Feedback for REG-104226-18 (§965[1] Transition Tax) as of 10/3/2018

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
Preamble	Pages 63-64	Double counting for November 2017 distributions to the United States from 11/30 year end deferred foreign income corporations (DFICs)	Treasury should follow the policy of both §965 and the foreign tax credit regime to either (1) exclude any 2017 inclusion or pre-965 earnings from the measurement of post-86 deferred foreign income of each DFIC or (2) allow tax credits available for use for the taxable dividend to also apply in when included §965.	It does not follow the policy of §965 to include in the §965 inclusion amount earnings which have been fully taxed in the United States. Section 965 measures a DFIC's post-86 deferred foreign income; income which has been fully taxed in the United States is not "deferred." This position is supported in the legislative text which excludes §959(c)(1) and (c)(2) earnings (previously taxed earnings) from a DFIC's post-86 deferred foreign income. The fact that a U.S. company may have received foreign tax credits on a distribution to the U.S. as support for double taxing these amounts is not persuasive. Prior to 2018, all dividends paid from a non-U.S. corporation's §959(c)(3) earnings to a U.S. corporation were currently taxed in the U.S.--the applicability of tax credits to offset some of this taxation does not change the fact that these earnings are no longer deferred but fully subject to U.S. taxation. It goes against the policy of the U.S. tax credit regime to imply that the availability of tax credits somehow makes taxable distributions available to additional U.S. taxation.

[1] Unless otherwise noted, all section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				The following example is instructive on this point. Facts: USP, a domestic corporation, owns all the stock of CFC1, a foreign corporation. USP has a 12/31 year end and CFC1 has a 11/30 year end. As of January 1, 2017, CFC1 had $80 of §959(c)(3) accumulated earnings with accumulated §902 taxes of $20. CFC1 had no earnings and paid no taxes in 2017. On November 3, 2017 CFC1 paid a $80 dividend to USP. Because of this dividend, CFC1 had no §959(c)(3) earnings or §902 taxes left as of its year end on 11/30. CFC1 did not have any earnings or pay any taxes in December 2017, and it is anticipated that CFC1 will not have any earnings or pay taxes in its tax year ending 11/30/2018 (its inclusion year). Analysis: CFC1's distribution to the U.S. on Nov 3 is fully taxed in its pre-inclusion year, with $100 of income to be taxed in the U.S. at 35% ($80 dividend plus $20 §78 gross-up) with $20 of taxes credits available to offset this gain (subject to FTC limitations). For purposes of §965, CFC1's accumulated post-86 deferred foreign income as of November 2 is $80 and is $0 as of December 31, making it's §965(a) inclusion amount $80 (the greater of the two measurement dates). Without any other adjustments for double counting, USP will be subject to tax on this $80 of earnings twice--once when it was distributed to the U.S., and once under §965. Further, because all CFC1's tax credits were

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				used in its November 3, 2017 dividend, it will have zero taxes left at the end of the year. This means that not only is the $80 taxed twice, but when it is taxed under §965 this inclusion comes with no tax credits. If Treasury took the first recommendation, the $80 of earnings would not be included in §965 inclusion. If Treasury took the second recommendation, the $20 of taxes would also be available for the §965 inclusion.
Preamble	Pages 101-103	Exclusions from Cash Position	The definition of "personal property which is of a type that is actively traded and for which there is an established financial market" in Regs. §1.965-1(f)(13)(i) should exclude publicly traded SFC stock held in the ordinary course of the taxpayer's trade or business. Ordinary course, for this purpose, is the common layman's definition – generally property held for use in the taxpayer's day-to-day trade or business and not held as a portfolio investment – and subject to the requirement that the stock has been held for a reasonable period of time. Treasury has the authority in §965(o) to make this modification to the proposed regulations (i.e., prescribe regulations or other guidance as may be necessary or	The preamble states that liquidity-based exceptions are not administrable and contrary to Congressional intent in determining the value of actively traded property. Treasury should reconsider this position because it was generally Congressional intent to impose a higher tax on a taxpayer's liquid assets. See Senate Finance Committee explanation at p. 358 ("The Committee… further believes that the tax rate should take into account the liquidity of the accumulated earnings"). Shares in publicly traded SFCs that a U.S. shareholder holds in the ordinary course of its trade or business are often held as a key component of the taxpayer's international operations and form a critical part of its overall supply chain. The mere

