Feedback for REG-101828-19 (Guidance under §958[1] (Rules for Determining Stock Ownership) and §951A (GILTI) as of 9/16/2019

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Prop. Regs. §1.951A-2(c)(6)	**Rules applicable to controlling domestic shareholder groups; Definition of tentative gross tested income item and tentative net tested income item; Taxes paid or accrued with respect to a tentative net tested income item**	All or nothing election	Rules should eliminate the all or nothing election. The GILTI high tax exclusion election should be made on a CFC by CFC basis, as currently allowed for FBCI and insurance income under §954(b)(4), and not have a blanket election for all CFCs of a controlling domestic shareholder group.	Eliminating the all or nothing rule would better align Prop. Regs. §1.951A-7(b) with the Subpart F high-tax exception under §954(b)(4). The preamble makes it clear that Treasury relies on §954(b)(4) as its statutory authority for the GILTI high tax exclusion. For the GILTI high tax election, however, Treasury adds a conformity provision requiring that a GILTI high tax election for one CFC applies to all CFCs which are part of the controlling domestic shareholder group. This requirement was not previously part of the §954(b)(4) regime. If Treasury's intention is to treat a CFC's high-taxed income in the same manner as its high-taxed FBCI and insurance income, as stated in the preamble, it should apply the same rules as currently applicable to FBCI and insurance income. Also, it is clear from the GILTI mechanics that CFC tax rate blending (high and low pools) can reduce overall GILTI liability, so blending the tax rate of CFC's not making the high tax exclusion election should

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

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				not change the original intention of this regime. Therefore, this provision should be revised to allow a CFC-by-CFC election to apply to the GILTI high tax exclusion.
Prop. Regs. §1.951A-2(c)(6)	**Rules applicable to controlling domestic shareholder groups; Definition of tentative gross tested income item and tentative net tested income item; Taxes paid or accrued with respect to a tentative net tested income item**	Determination of whether item is high-taxed income	The determination of whether an item of income is high-taxed income should be made on a CFC-by-CFC basis, as currently allowed for FBCI and insurance income under §954(b)(4), instead of on a QBU-by-QBU basis.	Determining whether income is high-taxed on a CFC-by-CFC basis, rather than on a QBU-by-QBU basis, would better align Prop. Regs. §1.951A-2(c)(6) with the Subpart F high-tax exception under §954(b)(4). The preamble makes it clear that Treasury relies on §954(b)(4) as its statutory authority for the GILTI high tax exclusion. For the GILTI high tax election, the proposed regulation applies the high-taxed income determination on a QBU-by-QBU basis. This requirement was not previously part of the §954(b)(4) regime. If Treasury's intention is to treat a CFC's high-taxed income in the same manner as its high-taxed FBCI and insurance income, as stated in the preamble, it should apply the same rules as currently applicable to FBCI and insurance income. Therefore, this provision should be revised to apply the determination of high-taxed income to be made on a CFC-by-CFC basis.

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	Definition of tentative gross tested income item and tentative net tested income item; Taxes paid or accrued with respect to a tentative net tested income item	Determination of whether item is high-taxed income	Alternatively, the Chamber requests that, to reduce some of the complexity and administrative burden, the QBU by QBU approach be simplified by allowing taxpayers to elect, for purposes of the GILTI high tax exclusion, to combine "qualifying QBUs" within the same CFC. The term "qualifying QBUs" would mean QBUs that (i) are located within the same CFC, (ii) are located within the same country, (iii) that the same local tax statutory rate is applied to all taxable profits, and (iv) have the same functional currency. Such combination of qualifying QBUs would be a "combined QBU group."	Determining high-taxed income on a QBU-by-QBU basis without further grouping would place an overwhelming administrative burden on taxpayers, especially larger taxpayers operating through numerous legal entities for non-tax reasons. Furthermore, a QBU-by-QBU determination is inconsistent with the Congressional focus for GILTI to target income in low- and zero-tax jurisdictions. Compared to a QBU-by-QBU approach, this approach would be more consistent with Congressional focus on operations in low- and zero-tax jurisdictions while alleviating the administrative burden on taxpayers and reducing incentives for tax-motivated restructuring.
	Limitations by reason of revocation	Time limitations	The high tax exception election should be available and made on an annual basis.	Allowing the election to be made on an annual basis would align with the Subpart F high tax exception §954(b)(4). The preamble itself makes it clear that Treasury relies on §954(b)(4) as its statutory authority for the GILTI high tax exclusion. The proposed regulations, however, add burdensome timing requirements for the GILTI high tax election which are a departure from the general application of §954(b)(4) and for which no policy reasons are evident. Specifically, Prop. Regs. §1.951A-

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				2(c)(6)(v)(2) states that once the GILTI high tax election is made, it cannot be revoked for 60 months (with a onetime exception for the first revocation). Similarly, if revoked, the election cannot be made for 60 months. This 60-month restriction imposes an unmanageable administrative burden on taxpayers. Determining whether an election (or revocation) would be beneficial or detrimental over a 60-month period is not administratively feasible for most taxpayers with businesses spread over multiple jurisdictions. First, a taxpayer often cannot determine its international business model (acquisitions, dispositions) over greater than an annual period. Second, each year some countries will change their systems of taxation, including headline tax rates. An annual election would be consistent with standard operating procedure for most businesses. If Treasury's intention is to treat a CFC's high-taxed income in the same manner as high-taxed FBCI and insurance income, as stated in the preamble, it should apply the same rules as currently applicable to FBCI and insurance income.

