulation provided that, where there is no foreign tax law governing the order in which foreign losses from different years will be used, the foreign country will be treated as providing first for the use of losses that do *not* give rise to a foreign use. The DPL regulations modified this ordering rule to apply regardless of whether there is a foreign tax law ordering rule, and more importantly, to limit the taxpayer-favorable ordering rule to situations in which the foreign income being offset is regarded for U.S. tax purposes. The Notice announces that proposed regulation will revert the ordering rule back to its prior status. Under this rule, disregarded payments would appear to be taken into account in determining when foreign losses are made available for a foreign use.
- The new proposed regulations eliminating the DPL rules will be effective in taxable years beginning on or after January 1, 2026, which is when the final DPL rules would have come into effect. Taxpayers may rely on the Notice in taxable years before the Proposed Regulations are issued.

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DPL Regulations Finalized and Then Withdrawn cont'd

- Prop. Reg. § 1.1503(d)-8(b)(12) contains a Pillar 2 transition rule in which, for losses incurred in taxable years beginning before August 6, 2024, the DCL regulations are applied without regard to QDMTTs and Top-Up Taxes (as defined in the OECD model rules). The Notice extends this transition relief for losses incurred in taxable years beginning before January 1, 2028.
- Apart from these immediately effective changes, the Notice contains interesting requests for comments.
 - The IRS and Treasury request comments on whether the IRS and Treasury should remove the “all or nothing rule” for determining foreign use. See Reg. section 1.1503(d)-3(b). Under the all or nothing rule, if *any* portion of the items making up a DCL are available for use under the foreign tax law, the entire DCL is tainted. It is helpful to hear that the IRS and Treasury may be revisiting this rule, which goes far beyond what is necessary to preclude the “double dipping” of a dual consolidated loss.
 - The Notice also requests comments on whether disregarded payments should be taken into account in determining whether a separate unit has a DCL. Notice 2025-44 requests comments on whether determination of a DCL should follow rules similar to the branch basket regulations (Treas. Reg. section 1.904-4(f)). This change could be helpful in reducing situations in which a disregarded entity that performs services for its owner has a DCL, despite showing a profit for foreign tax purposes. See Reg. 1.1503(d)-7(c), Example 8.

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Cloud Final Regulations and Proposed Regulations

- The long-awaited final cloud computing regulations (T.D. 10022) were released, providing final rules on digital content transactions (reg. section 1.861-18) and rules for classifying cloud transactions (reg. section 1.861-19), including whether a cloud transaction is characterized as a provision of a service, or a lease or license of property. The final regulations retain the overall approach of the 2019 proposed regulations,¹ with certain important revisions, including a rule that treats cloud transactions as per se a service.
- The source of income depends on the character of the income. For digital content and cloud transactions, the most relevant types of income are sales, leases, licenses, and services. The character and source of digital content and cloud transactions income also affect the tax treatment under various international provisions including foreign tax credits, global intangible low-taxed income, subpart F, foreign-derived intangible income, effectively connected income, and U.S. withholding taxes. The final regulations apply for most, if not all, of these international tax provisions (see reg. section 1.861-18(a)(1)). However, the final regulations do not explicitly address the interaction of digital content and cloud computer program regulations with these other provisions.

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Cloud Final Regulations and Proposed Regulations cont'd

- For transactions with multiple elements, the final regulations adopt a new predominant character rule. Under new reg. section 1.861-18(b)(2), any transaction with multiple elements, one or more of which would be a digital content transaction if considered separately, is classified in its entirety as a digital content transaction under one category if the predominant character of the transaction is described in any of the following four categories:
 - a transfer of a copyright right;
 - a transfer of a copy of digital content (a copyrighted article);
 - the provision of services; or
 - the provision of know-how.
- The cloud regulations (reg. section 1.861-19(c)(2)) provide a corresponding rule for transactions that have multiple elements, one or more of which is a cloud transaction. This contrasts with the prior regulations under reg. section 1.861-18 and the proposed regulations, each of which provided for bifurcation of a transaction with multiple elements into its component parts, unless a component was de minimis.

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Cloud Final Regulations and Proposed Regulations cont'd

- Digital Content Transactions: Reg. Section 1.861-18
 - The final regulations define a digital content transaction as one that constitutes a transfer of digital content, the provision of modification or development services, or of know-how regarding digital content.
 - As under the proposed regulations, digital content is limited to content that is protectable under copyright law. The final regulations do not broaden the definition of digital content to other similar intangible property material not protectable under copyright law.
 - The regulations rely on copyright law concepts to characterize digital content transactions, and the preamble explains that these copyright law-based distinctions might not translate well to uncopyrightable material.

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Cloud Final Regulations and Proposed Regulations cont'd

- The predominant character of a digital content transaction (or cloud transaction) is determined by the primary benefit or value received by the customer. If that information is not reasonably ascertainable, the predominant character is determined by the primary benefit or value received by a typical customer in a substantially similar transaction, which is determined by data on how a typical customer uses or accesses the digital content. Relevant factors include:
 - how the transaction is marketed;
 - the relative development costs of each element of the transaction; and
 - the relative price paid in an uncontrolled transaction for one or more elements compared with the total contract price of the transaction in question.
- The taxpayer is not required to develop data for this purpose that it does not otherwise have in the ordinary course of its business.