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
			appropriate to carry out the provisions of §965).	fact that there is a portion of the subsidiary's stock that is floated publicly does not detract from the SFC's vital role in the taxpayer's day-to-day business operations. Moreover, these shares are not sufficiently liquid to be treated as a cash equivalent when they represent a significant shareholding (e.g., greater than 10%). For example, the shares could not be disposed of in a single trade without a material reduction in the value of the block. Consequently, such shares are generally sold privately as a block and not through the public exchange.
		Determination of foreign cash position and previously taxed income (PTI)	Exclude from a U.S. shareholder's aggregate foreign cash position any obligation with respect to which there was an amount determined under §956, but only to the extent of (i) the amount included in gross income under §951(a)(1)(B) plus (ii) the amount excluded from gross income under §959(a)(2), with respect to such obligation. Treasury has the authority in §965(o) to make this modification to the proposed regulations (i.e., prescribe regulations or other guidance as may be necessary or appropriate to carry out the provisions of §965).	Excluding obligations that constitute U.S. property under §956(c) ("U.S. Loans") from a U.S. shareholder's Aggregate Foreign Cash Position would not create an administrative burden as claimed in the Preamble. Determining the existence and amounts of U.S. Loans can be clearly shown through routine tax filings and do not require a "facts-and-circumstances test." U.S. Loans should be analyzed separate from the other assets grouped together; they clearly represent assets that were funded or acquired with earnings which have already been taxed in the United States, either as subpart F income (thereby creating PTI) or under §956. As U.S. Loans have been funded or acquired with earnings that have already been taxed in the United

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				States under §951(a), it would be double taxation to subject these obligations to the higher 15.5% tax rate, which approach goes against the purpose of §959's exclusion of PTI from additional taxation. U.S. Loans do not represent and should not be treated as a reinvestment of deferred foreign income in cash equivalents; rather, they are funded with earnings that have already been subject to U.S. tax.
Prop. Regs. §1.965-1(f)	Definitions	Treatment of PTI in the determination of the existence of amount of a specified E&P deficit	Exclude PTI from determining the existence and amount of a specified E&P deficit	The statute is silent with respect to PTI in the case of deficit company. It does not say that PTI should be included (or excluded) from the calculation of E&P in the case of a deficit company. Given that the statute is not explicit, the Chamber disagrees that Treasury's interpretation of the statute is the only possible interpretation, and we certainly believe it is not the most reasonable interpretation of the words in the statue. The Notice of Proposed Rule Making (RIN 1545-BO51) states that Treasury and the IRS "are considering other rules with respect to the definitions of post-1986 earnings and profits, accumulated post-1986 deferred foreign income, and specified E&P deficit" in the finalization of the regulation. Additionally, Treasury and the IRS acknowledge that they have the authority to reach a different conclusion, as stated in the Preamble of the Notice of Proposed Rule Making (RIN 1545-

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				BO51) that §965(o) provides the necessary authority to consider a different interpretation with respect to these rules. Accordingly, consistent with the rules for calculating deferred foreign income, the rules for calculating earnings deficits should exclude the amount of undistributed foreign earnings that have already been subject to U.S. tax ("PTI"). The Chamber believes adopting this position would align the regulation with the intent of Congress that the transition tax apply to a taxpayer's net, historic foreign earnings "which had not been previously taxed." (See Ways and Means Committee Report p. 375). Further, the Chamber believes that this calculation achieves the most accurate measure of a taxpayer's E&P that should be subject to the transition tax.
		Applicable Attribution Threshold	Increase the applicable attribution threshold to a more meaningful percentage, such as 10%.	Prop. Regs. §1.965-1(f)(45)(ii) limits partnership attribution but only if the tested partner owns less than 5%. The proposed regulations acknowledge the compliance and administrative difficultly for a taxpayer to determine whether a foreign corporation is a SFC for purposes of §965 because of the repeal of §958(b)(4) and the application of downward attribution to partnerships under §318(a)(3)(A). Therefore, the proposed regulations provide that stock owned directly or indirectly by a partner will not be considered as being owned by a

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				partnership per §958(b) and §318(a)(3)(A) if such partner owns less than 5% of the interests in the partnership. While we appreciate Treasury's acknowledgement of the administrative difficulty of the repeal of §958(b)(4) as applied to §965, limiting the de minimis amount to less than 5% still presents significant compliance difficulty. Generally, other partners of a partnership are not willing to share detailed information about their holdings, regardless of the taxpayer shareholder's percentage interest.
Prop. Regs. §1.965-1(g)	Examples		Modify Prop. Regs. §1.965-1(g), *Ex. 1 and 2*, so that downward attribution of stock from a partner to a partnership is turned off when the partner owns less than a five percent interest in the partnership (the "special attribution rule of Prop. Regs. §1.965-1(f)(45)(ii)), but in a manner that is not contrary to the statutory prohibition on sideways attribution set forth in §318(a)(5)(C). The suggestion could be accomplished through having PS own directly, and not through attribution, the shares of DC.	Prop. Regs. §1.965-1(f)(45)(ii) provides for a "special attribution rule" which turns off downward attribution from a partner to a partnership in determining whether a foreign corporation is an SFC when the partner's interest in the partnership is deemed "de minimis," less than a five percent interest in the partnership's capital and profits. The two examples which illustrate this rule, examples 1 and 2 of Prop. Regs. §1.965-1(g), however, illustrate it in such a manner that is contrary to the anti-sideways attribution rule in §318(a)(5)(C) and prior guidance from the IRS, LTR 200637022 (Sept. 15, 2006). Section 318(a)(5)(C) provides that "[s]tock constructively owned by a partnership, estate, trust,