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				Therefore, this provision should be revised to allow an election for the GILTI high-tax exclusion to be made on an annual basis.
	Definition of tentative gross tested income item and tentative net tested income item; Taxes paid or accrued with respect to a tentative net tested income item	Different foreign tax years and tax accounting methods	Different foreign tax years: Revise the proposed regulations to provide that, to the extent taxpayers are required to use a tax year different from the CFC's U.S. tax year, such taxpayers are allowed to choose to apportion foreign taxes on a closing of the books or pro rata basis for purposes of calculating the effective rate at which taxes are imposed on tentative net tested income pursuant to the GILTI high tax exclusion election under Prop. Regs. §1.951A-2(c)(6)(v)(A). Alternatively, revise the proposed regulations to provide that U.S. shareholders of a controlled foreign corporation to use a tax year different from its U.S. tax year are allowed to calculate the effective rate at which taxes are imposed on tentative net tested income pursuant to the GILTI high tax exclusion election on the basis of a controlled foreign corporation's income and taxes accrued in the foreign fiscal year. Different foreign tax accounting methods: Revise the proposed rules to provide that, to the extent necessary to avoid distortions created by mismatches between U.S. and foreign income recognition principles, taxpayers are allowed to choose to adopt methods of accounting (including mark-to-market) required by local law applicable to a controlled foreign corporation for purposes of-calculating the effective rate at which taxes are imposed on tentative net tested	Different foreign tax years: Current year taxes under Prop. Regs. §1.960-1(b)(4) are foreign income taxes that are attributed to income to the extent they are paid or accrued in the U.S. taxable year of the controlled foreign corporation (in other words, paid or accrued by December 31st for calendar year taxpayers, as the calendar year would generally be the taxable year of the controlled foreign corporation for US tax purposes pursuant to §898). As a result of different U.S. and foreign tax years, tentative net tested income (determined, under Prop. Regs. §1.951A-2(c)(6)(ii)(B) by reference to the rules under Regs. §1.952-2, by reference to the gross income and allowable deductions of a controlled foreign corporation by treating such corporation as a domestic corporation) may not appropriately match foreign income taxes ultimately due with respect to such income if the income is earned in the calendar year and foreign income tax is not accrued until the close of the foreign tax year (*i.e.*, after the close of that calendar year). If this mismatch results, then under the current proposed regulations the amount of foreign income

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			income pursuant to the GILTI high tax exclusion election under Prop. Regs. §1.951A-2 (c)(6)(v)(A). Both recommendations could be subject to the requirement that taxpayers apply the elections consistently from year-to-year and in a reasonable manner.	taxes that are attributed to tentative net tested income for purposes of the GILTI high tax exclusion election under Prop. Regs. §1.951A-2(c)(6)(v)(A) will not properly reflect the actual effective foreign tax rate applicable to such income earned by a controlled foreign corporation and could result in the inability of a U.S. shareholder of that controlled foreign corporation to exclude such tentative net tested income for purposes of calculating the U.S. shareholder's GILTI tax liability. For example, assume US Parent (a calendar year taxpayer) owns CFC 1, a controlled foreign corporation that is organized in Foreign Country X. Foreign Country X requires corporate taxpayers to use a taxable year ending March 31. CFC 1's income is subject to corporate income tax in Foreign Country X at a 30% rate. In December of 2020, CFC 1 earns income of 100, all of which is GILTI. CFC 1 earns no other income in 2020 or 2021. CFC 1 owes tax of 30 with respect to its taxable year ending March 31, 2021. From a U.S. tax perspective, CFC 1 will be considered to have derived income of 100 and to have paid foreign tax of 0 in the taxable year ending December 31, 2020, and to have derived income of 0 and paid foreign tax of 30

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				in the taxable year ending December 31, 2021. As a result, US Parent will not be able to exclude any income of CFC 1 for purposes of calculating its GILTI tax liability even if the GILTI high tax exclusion election under Prop. Regs. §1.951A-2(c)(6)(v)(A) is made, notwithstanding that CFC 1 is paying tax at a 30% rate. Using the above example, the proposed revision would result in a matching of tentative net tested income determined for U.S. tax purposes and the foreign income taxes ultimately due with respect to such income, as the taxpayer would be permitted to apportion foreign taxes for the taxable year ending March 31, 2021 to the calendar year ending December 31, 2020. As a result, CFC 1 will be considered to have derived income of 100 and to have paid foreign tax of 30 in the taxable year ending December 31, 2020, and US Parent will be able to exclude the income of CFC 1 for purposes of calculating its GILTI tax liability pursuant to the GILTI high tax exclusion election under Prop. Reg. 1.951A-2(c)(6)(v)(A). Using the same example, the alternative proposed revision would result in a matching

