Feedback for Notice 2018-07 (Repatriation) as of 1/31/2018

NOTICE 2018-07, SECTION NUMBER	SECTION TITLE or ISSUE TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
Section 3.01	Determination of Aggregate Foreign Cash Position		How will intercompany dividends be calculated?
Section 3.01(b)	Treatment of Related-Party Transactions for Purposes of Determination of Cash Position	Short term loans from foreign affiliates to U.S. parent are counted as part of aggregate foreign cash irrespective of whether they triggered a taxable inclusion pursuant to §956.[1] Short term loans that have triggered an inclusion should be associated with previously taxed income (PTI) and excluded from the aggregate foreign cash.	
Section 3.02(a)	Adjustments to Post-1986 Earnings and Profits to Account for Certain Amounts Paid or Incurred Between Specified Foreign Corporations Between Measurement Dates	Future guidance should clarify how E&P and previously taxed income ("PTI") is apportioned between related CFCs in certain transactions that could give rise to double-counting of E&P.	Section 3.02 generally provides that the Department of Treasury and the IRS intend to issue regulations to address the potential of double-counting or double non-counting of post-1986 E&P arising from amounts paid or incurred between related specified foreign corporations occurring between measurement dates. The Notice provides examples of the double-counting and double non-counting that the regulations will address. While the examples show the aggregate amount of E&P for the related CFCs for

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

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			purposes of §965 would not double-count the amounts paid between them, they do not show how the E&P would be apportioned between the CFCs or how PTI would be allocated to the CFCs. Future guidance should clarify these open issues.
Section 3.02(b)	Determination of Amount of Diminution by Reason of Distributions to Specified Foreign Corporations	Further guidance to avoid double-counting of E&P on other transactions such as reorganizations and liquidations that occurred between the measurement dates where E&P was transferred from one CFC to another CFC. Such E&P transfers are similar to or have the same effect as actual dividends from one CFC to another CFC.	These actions, since they have the same impacts/effects of dividends, should be recognized similarly when calculating E&P.
Section 3.02(d)	Coordination Between Sections 959 and 965 in the Inclusion Year	Future guidance should clarify how E&P and PTI is apportioned in situations where a CFC has PTI attributable to §965 inclusions and also has PTI attributable to other subpart F inclusions arising outside of §965.	Section 3.02(d) of the Notice provides steps regarding the coordination of §§965 and 959 in the inclusion year regarding various types of inclusions of a deferred foreign income corporation ("DFIC"), and Section 3.03 of the Notice provides that the amount of gain recognized by a United States shareholder with respect to the stock of a DFIC under IRC §961(b)(2) will be reduced by the IRC §965(a) inclusion amount. However, the Notice does not specify the order in which PTI attributable to different types of inclusion would be apportioned. Future guidance should provide this clarification and in particular, provide that a CFC's PTI would be allocated first to IRS §965 inclusions and then to other

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			Subpart F inclusions.
Section 3.03	Application of Section 961 to Amounts Treated as Subpart F Income Under Section 965	See comment under Section 3.02(d), above.	
Other Issues	Definition of "Cash": Net Accounts Payable	Future guidance should address net accounts payable and how such accounts reduce a U.S. shareholder's "cash position."	The Notice does not discuss whether the net accounts payable can offset a United States shareholder's aggregate foreign cash position. The Notice addresses the treatment of certain related-party transactions involving net accounts receivables and short-term obligations between related specified foreign corporations for purposes of determining a United States shareholder's aggregate foreign cash position. The Notice does not, however, discuss whether, in the case of a United States shareholder having an overall net account payable can reduce its aggregate foreign cash position by such net account payable. Future guidance should permit such net accounts payable (i.e., the amount by which net accounts payable exceed net accounts receivable) to reduce a U.S. shareholder's "cash position" as defined in §965(c)(3)(B).
	Definition of "Cash": Treatment of Legally Restricted Funds	Cash position should not include legally restricted funds	Treasury should clarify that a U.S. shareholder's cash position, for purposes of the split rate, should be reduced to the extent a CFC has "cash" that is subject to currency or other legal restrictions imposed by a foreign country that prevents