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
			Treasury has the authority to make the suggested modification through §§965(o) and 7805. See also recommendation to raise ownership percentage in Prop. Regs. §1.965-1(f)(45)(ii), above.	or corporation by reason of the application of paragraph (3) shall not be considered as owned by it for purposes of applying paragraph (2) in order to make *another the constructive owner of such stock*" (emphasis added). This provision, and the IRS guidance interpreting it, allow for reattribution of stock deemed owned through downward attribution, but do not permit such stock to be reattributed through upward reattribution or through other means that result in sideways attribution or overlapping ownership attribution. In example 2 of Prop. Regs. §1.965-1(g), A's ownership of DC is attributed to PS, and USI's ownership of FC is attributed to PS. PS's deemed ownership of FC is then attributed to DC. This second attribution has the effect of a sideways attribution in contradiction of §318(a)(5)(C) and prior IRS guidance because PS legally owns neither DC nor FC. Its deemed ownership of each is through attribution under §318(a)(3)(A) and (C). Although reattribution is permitted downstream under §318(a)(5)(A), §318(a)(5)(C) and the IRS's prior guidance do not permit PS to attribute either of the shares upstream or to each other because doing so would have the effect of causing attribution when "there is no basis either in family relationship or in common economic interest for the application of" the reattribution rule. See H.R.

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				Rep. No. 1514, 88th Cong., 2d Sess., 1964-2 C.B. 706 (providing the rationale for the enactment of the anti-sideways attribution rule of section 318(a)(5)(C)).
Prop. Regs. §1.965-2(b)	Determination of and Adjustments to Earnings and Profits in the Last Taxable Year of a SFC That Begins Before January 1, 2018, for Purposes of Applying §§959 And 965	Tax credit priority rules—Prop. Regs. §1.965-2(b) ordering rules vs. Regs. §1.960-1(i)(2) ordering rules	The proposed regulations provide ordering rules in Prop. Regs. §1.965-2(b) for adjustments to E&P in a SPC's inclusion year, but does not specify if tax credits follow these same ordering rules. Treasury should clarify that the foreign tax credit ordering rules follow the Prop. Regs. §1.965-2(b) ordering rules.	In cases where a SFC has a §965 inclusion and pays a dividend, and the total of the §965 inclusion and the dividend exceed the SFC's total earnings for the year for foreign tax credit purposes, it is unclear how foreign tax credits should computed with the §965 inclusion. Treasury should clarify that the foreign tax credit ordering rules follow the Prop. Regs. §1.965-2(b) ordering rules. The following example is illustrative. Facts: For example, CFC1, which has a 11/30 year-end, had $300 of earnings as of 11/2, but received a dividend of $200 from its wholly owned subsidiary, CFC2, on 11/5/17, and paid $500 to its parent, US Shareholder, on 11/6/17. It had no other activity. CFC2 has a 12/31 year-end with $200 of earnings (with $30 of taxes) as of 11/2 and no other earnings for the year. CFC1 would use the 11/2 measurement date of $300 for its §965 inclusion as opposed to the 12/31 measurement date of zero ($300 plus $200 minus $500 payment to the US in a pre-inclusion year). CFC2 would use the 11/2 measurement date of $200 of earnings as its §965 inclusion as opposed to the 12/31 measurement date of zero ($200 minus $200 distribution to

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				another SFC). Therefore, CFC2 would have a total §965 inclusion and dividend paid ($200 plus $200) in excess of its $200 earnings. If CFC2 must prioritize Regs. §1.960-1(i)(2) and determine tax credits under §960 prior to §902, then all of its $30 of tax credits would go with its $200 §965 inclusion subject to the §965(g) haircut ($200 §965 inclusion divided by its total earnings of $200 multiplied by $30). Per the Prop. Regs. §1.965-2(b) ordering rules, CFC2 would be deemed to distribute E&P to CFC1 prior to any earnings being converted to PTI under §965, meaning that all $200 of its dividend to CFC1 would be §959(c)(3) earnings, but without any taxes as all its taxes accompanied its §965 inclusion with the haircut. CFC1 would have its $300 §965 inclusion, and U.S. Shareholder would have to recognize all $500 of its dividend received from CFC1 as a taxable distribution as it was made by a 11/30 company in a pre-inclusion year; therefore, not only is the $300 for CFC1 and $200 for CFC2 double counted as both a §965 inclusion and a taxable dividend, this taxable distribution to the US does not have any foreign tax credits. This creates a double hit to the taxpayer--double taxation plus a haircut on the $30 of tax credits.

