



Feedback for Notice 2018-13 (Repatriation) as of 2/20/2018

NOTICE 2018-13, SECTION NUMBER	SECTION TITLE or ISSUE TOPIC	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
Section 3.01	Determination of Status of a Specified Foreign Corporation as a DFIC or an E&P Deficit Foreign Corporation	<p>Clarify that the reference to “such specified foreign corporation has a deficit in post-1986 earnings and profits” under §965(b)(3)(B)(i) means a deficit in post-1986 E&P except to the extent such earnings are:</p> <p>a) Attributable to income of the SFC which is effectively connected with the conduct of a trade or business within the United States and subject to tax under this chapter, or</p> <p>b) In the case of a CFC, if distributed, would be excluded from the gross income of a US shareholder under §959.</p> <p>This would be consistent with the interpretation of an almost identical definition in prior law, §902(c). See Regs. §1.902-1(a)(9).</p>	<p>The amount of a DFIC’s earnings that are subject to the toll charge is based on its accumulated post-1986 deferred foreign income as defined under §965(c)(2), which means post-86 E&P except to the extent attributable to effectively connected income and §959 PTI. From a policy perspective, the shift to the territorial regime may mean that SFCs with §959(c)(1) or (2) PTI but a deficit in its §959(c)(3) E&P may lose the ability to utilize such deficits going forward if PTI is not excluded in the determination of whether a SFC has a deficit in accumulated post-1986 deferred foreign income. Additionally, taxpayers who did not repatriate PTI prior to the toll charge year because of valid business purposes (e.g., cash requirements for expansion or working capital) or regulatory reasons (e.g., meeting statutory reserves or local restrictions on distributions) are unfairly disadvantaged as compared to similarly situated taxpayers who were able to distribute PTI from their deficit</p>

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			companies.
Section 3.02	Alternative Method for Calculating Post-1986 Earnings and Profits	Calculating E&P requires consideration of applicable taxes, but pre-existing tax law establishes that taxes accrue on December 31 of each year, not earlier. Therefore, a November 2 measurement excludes taxes, resulting in excessively high E&P, and consequently, excessively high repatriation taxes. To avoid this outcome, pro-rating of taxes should be allowed with respect to the November 2 measurement of E&P.	
		Deduct allocable share of FY18 taxes against the calculation of DFI and include 100% of FY18 taxes in the §960 pool.	
Section 3.04(a)	Definitions for Determining Net Accounts Receivable	The Notice defines the term “accounts payable” under §965(c)(3)(C) to mean payables arising from the purchase of property described in §1221(a)(1) or §1221(a)(8) or from the receipt of services from vendors or suppliers. The definition should also include payables arising from the licensing of intellectual property (i.e., royalties or license fee payables). A proviso could be added that the licensing arise in the ordinary course of a trade or business.	The policy rationale for including payables from inventory property or services/ supplies purchases should extend to ordinary course licensing in of software or other technologies for use in a specified foreign corporation’s (SFC) manufacturing or distribution business.
		Future guidance should expand the definition of “accounts payable” for captive finance companies to include accounts and notes payable that offset the financing accounts and notes receivable held on the books of these companies.	Captive finance companies often raise debt in third party markets or borrow from their U.S. parent companies in order to fund their financing and leasing operations. The accounts and notes payable on the books of these companies should be considered “accounts payable” for purposes of §965(c)(3)(C). These