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			its distribution to the U.S. If foreign law prevents the cash from being freely available for distribution, the CFC's holding of cash is not driven by the U.S. tax consequences of a distribution, and the cash is not available to pay the U.S. tax liability. Treasury could address this issue by adopting language similar to the blocked earnings rule in Treas. Reg. §1.964-2, which reduces E&P of a CFC for any amount that "is established to the satisfaction of the district director … was subject to a currency or other restriction or limitation imposed under the laws of any foreign country … on its distribution to Unites States shareholders who own … stock of such corporation."
	Definition of "Cash": Reduction for Short-Term Debt Liabilities and Accounts Payable	Cash should be reduced to the extent of - (i) third party debt liabilities payable within 12 months of the cash measurement date, and (ii) accounts payable in excess of accounts receivable	Treasury should define a U.S. shareholder's cash position, for purposes of the split rate, to exclude the amount of any debt obligation of a CFC to an unrelated person that is due within one year of the cash determination date regardless of whether the obligation originally had a term of more than one year from the issue date. We note that, for financial statement purposes, liabilities with a remaining term of less than one year are accorded the same treatment as other short-term liabilities.

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			The cash, to the extent of such liabilities, is no more available for distribution to the U.S. to pay the transition tax than E&P invested in non-liquid assets. This is the case regardless of whether the debt originally had a term of more than one year from the date of issue. Reducing the cash position by this amount is consistent with including within the definition of cash any obligation held by a CFC that has a term of less than one year. It is also consistent with the rule netting accounts payable against accounts receivable for purposes of measuring the cash position.
	Definition of "Cash": Treatment of Previously Taxed Income (PTI)	Cash position should be reduced by undistributed PTI	Treasury should define a U.S. shareholder's cash position, for purposes of the split rate, as being reduced to the extent a CFC has undistributed PTI within the meaning of §959. For purposes of the transition tax, the E&P of a taxpayer's CFCs is fully allocated to the cash of the CFCs to the extent thereof (i.e., there is no tracing of cash to actual sources). A reduction of E&P by the amount of PTI should therefore result in an equal reduction of the cash position for purposes of the transition tax. To the extent of PTI, the E&P has been subject to full US tax, and, the E&P

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			subject to the transition tax is appropriately reduced by PTI. Consistent with this, the cash position should also be reduced by PTI. This would be the result if there were in fact a cash distribution of PTI. There are various reasons why a CFC would not have distributed PTI as of the date that cash is measured for purposes of the transition tax (e.g., the potential application of a high foreign withholding tax). This should not result in a higher transition tax than if the PTI had been distributed.
	Definition of "Cash": Treatment of Foreign Taxes Paid	Netting of E&P and deficits should include netting foreign taxes paid by deficit CFCs with foreign taxes paid by positive CFCs.	Section 965 does not address whether the E&P deficits and related foreign taxes of "deficit" CFCs are combined with the E&P and related foreign taxes of "positive" CFCs. Without clarification by Treasury, the result differs from that obtained where the positive and deficit operations and related foreign taxes are generated within a single CFC. Combining the E&P deficits and foreign taxes of deficit CFCs with the earnings and taxes of positive CFCs effectuates the objective of netting positive and negative E&P of separate CFCs. It avoids disparate treatment of operations conducted through separate CFCs rather than through a single CFC. The recommendation allows a U.S. shareholder to claim foreign tax credits at

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			its combined world-wide effective tax rate, avoiding trapped foreign taxes and double taxation in transition to the new international system, consistent with Congressional intent in allowing the combination of attributes across CFCs pursuant to this provision.
	Reference to "Net Operating Loss" under Section 965(n)	Section 965(n) should be clarified to allow current year 2017 taxable losses to be included in the definition of "net operating loss".	The intended purpose of new §965(n) was to allow a corporation to elect out of using its net operating losses from prior years, or its losses in the current year (the year of the deemed repatriation), against the deemed repatriation amount. The language as it is currently written is clear that the election applies to carryover and carried back net operating losses; however, it is possible to interpret the proposed language to exclude a taxpayer's current year (2017) net operating loss from the elect out. This appears inconsistent with the description on page 360 of the "Explanation of the Bill" released by the Senate Budget Committee on November 29th interpreting the elect out to apply to current year losses as well.
	Withholding Taxes on Transition Tax PTI	Request for guidance that withholding taxes on transition tax inclusion PTI is not subject to §965(g) disallowance	The Notice does not discuss whether withholding taxes on the transition tax inclusion PTI under §965 is subject to §965(g) disallowance. Future guidance should permit the utilization of withholding taxes on transition tax inclusion PTI.