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				Alternatively, if the foreign tax credit rules conform with the Prop. Regs. §1.965-2(b) ordering rules, when CFC2 pays the $200 dividend, the foreign tax credits would be deemed to move with that dividend prior to the §965 computation, meaning that all $30 of credits would move to CFC1 per §902. Then, when CFC1 pays the $500 dividend to U.S. Shareholder, this taxable dividend comes in with the $30 credits without a haircut. This method still creates double counting for the taxpayer (the $200 for CFC2 and $300 for CFC1 are counted both under §965 as the $500 taxable distribution from CFC1), but at least the taxpayer would get the full amount of its tax credits. Treasury seems to support this view on page 64 of the Preamble by stating that in cases of double counting, a distribution to the U.S. shareholder "may take into account foreign tax credits under section 902 and avoid the limitation under section 965(g)(1) that would apply if the underlying foreign taxes had been deemed paid" under §965.
Prop. Regs. §1.965-2(c)	Adjustments to Earnings and Profits By Reason of §965(a)	See Implications of Negative §959(c)(3) Earnings as a Result of Application of §965 comment, below, at Prop. Regs. §1.965-2(d).		

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
Prop. Regs. §1.965-2(d)	Adjustments To Earnings And Profits By Reason Of §965(b)	Implications of Negative §959(c)(3) Earnings as a Result of Application of §965	Provide that §959(c)(3) earnings cannot be reduced below zero as a result of the §965 inclusion. At a minimum, clarify under §960(a) that the existence of a prior deficit in §959(c)(3) earnings does not preclude the recognition of current year foreign tax credits attributable to current year subpart F income.	The proposed regulations provide that the §959(c)(3) earnings and profits of each CFC are reduced by a §965 inclusion, even if the reduction makes the §959(c)(3) earnings negative. The reduction of §959(c)(3) pools below zero from the §965 inclusion presents potential pitfalls for taxpayers. First, the §965 PTI is trapped to the extent it reduces §959(c)(3) earnings below zero because a CFC can only distribute PTI to the extent of its aggregate positive E&P--otherwise the distribution is a return of capital or treated as the sale or exchange of that stock. Also there is a risk that if the CFC has subpart F income going forward, the current tax credits will not be available because of the net negative accumulated §959(c)(3) earnings. This issue will be present in any DFIC with an 11/2 measurement date, as by definition its §965 inclusion is larger than its earnings as of 12/31.
Prop. Regs. §1.965-2(f)	Adjustments To Basis By Reason Of §965(b)	Basis Adjustment Flow-Thru to Lower Tier CFC	Clarify that the basis adjustments flow down through the CFC tiers under §961(c) in proportion to the E&P deficit allocated to such DFIC.	Basis adjustment only applies to U.S. shareholder's basis in its first tier DFIC. Where CFC holding companies are structured the operating entities that generate most of the E&P, and attract the E&P deficit against it, under transition tax rules would have the greatest need for basis adjustments. As these lower tier CFCs try to payout the E&P to move money back to the United States this causes

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				return of basis and then subpart F income at upper tier CFC.
		Basis Adjustments for §965(b) PTI	To be consistent with the purposes of the deficit allocation rule, and in order to avoid recapturing deficit allocations at ordinary income tax rates, Treasury should provide basis for §965(b) PTI such that any distribution of such PTI would not be subject to future tax at the full tax rate or, alternatively, provide that §961(b) basis reductions are not required in respect of distributions of §965(b) PTI. Treasury has the authority in §965(o) to make this modification to the proposed regulations. The Conference report also authorizes Treasury to make the suggested modifications.	The proposed regulations' basis rules do not reflect congressional policy to impose a lower rate of tax on the net deferred E&P of a §958(a) U.S. shareholder (or a consolidated group of such shareholders). Congress intended that taxpayers would benefit from the allocation of E&P deficits within applicable ownership chains to reduce otherwise taxable amounts at 8% or 15.5%. Nowhere in the legislative history or the statute is it suggested that Congress intended that deficit allocations would be recaptured at full income tax rates. This is no net benefit when the DFIC and deficit SFCs are in the same ownership chain. Treasury recognized this lack of benefit in a common ownership chain in the preamble to the GILTI proposed regulations (REG-104390-18, page 41). The Conference report clearly provides that Treasury has the authority, through §965(o), to provide basis adjustment rules in respect of §965 PTI. The conference report states that basis adjustments: [M]ay be necessary with respect to both the stock of the deferred foreign income corporation and the E&P deficit foreign