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Cloud Final Regulations and Proposed Regulations cont'd

- As an illustration of the predominant character rule, in reg. section 1.861-18(h), Example 17, the customer derives two benefits from a transaction in digital content: first, the ability to use a computer program to develop new software; and second, the right to use libraries and reusable software components in distributed software programs. The company has market research data and customer surveys indicating that customers use the program primarily for its computer program development features and do not make significant use of the libraries or reusable software components. The example concludes that the right to copy the libraries and reusable software components for distribution is the predominant character of the transaction. Therefore, the transaction is characterized as a transfer of a copyrighted article, rather than a grant of copyright rights.
- In terms of the right to prepare derivative works of digital content, Treasury and the IRS continue to be of the view that the right to make a derivative work without further rights to distribute to the public should be treated as a copyright right. However, the preamble notes that the predominant character rule should alleviate concerns about minor modification of software in connection with the customization or installation of a copy of software causing what would otherwise be a transfer of a copyrighted article to be treated as a license of a copyright.

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Cloud Final Regulations and Proposed Regulations cont'd

- A transfer of digital content accompanied by the right to use the digital content to provide a cloud transaction will generally result in the transfer of the right to either publicly display or publicly perform the digital content, depending on the type of digital content and specific rights transferred. The preamble notes the continuing relevance of copyright law for the definition of public display and public performance of a copyrighted work. Because of the factual nature of the issues and important role of copyright law, the final regulations do not specify which copyright right is used to provide a cloud transaction.
- Example 10 in reg. section 1.861-19 illustrates a situation involving a subsidiary acting as a reseller of software as a service. In the example, Corp. A owns the rights to the software program and hosts it on its servers. Corp. B, a foreign subsidiary of Corp. A, is granted the right to sell access to the online program hosted on Corp. A's servers. Corp. B does not perform functions to provide access to the cloud-based software. The example concludes that the transaction between Corp. A and Corp. B does not provide Corp. B with any copyright rights.

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Cloud Final Regulations and Proposed Regulations cont'd

- The final regulations retain the exceptions for the public performance or public display of digital content for the purpose of advertising the sale of the digital content performed or displayed.
- New and Notable Examples
 - The final regulations contain several new examples and make certain modifications to the examples in the proposed regulations. In addition, preexisting examples were modified to follow the same analytical structure. Selected examples are discussed below.
 - New Example 24 in reg. section 1.861-18 addresses a video game copyright owner that transfers product keys to retailers, allowing a copy of the game to be downloaded from the video game owner's servers, who then transfer those keys to customers. The video game is purchased for a one-time fee that has online and offline functionality, and that does not require paying a game-specific periodic subscription fee to access the online content. In new Example 24, the transfer of product keys is classified as the sale of copyrighted articles from the video game owner to the retailers. Both transfers are treated as the sale of a copyrighted article because the right to use (or sell in the case of the retailer) the program is transferred in perpetuity without further payment.

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Cloud Final Regulations and Proposed Regulations cont'd

- New Example 11 in reg. section 1.861-19 describes the purchase of a video game for a one-time fee whose primary functionality is offline. The vendor requires the customer to pay a monthly fee to the game developer to access certain online content specific to the game. The example concludes that, under the facts presented, a customer's purchase of a game has the predominant character of a sale of a copyrighted article.
- The preamble explains that Example 11 does not introduce the additional complexity of a separate subscription fee that the customer must pay to a console maker to enable online functionality for all games played on that console. Treasury and the IRS concluded that such a fee would not be relevant to determining the character of transactions specific to the game itself. The preamble states that such a fee is more akin to the monthly amount that a customer may pay to an internet service provider for internet access to play games online in general, because the fee is not specific to the game and is instead required to enable online functionality on a device that has other functions.

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Cloud Final Regulations and Proposed Regulations cont'd

- New Example 20 in reg. section 1.861-18 describes a scenario in which a platform operator (Corp. A) offers applications for sale as an agent of the application developers for download to a mobile phone. The transaction has multiple elements. One element is the transfer of a master copy of the application by the developer to Corp. A, which could be a transfer of a copyrighted article if considered separately. Another element is the transfer of the right to make and distribute copies of the application, which could be a transfer of a copyright right, if considered separately. A third element is the platform and agency services provided by Corp. A to the application developer, which would not be a digital content transaction or cloud transaction. A fourth element is the hosting services provided by Corp. A to the application developer, which would be a cloud transaction if considered separately.
- Applying the predominant character rule, Example 20 concludes Corp. A receives the copy of the application and the right to make and distribute copies of the application merely to facilitate the sale of applications on behalf of the application developer. As a result, the transaction is not characterized as either a digital content transaction or a cloud transaction because the primary benefit or value the application developer receives is the platform and agency services. However, the transfer of a copy of the application from the application developer to the end customer is a digital content transaction.

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Cloud Final Regulations and Proposed Regulations cont'd

- The preamble notes, however, that whether a taxpayer is acting as an agent of another taxpayer is determined under general tax principles, which are outside of the scope of the regulations. Example 19 contains an alternative fact pattern involving a website that receives from the authors a license for the rights to offer electronic books for download onto customers' computers or electronic devices. This has different facts from the agency platform operator model in Example 20: The primary benefit or value that the website operator receives in the transaction is the right to reproduce and distribute an unlimited number of copies of the books to customers. Example 19 is treated as resulting in a license of copyright rights from the authors to the website operator, and a transfer of copyrighted articles from the website operator to the customer.
- One comment recommended changes to the facts of examples 19 through 21 in the proposed regulations, which contained a restriction on the transfer of the digital content by limiting the number of devices onto which the customer could download the content. The final regulations made that change, and facts were added to make clear that no copyrights were granted.

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Cloud Final Regulations and Proposed Regulations cont'd

- Sourcing Proposed Regulations
 - The final regulations, like the proposed regulations, provide that the title passage rule no longer applies to sales of digital content through an electronic medium (such as a download). Further, when a copyrighted article is sold through an electronic medium, the sale is deemed to have occurred at the location of the billing address of the purchaser, regardless of whether that purchaser is a related or an unrelated party.
 - In response to comments, Treasury and the IRS generally agreed that a billing address is a more administrable rule than the location of the customer's download or installation. However, the regulations declined to adopt a rule tracing a sale to a related party to the billing address of a subsequent unrelated purchaser.
 - For transfers of digital content that are leases, the preamble notes that the place of use rule continues to apply, rather than the billing address rule for sales of digital content.