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			<p>payables should offset the accounts and notes receivable to determine “net accounts receivable” under §965(c)(3)(C). Including all accounts and notes receivables from a financing business, without the offset for the debt incurred to fund those assets, overstates the cash position of the company given that a significant amount of the receivables will be used to pay off debt and do not represent unrepatriated earnings held in liquid form.</p>
		<p>The Notice defines the term “accounts payable” under §965(c)(3)(C) to mean payables arising from the purchase of property described in §1221(a)(1) or §1221(a)(8) or from the receipt of services from vendors or suppliers. The definition should also include as accounts payable wages and salaries in addition to the services from vendors and suppliers.</p>	
<p>Section 3.04(b)</p>	<p>Treatment of Demand Obligations</p>	<p>The regulations to be issued should allow that facts and circumstances can overcome the default treatment per the Notice of loans that are payable on demand being treated as short-term obligations.</p>	<p>Though a loan document may contain “on demand” language, the loan’s stated maturity date, the relationship of the parties to the loan, the subordination (if any) of the loan to other debt obligations and any history of loan payments being made on demand should all be considered in determining whether the loan is considered a short-term obligation for purpose of §965(c)(3)(B).</p> <p>The “on demand” language contained in</p>

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			some loan agreements is often boilerplate language that, though included in the document, is very unlikely to be asserted by the lender. This is especially true in situations where the parties to the note are related parties; in particular, where the specified foreign corporation lender is a subsidiary of the borrower. There could also be superior debt obligations that limit or prohibit cash transfers from US debtor companies to foreign affiliates that are not obligors on the superior debt.
Section 5.02	Elimination of Form 5471 Filing Obligation for Certain Constructive Owners	Foreign multinationals who are publicly traded with U.S. subsidiaries that otherwise would not have CFCs should not be subject to the compliance burden of Form 5471 for each attributed CFCs pursuant to §6038.	
Other Issues	Reference to “Net Operating Loss” under §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

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			<p>“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.</p>
	<p>Election to pay tax liability in installments under §965(h) and to defer inclusion in taxable income under §965(m)</p>	<p>Confirmation that multinationals (including REITs) that hold interests in DFICs through majority-owned pass-through entities can elect to pay tax liability in installments/defer inclusion of deemed repatriated income pursuant to §956(h) and (m) respectively.</p>	<p>Section 965(h) permits U.S. shareholders of DFICs to elect to pay the deemed repatriation amount in eight installments.</p> <p>Section 965(m) allows REIT shareholders of DFICs to elect to include the deemed repatriation amount in income in eight installments. Many companies, including REITs, that operate on a multinational basis own and operate some of their businesses and properties through majority-owned operating partnerships that in turn own DFICs.</p> <p>Treasury should confirm that the ability to make these elections can flow through the partnership to the U.S corporate shareholder or REIT, respectively.</p>
	<p>Definition of “Cash”: Treatment of Previously Taxed Income (PTI)</p>	<p>Cash position should be reduced by undistributed PTI</p>	<p>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.</p> <p>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</p>

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			<p>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.</p> <p>To the extent of PTI, the E&P has been subject to full US tax, and, the E&P 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.</p>
	Definition of Cash: SFCs that are Publicly Traded	<p>An exception for equity interests that are sufficiently large that the U.S. shareholder has to include in its cash position its pro rata share of the SFCs' cash; or</p> <p>An exception for equity interests above 10%.</p>	<p>Section 965(c)(3)(B)(iii) requires the aggregate foreign cash to include the fair market value of personal property which is of a type that is actively traded on an established securities market.</p> <p>This rule potentially is implicated by an equity interest in an SFC that is held as a long-term, strategic asset but has some public shareholders due to legal, financing, strategic, or other business considerations.</p>

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			This therefore could result in a transition tax liability on E&P at the 15.5% rate (rather than 8%) where shares of an SFC that are majority owned are counted as part of the aggregate foreign cash position.
	Definition of Cash and E&P Determination: Treatment of Blocked Income and Assets	Guidance clarifying that certain blocked assets should not be taken into account when determining repatriation amounts because they cannot be repatriated.	It should be clarified that §964(b) should be applied to repatriation determinations. This would be consistent with current law. Section 964(b) says that no part of profits and earnings of a CFC for any taxable year shall be included in earnings and profits under §§952 and 956. We believe this should be extended to repatriation considerations as Treasury has already deemed these to be blocked assets.