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				corporation and authorizes the Secretary to provide for such basis adjustments or other adjustments, as may be appropriate. For example, with respect to the stock of the deferred foreign income corporation, the Secretary may determine that *a basis increase is appropriate* in the taxable year of the section 951A inclusion or, alternatively, the Secretary may *modify the application of section 961(b)(1) with respect to such stock* (emphasis added).
Prop. Regs. §1.965-2(g)	Gain Reduction Rule	Ordering	Clarify that the gain reduction rule applies first to available §965(a) PTI. Only after available §965(a) PTI has been fully distributed, should the gain reduction rule be applicable to §965(b) PTI. In other words, §965(b) PTI should be last-in-line in terms of distributed PTI.	There is a need to coordinate the gain reduction rule and basis adjustments. As noted, a U.S. shareholder having insufficient basis in its first-tier ownership to absorb SFC deficits used to reduce DFIC earnings amounts will suffer immediate gain. To avoid this result, if the U.S. shareholder does not make the basis election, the gain reduction rule would subject to immediate tax the U.S. shareholder's receipt of §965(b) PTI (assuming no other basis exists). In the absence of an ordering rule governing PTI, taxpayers will be uncertain as to the tax consequences of a distribution of §965 PTI.
Prop. Regs. §1.965-3(b)	Rules For Disregarding Certain Assets For Determining Aggregate Foreign Cash Position	Obligations Between Related SFCs	Restore the rule of Notice 2018-7, §3.01(b) that provides that obligations between related SFCs are disregarded to the extent of common ownership without regard to whether the obligation exists in respect of	Prop. Regs. §1.965-3(b)(1) disregards obligations between related SFCs for purposes of measuring the U.S. shareholder's aggregate cash position only to the extent that the obligation exists on the same cash measurement date (first, second, or final) for

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
			both counterparty SFCs on the same cash measurement date. Treasury has the authority in §965(o) to promulgate this suggested modification. Treasury has the authority in both §§965(o) and 1502 to promulgate this suggested modification.	both the counterparty SFCs. This is a significant change from the prior notice (Notice 2018-7).
		Same Cash Included by Two SFCs on Same Cash Measurement Date	Prop. Regs. §1.965-3(b)(2) identifies specific types of assets that can be excluded from the definition of "cash" by an SFC if it can be supported that that asset has already been included as "cash" by another SFC on the same cash measurement date. Cash should be added as an asset subject to this rule.	If cash is not considered as an asset eligible for this exclusion, there could be double counting of cash, for example, as a result of a §381 transaction to effectuate an integration of SFCs following an acquisition.
Prop. Regs. §1.965-4(b)	Transactions Undertaken with a Principal Purpose of Changing the Amount of a §965 Element	§481(a) Adjustment	An increase in §960 deemed paid credit does not count as a change in a §965 element for purpose of the accounting method change if it is as a result of an increase in your §965 inclusion.	For companies filing accounting method changes with positive §481(a) adjustments, their transition tax liability would have been increased even if the positive E&P adjustments would pull up more §960 deemed paid credit. However, because the way the current proposed regulation is written, companies now don't need to pay tax on 25% of the positive §481(a) adjustment. As such, a portion of the §481(a) adjustment is tax-exempt permanently. Prop. Regs. §1.965-4(b) provides that a transaction is disregarded for purposes of determining the

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				amounts of all §965 elements of a U.S. shareholder if the transaction would change the amount of the §965 element of the U.S. shareholder. A change in a §965 element includes (1) a reduction in a U.S. shareholder's §965(a) inclusion amount with respect to a specified foreign corporation, (2) a reduction in the aggregate foreign cash position of the U.S. shareholder, and (3) an increase in the amount of foreign income taxes of a specified foreign corporation deemed paid by the U.S. shareholder under §960 as a result of a §965(a) inclusion. Prop. Regs. §1. 965-4(c) and (d) state that any change in method of accounting made for a taxable year that ends in FY18 or FY19 is disregarded for purpose of determining the amounts of all §965 elements if it changes the deemed paid FTC as a result of a §965(a) inclusion.
		Automatic Method Change Procedures	Amend the automatic method change procedures to disregard deemed paid foreign tax credits resulting from the application of §965 in applying the procedures to accounting method changes in the 2017 or 2018 tax year(s), as applicable, to which the toll tax applies. See AICPA letter dated August 30, 2018, making same recommendation.	A taxpayer that voluntarily changes its accounting method with IRS consent receives audit protection for that method. However, a CFC does not receive audit protection if any of the CFC's domestic corporate shareholders computed an amount of foreign taxes deemed paid under §§902 and 960 that exceeds 150% of the average amount of foreign taxes deemed paid under §§902 and 960 in the shareholder's three prior tax years. The point of this provision is to prevent a taxpayer from utilizing