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Commentary on the Sourcing Proposed Regulations

- Several comment letters recommended the withdrawal of the Proposed Regulations. This includes the comment letters by SofTEC, SVTDG & the Software Council writing jointly, the USCIB, the IT Industry Council ("ITI"), and the NFTC.
- The principal reason advanced for withdrawing the Proposed Regulations was that existing authorities provide sufficient and in some respects superior guidance on sourcing income from cloud transactions. The commentators cite *Piedras Negras*, 43 BTA 297 (1941), as providing that the place where personnel and equipment operate the cloud service governs the source of income.
- The commentators universally supported the Proposed Regulations' taxpayer-by-taxpayer approach to sourcing cloud transaction income. None of the commentators suggested the use of an aggregate approach that would take into account the activities of other related entities.
- Administrability and consistency with governing case law (e.g., *Moline Properties* and *Miller*) were the main reasons cited in support.

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Commentary on the Sourcing Proposed Regulations

- Several comment letters ask for clarification of new Example 10 in Treas. Reg. § 1.861-19(d). In Example 10, Corp A owns the IP associated with a software-as-a-service product. Corp A hosts the software-as-a-service product on its servers and delivers the cloud-based product to end customers. Another entity, Corp B, contracts with Corp A to act as a reseller. Corp B executes agreements with end customers, but solely Corp A delivers the cloud product. The Example concludes that Corp B acts as a reseller and does not thereby acquire any copyright rights from Corp A. Thus, both the transaction between Corp A and Corp B, and the transaction between Corp B and the end customers, is a cloud transaction characterized as a service under Treas. Reg. § 1.861-19.
- For example, SofTEC poses two hypothetical scenarios to illustrate different “reseller” variations on Example 10, which could have different tax characterizations. In the first scenario, Corp A contracts with Corp B and then solely Corp B contracts with the end user.
- Alternatively, a reseller arrangement could have the same facts as above, but also involve Corp A executing an agreement with the end user to deliver the cloud transaction to the end user. Corp B still contracts with the customer to resell the cloud transaction, but does so primarily for invoicing and billing purposes.

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Section 987 Final Regulations

- Regulations
 - Final regulations governing foreign currency gains and losses of qualified business units (QBUs) retain rules from proposed regulations that have been heavily criticized for the compliance burden they impose on taxpayers.
 - The final regulations, published December 11, 2024, follow the foreign exchange exposure pool method, under which items of income, gain, deduction, and loss attributable to a QBU are calculated in the QBU’s functional currency before being translated into the taxpayer’s functional currency. A QBU is a corporation, partnership, or separate and clearly identified unit of a trade or business of the taxpayer that maintains separate books and records.
 - Although taxpayer organizations complained that the method for determining foreign currency gain and loss in the proposed regulations was inconsistent with prevailing financial accounting rules, the final regulations retain the basic approach of the proposed regulations. Under that approach, so-called “marked items” are translated into the owner’s functional currency using a spot exchange rate, and “historic items” are translated using a historic rate.

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Section 987 Final Regulations cont'd

- As in the proposed regulations, simplification is available via a current rate election, under which all assets and liabilities attributable to the QBU are treated as marked items. Further simplification is available under an annual recognition election, under which a QBU recognizes the full amount of its net unrecognized section 987 gain or loss on an annual basis. The final regulations also provide an election under which a taxpayer recognizes section 988 gain or loss (foreign currency gain or loss from certain specified transactions) from a QBU's transactions under a mark-to-market method of accounting.
- In a welcome change, the final regulations limit the scope of the loss suspension rule that applies when a current rate election is in effect and an annual recognition election is not. Instead of suspending all losses, as under the proposed regulations, the final regulations suspend section 987 loss only if the aggregate amount of section 987 loss subject to suspension in the tax year exceeds the lesser of \$3 million or 2 percent of the controlled group's gross income.

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Section 987 Final Regulations cont'd

- Another welcome change provides that suspended section 987 loss is recognized to the extent of net section 987 gain recognized in the current year and the three preceding years. The proposed regulations did not look back to gain recognized in preceding years. However, the lookback period under the final regulations does not include years before the transition date, and an antiabuse rule prevents a taxpayer benefiting from strategically recognizing gain that can be offset by an otherwise unusable tax attribute. For taxpayers that make both an annual recognition election and a current rate election, the lookback period includes all tax years in which both elections are continuously in effect, and the loss suspension rule does not apply to losses incurred during the years that both elections are in effect.
- In the case of a terminating QBU, the owner recognizes suspended section 987 loss only to the extent of its net section 987 gain in the same recognition grouping for the tax year. Transition rules apply for the first year in which the final regulations are applicable.

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Section 987 Final Regulations cont'd

- The final regulations, including the preamble, are 325 pages, and the rules are complex. Taxpayers will need to analyze how the regulations apply to their circumstances and model the consequences of making the current rate election, the annual recognition election, and the section 988 mark-to-market election.
- Commentary
 - Industry groups also commented on the newly finalized Section 987 regulations and the proposed regulations' "Recurring Transfer Group Election".
 - The SVTDG and NFTC recommend the withdrawal of the final section 987 regulations in favor of the previous-law standard of "any reasonable method" or the previous "earnings and capital method." Other industry groups, such as the Tax Executives Institute, previously recommended that the IRS retain the final section 987 regulations. Perhaps taxpayers' views are changing, however, as they get further into the process of actually implementing the new regulations.
 - On September 5 the Securities Industry and Financial Markets Association (SIFMA) submitted additional comments on the section 987 final and proposed regulations.