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				of tentative net tested income determined for U.S. tax purposes and the foreign income taxes ultimately due with respect to such income, as the taxpayer would be permitted to calculate its GILTI tax liability based on the taxable year beginning on April 1, 2020 and ending March 31, 2021. As a result, CFC 1 will be considered to have derived income of 100 and to have paid foreign tax of 30 in the taxable year ending March 31, 2021, and US Parent will be able to exclude the income of CFC 1 for purposes of calculating its GILTI tax liability pursuant to the GILTI high tax exclusion election under Prop. Regs. §1.951A-2(c)(6)(v)(A). Different foreign tax accounting methods: A mismatch between tested income and foreign taxes may result not just from timing differences between U.S. and foreign tax years, but also as a result of different U.S. and foreign rules with respect to the timing for recognition of income or loss. Such a mismatch could likewise create significant distortions in the foreign taxes attributable to a taxpayer's GILTI income. For example, assume US Parent also owns CFC 2, a controlled foreign corporation that is organized in Foreign Country Y. Foreign

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				Country Y requires corporate taxpayers to use a taxable year ending December 31. CFC 2's income is subject to corporate income tax in Foreign Country Y at a 30% rate. CFC 2 earns 100 of income in the foreign taxable year ending December 31, 2020, all of which is GILTI income. Assume also that Foreign Country Y requires corporate taxpayers to mark their assets to market at the end of each taxable year for tax purposes (and that resulting income or loss would also be GILTI income or loss for CFC 2), but that under U.S. federal income tax principles a corporation would not mark-to-market those assets. Under Prop. Regs. §1.951A-2(c)(6)(ii)(B), tentative net tested income is determined by reference to the gross income and allowable deductions of a controlled foreign corporation by treating such corporation as a domestic corporation. As a result, the calculation of CFC 2's gross income and allowable deductions for purposes of computing tested income for GILTI purposes would not include any income or loss resulting from the mark-to-market of assets at year end. If the mark-to-market results in CFC 2 recognizing an additional 50 of income, then total foreign tax of 45 (150 of income

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				multiplied by 30% tax rate) would be due, and for purposes of the GILTI high tax exclusion election under Prop. Regs. §1.951A-2(c)(6)(v)(A) CFC 2 would be deemed to be paying tax at a 45% rate (45 of tax paid *divided by* 100 of regarded income for US tax purposes). However, if the mark-to-market results in CFC 2 recognizing a loss of 50, then foreign tax of 15 (50 of income *multiplied by* 30% tax rate) would be due, and for purposes of the GILTI high tax exclusion election under Prop. Regs. §1.951A-2(c)(6)(v)(A) CFC 2 would be deemed to be paying tax at a 15% rate (15 of tax paid *divided by* 100 of regarded income for U.S. tax purposes). Accordingly, whether or not income of CFC 2 could be excluded for purposes of calculating US Parent's GILTI tax liability pursuant to the GILTI high tax exclusion election under Prop. Regs. §1.951A-2(c)(6)(v)(A) would, as a result of the mismatch between U.S. and foreign income recognition principles, be dependent entirely on market fluctuations which are entirely outside of US Parent's and CFC 2's control, instead of being contingent upon the actual rate of tax imposed on CFC 2 in Foreign Country Y.

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				In order to avoid distortions created by mismatches between U.S. and foreign income recognition principles, U.S. shareholders of a controlled foreign corporation should be allowed to choose to adopt methods of accounting (including mark-to-market) required by local law applicable to a controlled foreign corporation for purposes of calculating the effective rate at which taxes are imposed on tentative net tested income pursuant to the GILTI high tax exclusion election under Prop. Regs. §1.951A-2(c)(6)(v)(A).
Prop. Regs. §1.951A-7(b)	**High tax exclusion**	Applicability date for the high tax exclusion regulations	Provide that taxpayers can rely on the regulations effective for tax years beginning on or after December 31, 2017, provided the rules are consistently applied.	Treasury has affirmed that the high tax exclusion will apply to the GILTI rules in a manner more closely aligned with Congressional intent. Given this, it does not make sense to apply these regulations only to years starting after they are published as final regulations in the federal register (especially when all other GILTI regulations are applicable back to 2018). In other words, if the GILTI high tax exclusion is not applicable until tax years beginning in 2020, then taxpayers would be forced to pay a GILTI tax liability for two years (2018 and 2019) in an amount that may not be consistent with Congressional intent. Treasury should remedy this by conforming the applicability of these

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				regulations with Prop. Regs. §1.951A-7(a), which applies other GILTI regulations to taxable years beginning after December 31, 2017. Taxpayers with high-tax GILTI inclusions and domestic losses are particularly disadvantaged by the absence of retroactivity because they lose the benefit of US expenses that must be allocated against GILTI inclusions and permanently lose domestic losses.