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				accounting method changes in a way that inappropriately increases the taxpayer's foreign tax credits. However, as a result of the imposition of the toll tax under §965 in 2017, it is likely that a taxpayer's deemed taxes paid in 2017, or 2018, as applicable, will exceed 150% of the deemed taxes paid in the prior three tax years as a result of the toll tax. Thus, CFCs would not receive audit protection in connection with accounting method changes in 2017 or 2018, as applicable, as a result of the enactment of the toll tax, for reasons unrelated to the purpose of the denial of audit protection.
Prop. Regs. §1.965-4(c)	Disregard Of Certain Changes In Method Of Accounting And Entity Classification Elections	Entity Classification Election	Provide an exception to the entity classification rule if the election only changes the U.S. shareholder from a domestic pass through entity to a domestic c-corp (or vice-versa), similar to the results obtained pursuant to an election under the §962 provisions.	The entity classification rule should not apply to a check the box (CTB) election that changes the U.S. shareholder from a domestic pass-through entity to a C corporation (or vice versa).
Prop. Regs. §1.965-4(f)	Disregard Of Certain Transactions Occurring Between E&P Measurement Dates		Treasury should modify the Prop. Regs. §1.965-4(f) rule to provide that in the case of specified payments occurring in the ordinary course of business, Prop. Regs. §1.965-4(f) shall not apply to all or a portion of a specified payment to the extent that the taxpayer can demonstrate to the satisfaction of the Secretary that applying Prop. Regs. §1.965-4(f) would result in the	Prop. Regs. §1.965-4(f) provides that, with respect to the E&P measurement date of December 31, 2017, if a payor's E&P is reduced as of such date by a "specified payment" (including a distribution) made after 11/2/2017 and on or before 12/31/17, the payment (and associated reduction in E&P as of 12/31/17) is disregarded if the related payee has a different tentative E&P measurement date.

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
			double counting of E&P of the payor SFC or the payee SFC as of its E&P measurement date. For this purpose, ordinary course payments would include specified payments for services, rents, royalties, interest and distributions pursuant to the taxpayers day-to-day conduct of business, and not entered into with a principal purpose of reducing the E&P of an SFC as of the 12/31/17 E&P measurement date. Treasury has the authority in §965(o) to make the suggested modification. The Conference report also provides that Treasury may identify instances in which it is appropriate to grant relief from potential double counting of earnings and profits.	In cases in which an SFC both receives and pays specified payments on or after November 3, 2017, and on or before December 31, 2017, if only one side of the payment streams is disregarded pursuant to Prop. Regs. §1.965-4(f), for example because one side of the payments is between two related SFCs having the same tentative E&P measurement date, the application of Prop. Regs. §1.965-4(f) could result in a double counting of E&P to the detriment of the U.S. shareholder. This result is inappropriate because Prop. Regs. §1.965-4(f) is intended to prevent a reduction of the payor SFC's E&P as of its E&P measurement date of December 31, 2017, but it is not intended to cause the payee SFC's E&P to be increased to the extent that the overall E&P of all SFCs is greater than it would have been in the absence of the specified payment streams.

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
		Double Counting §965 Amount for Transactions between Measurement Dates	Revise the rule so that a payment which results in double counting reduces the payor's §965 inclusion amount without any adjustment to the payee's §965 amount. This would solve the mismatch of §959(c)(2) and (c)(3) earnings and avoid the trapped PTI/nimble dividend issues moving forward.	The proposed regulations provide that if a payment is made from one DFIC to another DFIC between the measurement dates, such payment may be disregarded for purposes of determining the post-86 E&P of each payor and payee as long as the following conditions are met: (1) the payor and payee are related, (2) the payor and payee have different tentative E&P measurement dates, (3) the payment occurs between 11/2 and 12/31/17, (4) the payment would reduce the payor's post-86 E&P for the 12/31 measurement date. If a payment is disregarded, then the 11/2 or 12/31 amounts are calculated as if the payment was never made, which, in effect, keeps the earnings with the payor and excludes the earnings from the payee. This approach of keeping the earning with the payor causes negative §959(c)(3) earnings for the payor, which may result in trapped PTI or limit the amount of taxes available as tax credits if that entity has a subpart F inclusion post inclusion year. This approach is also against the specified ordering rules codified in §965(d)(3), which provides that dividends between SFCs reduce the post-86 E&P for purposes prior to determining the §965 inclusion amount for that entity as opposed to disregarding that dividend and keeping those earnings with the payor.

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				For example, CFC2, a 12/31 year-end DFIC with $100 of accumulated E&P as of 11/2/2017 and no other earnings after this date, pays a dividend of $100 on 11/3/2017 to its parent, CFC1, another 12/31 year-end DFIC with $100 of accumulated E&P immediately prior to receipt of the distribution and has no other earnings for the year. CFC2 has a $100 of post-86 E&P using the tentative measurement date of November 2 and CFC1 has $200 post-86 E&P using the tentative measurement date of December 31. This outcome would result in the double counting of $100 for §965 purposes. If the $100 payment is disregarded per the double counting rules in Prop. Regs. §1.965-4(f), then CFC2, the payor, would have $100 of post-86 E&P on the Nov 2 measurement date (unchanged from the prior example), and CFC1 would have $100 of post-86 E&P as of 12/31. From a U.S. shareholder perspective, this approach removes the double counting of the $100 payment, but on a CFC level it results in the mismatch of §959(c)(2) and (c)(3) earnings. CFC2 has $100 of 965 inclusion, but it has $0 of §959(c)(3) earnings at the end of the year, meaning that after adjustments from §965 it would end the year with negative ($100) of §959(c)(3) earnings. CFC1, on the other hand, has $100 of §965 inclusion, but has $200 of §959(c)(3) earnings at the end of the year pre-§965, meaning that it