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Section 987 Final Regulations cont'd

- Under the final regulations, taxpayers are required to reconstruct their section 987 pools from periods before the final regulations became effective. The regulations term these pools "net accumulated unrecognized section 987 gain or loss." This can be done using the modified Foreign Exchange Exposure Pool method. SIFMA recommends that the IRS and Treasury allow taxpayers to rely on their financial statements instead of having to use the modified method to reconstruct net accumulated unrecognized section 987 gain or loss from prior periods.
- Second, SIFMA expands on an earlier comment on the recurring transfer group rules in the 2024 proposed regulations. These rules would allow a taxpayer that has made a current rate election to translate certain ordinary course of business transactions from a qualified business unit at the average exchange rate for the year, effectively netting these transfers. Under the proposed regulations, the recurring transfer group exception is available only for purchases and sales of goods, services, and leases and licenses of property. In an earlier comment letter, SIFMA recommended that this definition improperly excludes financial institutions from the benefits of the exception, since lending and borrowing are a financial taxpayer's transactions in the ordinary course of business. Accordingly, SIFMA recommended that the exception be broadened to fit financial institutions.

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Section 987 Final Regulations cont'd

- In the new letter, SIFMA fleshes out the potential scope of a version of this exception for financial institutions. To the extent the IRS and Treasury believe limitations should be placed on loans included in the recurring transfer group, SIFMA recommends either limiting this relief to banks as defined in section 956 or regulated financial companies as defined in reg. section 1.385-3(g)(iv)(A).
- Notably, both TEI and the NFTC are supportive of having the regulations now be in final form. TEI recommends that the Treasury (under the new administration) *not* take any action to suspend the Final Regulations, which would throw taxpayers back into the reporting uncertainty that has persisted since at least the early 1990s.
- Both TEI and the NFTC request that the Recurring Transfer Group election (Prop. Reg. sec. 1.987-2(f)) be expanded. TEI and NFTC request that the transfer group include intercompany loans between QBUs (e.g., in cash pooling). They also request that the election apply to all ordinary course transactions, not only the enumerated items in the proposed regulations (which are inventory sales, payments for services, and rents and royalties). Lastly, they request that taxpayers electing to use the “alternative method” of measuring unrecognized Section 987 gain or loss, in lieu of preparing a tax adjusted balance sheet (See Reg. section 1.987-4(e)(2)(iii)), be permitted to make the Recurring Transfer Group election.

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Section 987 Final Regulations cont'd

- Responding to another request for comments, both TEI and NFTC believe that the IRS and Treasury should exercise their authority not to apply Section 987(3) at the CFC level. This would simplify administration and provide parity for CFC-to-QBU transactions and CFC-to-CFC transactions. If Section 987(3) is retained at the CFC level, TEI and NFTC also request that CFCs be permitted to use the modified gross income method to characterize Section 987 gain or loss.
- The SIFMA comment letter points out several ways in which the rules for section 987 hedging transactions (Reg. section 1.987-14) could be improved.
- One key requirement of the Section 987 hedging transaction in the final regulations is that the hedge be accounted for as an adjustment to the cumulative transaction account (CTA) under GAAP. As SIFMA points out, however, taxpayers frequently will also hedge their FX exposure with respect to intercompany loans involving a QBU which are insufficiently long-term to be accounted for in this manner. SIFMA recommends that the Section 987 hedging rules be expanded to cover this situations – e.g., for an intercompany receivables from the QBU.

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Section 987 Final Regulations cont'd

- SIFMA also points out that many taxpayers centralize their third-party hedging transactions in a single Treasury center, which then interfaces with the financial markets for all affiliates. SIFMA recommends that the hedging transaction rules accommodate this by allowing the hedge to be executed by an related person (within the meaning of section 267), rather than the owner of the QBU.
- SIFMA also requests transition relief for taxpayers that historically hedged Section 987 exposure, to allow matching of the source and character of pre-transition gain or loss with that of the QBU's pre-transition gain or loss.
- SIFMA, like TEI and the NFTC, also requests that the Recurring Transfer Group election be expanded to cover intercompany lending transactions between QBUs and their owners.

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Overview of the Final Regulations

- The final regulations follow the same framework as the Foreign Exchange Exposure Pool (FEEP) method of the 2006 through 2023 regulations.
- Historic vs. marked items distinction remains critical.
- Section 987 gain or loss on a remittance is limited to movement in \$USD value vs. \$USD basis of marked items only.

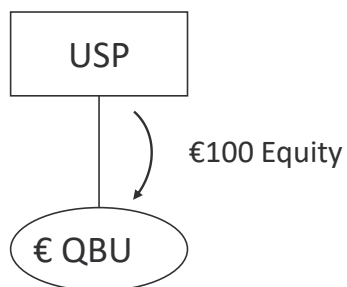
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Simplified Example of Section 987 Regulations

Year 1

Exchange Rate
€1 to \$1.25



QBU Balance Sheet

	€ Basis	\$ Basis
Inventory	50	62.5
Machine	50	62.5

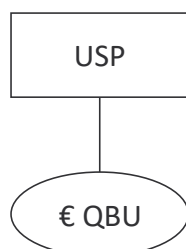
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Simplified Example of Section 987 Regulations

Year 2

Exchange Rate
€1 to \$1



QBU

- Sells €50 inventory for €75
- Acquires €50 new inventory, including cost from depreciation of machine by €10

Taxable Income	€	\$
Gross Receipts	75	75
COGS	50	62.5
Income	€25	\$12.5

Note – FX translation reduces taxable income from \$25 to \$12.5

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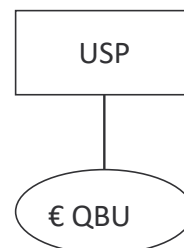
Simplified Example of Section 987 Regulations

End of Year 2 Balance Sheet

Exchange Rates

Year 1 — \$1.25 to €1

Year 2 — \$1 to €1



	€ Basis	\$ Basis
Cash	35	35
Inventory	50	52.5
Machine	40	50

- Note €35 cash = €75 gross receipts, less €40 new inventory purchases.

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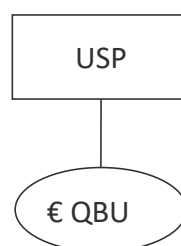
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Simplified Example of Section 987

Assume no year 3 operations for simplicity

End of Year 3

Exchange Rate €1 to \$0.80



Balance Sheet	€ Amount	"Marked" \$ Value	\$USD Basis
Cash	35	28	35
Machine	40	N/A	50
Inventory	50	N/A	52.5

- The QBU has unrecognized Section 987 loss of <\$7>.
- Translation loss in machine and inventory investments will be recognized through taxable income adjustments.

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A Menu of the Options / Elections in the Final Regs

- QBU grouping election
- Section 988 mark-to-market election for Section 988 transactions of the QBU
- Simplified inventory method
- **The Current rate election**
- **The Annual recognition election**
- Election to recognize eligible pre-transition gain / loss over a 10-year spread period
- Election to attribute Section 987 gains / losses in the passive category to Section 988(c)(1)(D) (without regard to business needs exception)

- Note that Reg. § 1.987-1(g) prescribes:
- Consistency across U.S. consolidated group and related CFCs
- 60-month bar on revocation (w/o IRS consent) of current rate, annual recognition and Section 988 MTM election

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Current Rate Election (Reg. § 1.987-1(d)(2))

- The current rate election simplifies Section 987 by treating all assets and liabilities of the QBU as “marked items.”
- This approximates the results under the original 1991 Proposed Regulations (full earnings and capital method).
- However, if the taxpayer has a Current Rate Election and does not also make the Annual Recognition Election, Section 987 losses are suspended under a “loss-to-the-extent-of-gain” rule.

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Suspended Loss Rules (Reg. § 1.987-11)

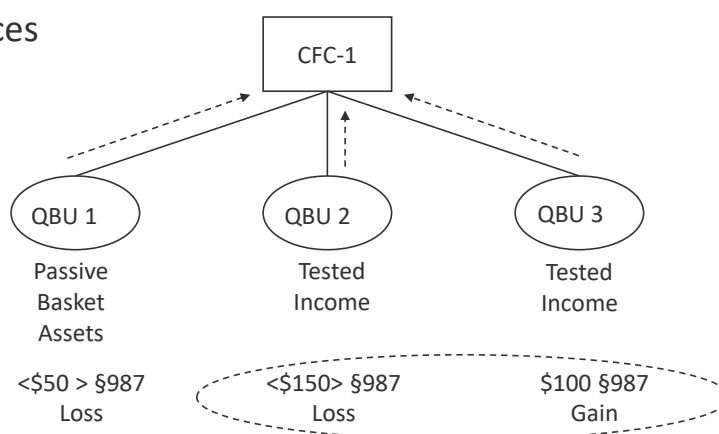
- The owner's recognized Section 987 losses in each "recognition grouping" generally are suspended and may be taken into account only to the extent of any recognized Section 987 gains in the same recognition grouping, **either** in the current taxable year **or** any of the preceding 3 taxable years ("look-back gain").
- A recognition grouping generally is defined as:
- Separate Section 904 category, OR
- In the case of a CFC, a relevant income category, such as tested income, FBC sales income, etc.
- De minimis rule for losses < **lesser of** \$3M and 2% of the owner's gross income.

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Example of a Suspended Loss

Year 1 Remittances



Results:

- QBU 3's \$100 of recognized gain in the tested income category allows \$100 of QBU-2's \$150 of loss to be taken.
- CFC-1 has a <\$50> suspended loss in each of the tested income group and passive basket group for recognition in a later year to extent CFC-1 has Section 987 gains in the same grouping.

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Annual Recognition Election (1.987-5(b)(2))

- The election treats each QBU as if it remitted all of its assets to the owner at the end of each year, resulting in recognition of all Section 987 gain or loss on a current basis.
- The Annual Recognition Election, if combined with the Current Rate Election, is similar to the Net Worth Method of Rev. Rul. 75-106.
- Consistency requirements for the “Section 987 Electing Group” (see Reg. 1.987-1(g) above) prevent cherry-picking losses from QBUs with weak currencies.

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Source and Character of Section 987 Gain or loss

- Section 987 gain or loss is ordinary income or loss.
- For subpart F / GILTI and Section 904 purposes, Section 987 gain or loss is assigned based on the tax book value of the QBU’s assets for the taxable year of the remittance.
- Special rules:
- Election to impute a CFC’s passive basket Section 987 gain or loss to the foreign currency category of subpart F income (Sec. 954(c)(1)(D))
- Rules addressing assignment of Section 987 gain or loss for purposes of applying the high-taxed exclusion from GILTI.

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Transition to the New Regs

- Treas. Reg. 1.987-10 provides for detailed transition rules for implementing the new regulations effective for taxable years beginning after December 31, 2024.
- The dollar basis of assets is generally set at the spot rate immediately before the effective date of the new regulations.
- Exception for taxpayers under the “earnings only” method.
- There is generally no option to use a “fresh start” for determining the unrecognized Section 987 gain or loss of the QBU that comes into the system.
- Exception in Reg. 1.987-10(f) for certain QBUs with grandfathered “fresh start” elections under earlier versions of the regulations, where returns were filed prior to November 2023.

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Transition to the New Regs cont.’