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				would end the year with positive $100 of §959(c)(3) earnings. While an excess of §959(c)(3) earnings may not be disadvantageous due to the application of §245A, the negative §959(c)(3) earnings at CFC2 may cause significant adverse impacts to taxpayers. If CFC2 was able to reduce its §965 amount by the $100 double counted earnings, it would have a §965 amount of $0, which would match its year end §959(c)(3) pool of $0 because of its $100 dividend. CFC1 would have $200 of §965 amount (its $100 of earnings plus the $100 dividend), which would match it year §959(c)(3) pool of $200. The approach would still reduce the US shareholder's total §965 inclusion by the $100 previously double counted payment, while also aligning the pools on a CFC by CFC level.
		Tiered Double Counting §965 Amount for Transactions Between Measurement Dates	The double counting rules in Prop. Regs. §1.965-4(f) do not address situations where disregarding one specified payment causes another payment to become a specified payment after a change in a SFC's measurement date.	Treasury should clarify that the Prop. Regs. §1.965-4(f) double counting rules apply in cases where disregarding a specified payment results in the payee switching its measurement date, which then creates new specified payments which should also be disregarded or else they will be double counted in the a U.S. Shareholder's §965 inclusion. For example, prior to any dividends, CFC1 had no accumulated or current E&P in 2017 and it owns 100% of CFC2. CFC2 had no earnings as of

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				12/31/16 and earned $150 on 6/1/2017 with no other current earnings. CFC2 also owns 100% of CFC3. CFC3 had no earnings as of 12/31/2016 and earned $100 on 8/1/2017 with no other current earnings. CFC1, CFC2, and CFC3 have 12/31 year-ends for US tax purposes. On 11/15/2017, CFC3 paid a $100 dividend to CFC2. On 11/16/2017, CFC2 paid a $50 dividend to CFC1. The tentative measurement date and amount for each entity would be as follows: $100 as of 11/2 for CFC3 (it had $0 earnings as of 12/31); $200 as of 12/31 for CFC2 ($150 of earnings plus $100 dividend received minus $50 dividend paid--it had $150 earnings as of 11/2); and $50 as of 12/31 for CFC1 (it had $0 earnings as of 11/2). CFC3 to CFC2 double counting: Because CFC3 uses the 11/2 measurement date and CFC 2 uses the 12/31 measurement date, the dividend payment from CFC3 to CFC2 between measurement dates is a specified payment under Prop Reg 1.965-4(f) and is therefore disregarded. If it is disregarded, then CFC3 would have $100 of earnings on both the 11/2 or 12/31 measurement dates and CFC2 would have $150 of earnings as of 11/2 and only $100 of earnings as of 12/31, so it would switch to the 11/2 measurement date. CFC2 to CFC1 double counting: Now that CFC2

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				has switched to the 11/2 measurement date after applying the double counting rules for the specified payment between CFC3 to CFC2, CFC2 and CFC1 are now both double counting the $50 dividend paid by CFC2 to CFC1 between measurement dates. The proposed regulations do not address this situation; the regulations should be clarified to disregard the $50 payment.
Prop. Regs. §1.965-5(b)	Rules For Foreign Income Taxes Paid Or Accrued	Withholding Tax Haircut	Modify regulations so that companies do not lose credits for foreign withholding taxes imposed on distributions of earnings that have already been subject to the transition tax.	Under Prop. Regs. §1.965-5, there is no credit available for the applicable percentage of withholding taxes paid or accrued when earnings taxed under §965 ("Section 965 PTI") are distributed. This rule is not supported by the statutory language of §965(g). Moreover, this proposed rule effectively limits the amount of foreign withholding tax credits a company may take when, in the future, it chooses to repatriate any of its foreign cash (which was already taxed under §965) back to the United States. By limiting the dollar-for-dollar credit available for the withholding taxes incurred on distributions of previously taxed income, the regulations are discouraging companies from investing its historic foreign earnings back into the United States.
Prop. Regs. §1.965-5(c)	Rules For Foreign Income Taxes Treated As Paid Or Accrued	Upper-Tier Entity Definition	Clarify that references to "upper-tier foreign corporation" includes a disregarded entity or partnership that is legally an owner of the SFC in question, and that references to distributions similarly refer to legal	Prop. Regs. §1.965-5(c)(1)(ii) limits §960(a)(3) PTI taxes to foreign income taxes paid or accrued by an "upper-tier foreign corporation" with respect to a "distribution" of PTI from a "lower-tier foreign corporation." Read literally, it appears that the