- Unrecognized Section 987 gain / loss from the pre-transition period is determined under the owner’s historic method if it was an “eligible pre-transition method,” defined as:
 - Application of the 1991 Proposed Regs “earnings and capital” approach, and other methods consistently applied that achieve the same lifetime result for the QBU
 - Reasonable applications of an “earnings only” method applied consistently to all of the US taxpayer’s QBUs
- Otherwise, the taxpayer reconstructs Section 987 gain / loss as if it had made a current rate election for all taxable years since 2006.
- Unrecognized transition gain or loss can either be added to the QBU’s go-forward pool or recognized ratably over a 10-year spread period.

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Reporting Requirements (1.987-9)

- As part of a taxpayer's general obligations to maintain records necessary to substantiate its tax positions, the regulations require contemporaneous record-keeping of 14 different categories of information with respect to each QBU.
- Reg. § 1.987-9(d) indicates that a future version of Form 8858 may require some of this information to be furnished with the tax return.

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Commentary on the Section 987 Regulations

- Initial comments supported moving forward with the final regulations. Both TEI and the NFTC stated that they were supportive of having the regulations now be in final form. TEI recommended that the Treasury (under the new administration) not take any action to suspend the Final Regulations, which would throw taxpayers back into the reporting uncertainty that has persisted since at least the early 1990s.
- More recent letters from the SVTDG and NFTC recommended the withdrawal of the final section 987 regulations in favor of the previous-law standard of "any reasonable method" or the previous "earnings and capital method." Perhaps taxpayers' views are changing, however, as they get further into the process of actually implementing the new regulations.

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PTEP Proposed Regulations

- Under proposed regulations published December 2, 2024, shareholders would be required to track 10 groups and two subgroups of previously taxed earnings and profits (PTEP) annually in each controlled foreign corporation in which they hold stock.
- This account maintenance requirement, generally consistent with rules previewed in Notice 2019-1, 2019-3 IRB 275, would apply to every U.S. person, other than a partnership, that holds stock in a CFC either directly or through a partnership. CFCs also would be required to maintain PTEP accounts with respect to these shareholders, but not on a year-by-year basis.

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PTEP Proposed Regulations

- The proposed regulations contain extensive guidance regarding PTEP and basis adjustments, including a taxpayer-favorable rule regarding the timing of basis increases resulting from a shareholder's inclusion in income of undistributed earnings of a CFC. Under the proposed regulations, these increases under section 961(a) generally would be treated as occurring on the first day of the CFC's tax year during which the shareholder owned the relevant share.
- An exception applies if a transaction during the year changes the shareholder's ownership of the CFC, in which case the basis increase applies on the date of the last such transaction preceding the event that gave rise to the basis adjustment.
- Under the current regulation, taxpayers could be required to recognize gain if they receive a distribution in excess of preexisting basis, even though the basis increase resulting from a subpart F or global intangible low-taxed income inclusion for the year of the distribution would have been sufficient to cover the entire distribution. IRS Advisory Memorandum 2023-002 (AM 2023-002) opined that, despite reg. section 1.961-1(a), the "better interpretation" is that the additional basis is available for a midyear distribution.

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PTEP Proposed Regulations

- In contrast, the proposed regulations take a potentially controversial approach in applying section 961(c). Specifically, the proposed regulations would treat a United States shareholder of a higher-tier CFC as recognizing income under section 961(c) when a downward adjustment with respect to that CFC's stock of another CFC exceeds the higher-tier CFC's basis in that stock.
- Although the statutory language of section 961(c) authorizes regulations providing for "adjustments similar to the adjustments provided" in section 961(a) and (b), an income inclusion is not an adjustment.

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PTEP Proposed Regulations

- More generally, the proposed regulations track basis with respect to three kinds of “ownership units”:
 - section 961(a) ownership units, involving stock owned directly by a United States shareholder or a partnership interest through which a nonpartnership United States shareholder indirectly owns CFC stock;
 - derivative ownership units, involving a partnership’s ownership of CFC stock or partnership interests through which the higher-tier partnership owns CFC stock; and
 - section 961(c) ownership units, through which CFCs own stock of other CFCs.
- Derived basis and section 961(c) basis may be positive or negative.
- Generally, the basis of each property unit is increased by the amount that would be distributed with respect to the property unit in a hypothetical distribution by the CFC (on the last day of its tax year), equal to the U.S. dollar amount of the covered shareholder’s income inclusion

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Commentary on the PTEP Proposed Regulations

- Several taxpayer organizations submitted comment letters to the IRS on the “long awaited” PTEP proposed regulations.
- First, all the comments ask the IRS and Treasury to revisit the share-by-share tracking of PTEP basis, which can trigger gain under Section 961(b) before the taxpayer has exhausted its stock basis in the CFC.
- The TEI letter (and others) illustrate this problem with the following example:
 - Assume that US Parent owns all of the stock of CFC-1, with zero basis. CFC-1 generates \$100 PTEP, increasing the basis of Parent’s stock in CFC-1 to \$100. Next, USP contributes CFC-2 with zero basis to CFC-1, in a § 351 transaction that is also a type B reorganization. Under Reg. section 1.358-2, USP creates a separate block of zero basis stock in CFC-1. Lastly, CFC-1 repatriates the \$100 of PTEP. Under § 961(b), this reduces the basis of US Parent’s stock in CFC-1 by \$100. Under the Proposed Regulations’ combination of a pro rata approach to allocating PTEP distributions, with a share-by-share approach to determining basis, the PTEP distribution triggers gain on Block 2 of CFC-1’s stock.

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Commentary on the PTEP Proposed Regulations

- Second, the comment letters focus on various aspects of the proposed guidance on Section 961(c).
- Where an upper-tier CFC sells a lower-tier CFC at a loss, and another lower-tier CFC at a gain, the section 961(c) loss should be available to offset the gain for determining the United States shareholder's subpart F income.
- The ACT Letter discusses treatment of CFC-to-CFC distributions of PTEP, and argues persuasively that Congress did not intend, through adoption of Section 961(c), to cause a distribution of PTEP from one CFC to another CFC to trigger gain.
- The commentators also generally suggest that the Proposed Regulations' concept of "negative section 961(c) basis" is overly complex, and creates unnecessary traps for the unwary. For example, a Section 332 liquidation may trigger recognition of gain due to recapture of Section 961(c) basis. (This is much more burdensome than the rules for "excess loss accounts" (ELAs), in which a section 332 liquidation eliminates the ELA without tax).

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Commentary on the PTEP Proposed Regulations

- The ACT letter poses an interesting scenario in which the Section 78 gross-up on PTEP-related taxes may result in double taxation under the Proposed Regulations.
- For example, as withholding taxes or other foreign taxes are imposed on a distribution of PTEP up to the US Parent, the Proposed Regulations' definition of "covered distribution" may not permit the Section 78 gross-up to be received tax-free under Section 959. The letter argues that this result is contrary to the legislative history of Section 78 and should be revised in the final regulations.
- Note that the OBBBA appears to have fixed this double tax problem through its amendment to Section 78.
- Lastly, all of the letters make one overarching point: the rules set out in the Proposed Regulations will be burdensome to administer and track.

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Inbound F Reorganizations & FIRPTA

- Notice on Public Company F Reorg / Domestications
 - In Notice 2025-45, the IRS announced that it would issue proposed regulations to make it easier for publicly traded foreign corporations to become US corporations without triggering FIRPTA gain. In addition, as part of the Notice, the IRS announced changes to Reg. sec. 1.368-2(M) to prevent intervening stock market trading during the steps of the F reorganization from disrupting F reorganization treatment. Both these proposed changes may be relied on by taxpayers immediately.
- FIRPTA Change
 - The IRS and Treasury understand that the FIRPTA non-recognition rules, Regs. § 1.897-5T and 1.897-6T, as modified by Notices 89-85 and 2006-46, may serve as an impediment to publicly traded foreign corporations with U.S. real property interests (“USRPIs”) redomiciling into the United States. These domestications of public companies often are motivated principally by non-tax business concerns. The IRS and the Treasury believe the current rules are too restrictive and present unnecessary impediments to these business-driven transactions.

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Inbound F Reorganizations & FIRPTA cont’d

- The Notice’s new rules apply to F reorganizations in which the resulting US corporation is publicly traded and is not a RIC or a REIT. See Section 3.02 of the Notice. Also, the principal class of shares of the foreign corporation must be regularly traded on an established securities market during the three year period preceding the F reorganization. The principal class of shares is the class (or combination of multiple classes) that amount to more than 50% of the corporation’s stock by vote and value. “Regularly traded” is defined by reference to the existing FIRPTA definition. See Reg. section 1.897-9T(d)(1).
- The exception does not apply if the domestic corporation transfers any property (other than money) to its shareholders as a “part of the plan” with the F reorganization. A plan is deemed to exist for transfers within one year after the F reorganization, and the Notice notes that this definition of a “plan” is broader than the F reorganization’s “plan of reorganization.” De minimis transfers of less than one percent of the foreign transferor’s assets by fair market value are disregarded.

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Inbound F Reorganizations & FIRPTA cont'd

- Where the new exception applies, which it terms a “covered inbound F reorganization,” certain rules in Reg. § 1.897-5T(c)(4) are relaxed. Specifically, the “subject to tax” requirement is deemed satisfied for any shareholders who own less than 5% of the foreign transferor’s stock. Moreover, the foreign transferor will only be required to recognize gain on the distribution of the domestic corporate stock with respect to dispositions by 5%-or-greater shareholders. For purposes of the 5%-or-greater rules the company only needs to apply constructive ownership rules to the extent it has actual knowledge or reason to know of the relevant relationships. A statement filed by the foreign transferor with its tax return will only need to include signed declarations from 5%-or-greater shareholders. Lastly, the requirements in Reg. § 1.897-6T(a) to avoid gain recognition will be replaced by a requirement to file a statement that the foreign transferor is relying on the provisions of Notice 2025-45.
- **F Reorganizations Generally**
 - Treas. Reg. section 1.368-2(m), finalized in 2015, contains the general requirements for an F reorganization. Among other requirements, Reg. § 1.368-2(m)(1)(ii) provides that the stock ownership in the transferor immediately before, and the stock ownership of the acquiring corporation immediately after, the F reorganization must be identical.

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Inbound F Reorganizations & FIRPTA cont'd

- F reorganizations may be effected through multiple steps as part of a single plan of reorganization, such as a transfer of stock to the acquiring corporation, followed by an LLC conversion or a check-the-box election to become a disregarded entity. If the transfer of stock, and the LLC conversion or check-the-box election are not completed simultaneously, intervening changes in stock ownership during the steps that make up the F reorganization might cause the identical ownership requirement not to be satisfied.
- The Notice would amend Reg. § 1.368-2(m)(1)(ii) to provide that the identity of stock ownership requirement is applied without regard to intervening dispositions of stock ownership that are not part of the plan of reorganization. The Notice would appear to formalize a private letter ruling (PLR 202339009) where the IRS adopted a similar analysis to the domestication of a publicly traded foreign parent. In the PLR, the taxpayer made a representation that any purchases or repurchases of the foreign parent corporation’s stock were not included in the plan of reorganization.

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Inbound F Reorganizations & FIRPTA cont'd

- A new Example 15 would illustrate the operative rule. There, a publicly traded foreign corporation (P) with a single class of outstanding stock serves as a holding company for a Domestic Sub. P organizes a US Corp with nominal capitalization to effect the domestication. US Corp forms a merger sub and acquires all of P's stock via a reverse merger in exchange for US Corp stock. Next P elects to change its classification to a disregarded entity effective 3 days after the completion of the reverse merger. During that three-day period, some stockholders of US Corp sell their stock to new shareholders who were not shareholders of P. Since these sales are not part of the plan of reorganization, they are disregarded for applying the identity of ownership requirement.
- The Notice may be relied for transfers, exchanges and distributions on or after August 19, 2025.