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
			distributions not to U.S. tax characterizations. Consequently, the definition of distribution and upper-tier foreign corporation are to be read by reference to the foreign legal ownership, and not U.S. tax classification. When a disregarded entity makes a cash distribution to its owner, or a partnership distributes cash to its partners, subsequent to the imposition of U.S. tax on those earnings, the distribution may not be recognized for U.S. tax purposes as a distribution of PTI, but it would be so recognized for foreign tax purposes and consequently any foreign withholding tax imposed on such a distribution clearly should be eligible for creditability pursuant to §960(a)(3). Treasury has the authority in §965(o), as well as §7805 (providing the Secretary with the authority to prescribe all needful rules and regulations for the enforcement of the Internal Revenue Code), to make the suggested modification.	proposed regulation is limited to transactions between two recognized CFCs and not when a disregarded entity or partnership makes a distribution of PTI to its owner or partners, respectively. Section 960(a)(3) provides that any portion of a distribution to a domestic corporation that is PTI is treated by the domestic corporation as a dividend solely for purposes of taking into account under §902 any income, war profits or excess profits taxes paid to any foreign country on or with respect to the accumulated profits of such foreign corporation from which such distribution is made so long as such taxes were previously deemed paid. Nothing in §960(a)(3) suggests that it is limited to taxes imposed on distributions between corporations that are so recognized for U.S. tax purposes. As the taxes of a partnership and a disregarded entity are treated as those of the partnership and owner, respectively, under Regs. §1.901-2(f)(4), a distribution from such an entity to its partners or owner is treated as a tax passed onto the partners (under Regs. §1.704-1(b)(4)(viii)) or imposed on the owner. The legislative history of §960(a)(3) has an example of the provision applying to a distribution subject to withholding tax

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				from a lower-tier company to an upper-tier company. A failure to modify the regulation as suggested would put taxpayers who have made permitted elections under the entity classification rules to treat foreign eligible entities as disregarded or as partnerships at a significant disadvantage relative to taxpayers who have not exercised the regulatory right to elect the U.S. tax classification of foreign entities (although even for these taxpayers, some of their foreign entities may default into disregarded or partnership classification).
		Taxes Attributable to Allocated §965(b) Losses Cannot Be Credited	These taxes should meet the requirements of §960(a)(3) as they are income taxes paid on or with respect to the §965(b) PTI.	The Preamble states that foreign taxes which are not included by a U.S. shareholder under §965 as a result of the §965(b) loss allocation cannot be credited under §960(a)(3) since these taxes were not imposed on a distribution of PTI and §965(b) earnings are "treated as having been included in a U.S. shareholder's income under §951(a)" and, therefore, the related taxes are treated as having been deemed paid. In sum, the Preamble states that "no credit is allowed under section 960(a)(3) or any other provision of the Code for such taxes." These taxes should not be excluded as a credit. It is unclear how these taxes, which represent actual foreign income taxes paid by a CFC, can be viewed

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
				as already being paid or accrued because of the §965(b) losses. Section 965(b)(4)(A) states that §965(b) earnings are treated as PTI for purposes of §959; it does not say for purposes of §960.
Prop. Regs. §1.965-6(c)	Section 902 Fraction	E&P increase per §965(b)(4)(B) happens as the first day of the corporation's first day of the next year (Prop. Regs. §1.965-6(c)(3))	Conform the regulations with the language of §965(b)(4)(B) to provide that these adjustments happen in the last taxable year which begins before January 1, 2018.	The Preamble states that Treasury and the IRS have decided that the increase in an E&P deficit foreign corporation's E&P per §965(b)(4)(B) should not apply for purposes of §902. To achieve this outcome, the proposed regulations state that this §965(b)(4)(B) increase does not occur until the first day of the foreign corporation's first taxable year following the corporation's last taxable year that begins before Jan 1, 2018. This provision in the proposed regulations goes against the language in the code; §965(b)(4)(B) states that with respect to any taxable year beginning with the taxable year described in §965(a) (i.e., the inclusion year), the E&P deficit foreign corporation's E&P is increased by its allocated losses. The code makes it clear that this increase happens in the inclusion year, not in the year after the inclusion year.
		Tax Credits for E&P Deficit Foreign Corporation are not Deemed Paid to the U.S. Shareholder	Clarify that these taxes are able to be used by the taxpayer, either as part of the §965 inclusion (e.g., allocated pro rata to other DFICs) or as part of future inclusions.	The proposed regulations confirm that when the denominator in the §902 fraction is zero or less than zero, then no taxes are deemed paid with respect to any §965 inclusion.

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
		(Prop. Regs. §1.965-6(c)(2))		The proposed regulations do not further address what happens to tax credits which are not deemed paid per §965 because the denominator in the §902 fraction is zero or less than zero. Previously, when the denominator is zero and there is a nimble dividend, the tax credits, which represent actual foreign income taxes paid, do not go away. Instead they are deferred for potential future use by the taxpayer.