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Rulings

CCA 202502005—Source of Services Income

- Addresses source of services income where affiliate of the taxpayer performs activities under an intercompany services agreement.
- Taxpayer agreed to provide services to a third party, owned all the IP necessary to perform the services, performed some of the services itself and contracted with a CFC to perform a substantial portion of the services.
- The CCA cited both *Le Beau Tours* and *Miller*, where the source of a taxpayer's service income was determined without regard to activities performed for it by unrelated parties and related parties, respectively, that were acting as independent contractors. The CCA contrasted *InverWorld*, in which it states that the activities of a U.S. subsidiary acting as a dependent agent were imputed to its Cayman Islands parent for sourcing purposes.
- The CCA applied the Supreme Court's test in *National Carbide* for determining whether an agency relationship exists between a parent and its subsidiary, the first two of which are [1] Whether the corporation operates in the name and for the account of the principal, and [2] binds the principal.
- Under the *National Carbide* factors, the memorandum found that the CFC was not acting as its parent's agent.

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LTR 202502002—R&D Services and FDII

- The IRS ruled that cost-plus research and development services fees that certain U.S. subsidiaries (R&D Cos) earned from R&D services for a foreign affiliate gave rise to foreign-derived deduction-eligible income (FDDEI) under section 250.
- Under Treas. Reg. 1.250(b)-5(d), services fees are FDDEI to the extent that the recipient of the service is "located outside of the United States." A business recipient is treated as located outside of the United States to the extent that operations outside of the United States of the recipient and its affiliates (other than the service provider) benefit from the service.
- The foreign parent's foreign OpCo owned all product IP related to a pharmaceutical business and used it to make and sell products. Foreign OpCo's only operations were in its home country, and the group conducted business in other countries through separate subsidiaries. Foreign OpCo sold the products into the U.S. market through a limited risk distributor, U.S. distributor.
- The IRS concluded that the service recipient's location was entirely foreign, so that all R&D service fees were FDDEI. The IRS concluded that the limited risk U.S. distributor did not benefit from the R&D services.

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LTR202504005—Hovering Deficits and 245A

- The IRS ruled that a CFC’s “hovering deficit” did not reduce undistributed foreign earnings supporting a dividend eligible for a section 245A DRD.
- Under section 245A(c), the foreign-source portion of a dividend (which is eligible for a DRD) is determined by multiplying the dividend by a fraction equal to the “undistributed foreign earnings” over the total “undistributed earnings” of the CFC. Undistributed earnings are the earnings and profits of the CFC as of the close of the tax year and without diminution for dividends distributed during that year.
- In the ruling a second tier CFC (CFC2) made a liquidating distribution to a first tier CFC (CFC1) that gave rise to a hovering deficit in CFC1. Later, different second tier CFCs paid dividends to CFC1 from their section 959(c)(3) E&P, and in the same year CFC1 made a distribution to the US parent.
- A hovering deficit may only be used to offset E&P that is accumulated by the surviving corporation (CFC1) after the transaction (the liquidation) and that is not distributed or deemed distributed in the same tax year. Because CFC1 distributed the dividends received from the lower-tier CFCs in the same tax year they were received, the related E&P never became accumulated E&P so as to be offset by the hovering deficit.
- Accordingly, the IRS ruled that the hovering deficit would not reduce CFC1’s “undistributed earnings.”

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Advice Memo 2025-002—Branch Profits Tax and Reverse Hybrid

- Reverse Hybrid entity (corporation for US tax purposes, fiscally transparent for foreign purposes) organized in country X earns ECI.
- The Advice Memo concludes that the Reverse Hybrid is subject to branch profits tax because U.S. domestic tax law governs the application of branch profits tax.
- Some of Reverse Hybrid’s owners are residents of a country that has an income tax treaty with the U.S. that has a fiscally transparent entity (“FTE”). The FTE provision states that where an entity is fiscally transparent under the laws of either treaty country, the income is derived by a resident of a treaty country to the extent the item is treated under such country’s tax laws as income of a resident.
- That treaty also has a provision reducing the U.S. 30% statutory branch profits tax rate to a lesser rate.
- The Advice Memo concludes that the owners of the Reverse Hybrid who are the who are resident of the treaty country can invoke the treaty to reduce the branch profits tax rate on their share of Reverse Hybrid’s profits.

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ILM 202529008—Beat and SCM

- In ILM 202529008 the IRS concluded that a taxpayer who did not use the services cost method (SCM) for transfer pricing purposes was still able to avail itself of the SCM exception for purpose of determining the amount of base erosion payments.
- Taxpayer excluded amounts paid or accrued for services rendered by foreign related parties from their base erosion payments under the section 59A(d)(5) services cost method exception (“BEAT SCM exception”) but have not applied the Treas. Reg. section 1.482-9(b) services cost method (“Transfer Pricing SCM exception”) to price these transactions. The Taxpayer uses another method acceptable under section 482, such that it pays an amount that exceeds the total services costs and take a corresponding deduction, which is greater than it could claim if they had applied the Transfer Pricing SCM.
- The Service stated that although the BEAT SCM exception requirements generally cross-reference the Transfer Pricing SCM requirements, the BEAT rules do not require taxpayers to apply the Transfer Pricing SCM to benefit from the BEAT SCM exception.
 - Compared to the Transfer Pricing SCM, the BEAT SCM exception broadens the scope of services eligible for the exception by including services that fail the business judgment rule.
 - Taxpayers are eligible for the BEAT SCM exception even if they pay a mark-up component on those services.

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