

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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November 16, 2020

Office of Associate Chief Counsel
Attention: Christina G. Daniels and Lynlee C. Baker
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CC:PA:LPD:PR (REG-110059-20)
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Internal Revenue Service
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Via Federal eRulemaking Portal

RE: Comments on REG-110059-20: Ownership Attribution Under §958 for Purposes of §§367(a) and 954(c)(6)

Dear Sir or Madam:

The U.S. Chamber of Commerce appreciates the opportunity to provide feedback on REG-110059-20, proposed regulations relating to the modification of §958(b)¹ of the Internal Revenue Code (Code) by the Tax Cuts and Jobs Act (TCJA), which was enacted on December 22, 2017, modifying the ownership attribution rules applicable to outbound transfers of stock or securities of a domestic corporation under §367(a), and narrowing the scope of foreign corporations that are treated as controlled foreign corporations (CFCs) for purposes of the look-through rule under §954(c)(6).²

The proposed regulations address certain consequences of the repeal of §958(b)(4). Before repeal, §958(b)(4) turned off downward attribution, under subparagraphs (A), (B), and (C) of §318(a)(3), from a foreign person to a U.S. person for subpart F purposes. The TCJA repealed §958(b)(4) and, as a result, downward attribution applies to attribute stock ownership

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

² 85 Fed. Reg. 59,484 (September 22, 2020).

from a foreign person to a U.S. person for subpart F purposes (“downward attribution”).

One of the consequences addressed in the proposed regulations is the availability of the exception under §954(c)(6) to apply in situations only made possible by the repeal of downward attribution. The Internal Revenue Service (IRS) sees this availability as improper if a foreign corporation is a CFC solely by reason of downward attribution as “most or all of that foreign corporation’s earnings typically are not under U.S. taxing jurisdiction... and, as a result, amounts paid or accrued by that foreign corporation to another foreign corporation that is a CFC (without regard to downward attribution) should not be eligible for the section 954(c)(6) exception.” The Chamber agrees that in some situations, such as the example in the preamble of the proposed regulations, the §954(c)(6) exception should be disallowed. But we believe that in the counterfactual, where the earnings of the payor—a CFC solely by reason of downward attribution—are subject to U.S. taxing jurisdiction, the IRS’ rationale should be consistently applied to allow the §954(c)(6) exception.

The IRS has requested comments regarding whether the proposed regulations should be modified to make the exception provided by §954(c)(6) available in cases in which a related foreign payor corporation (that is a CFC solely as a result of downward attribution) has §958(a) U.S. shareholders and therefore is partially under U.S. taxing jurisdiction. The Chamber appreciates the IRS’ consideration of this matter and urges the IRS to preserve the §954(c)(6) exception without limitation in circumstances where the payor CFC is subject to U.S. taxing jurisdiction, even if the payor CFC would not be a CFC but for downward attribution. To not allow the statutory exception in these circumstances would impose U.S. tax on a broader range of the income of CFCs created by downward attribution than would be the case if they were CFCs without regard to downward attribution, with no apparent policy basis for the disparate treatment.

Though §954(c)(6) applies to dividends, interest, rents, and royalties, maintaining its look-through rule in a downward attribution fact pattern is most critical for dividends.³ Dividends are routine in tiered-structures and, over the long run, generally bound to happen as a fundamental element of a corporation’s investment return to its shareholders. For example, assume a U.S. parent (USP) owns 45% of foreign corporation (FC1). FC1 is not a CFC. FC1 has a complex, tiered structure of wholly owned foreign corporate subsidiaries. Some of those subsidiaries are owned beneath other subsidiaries organized in different countries from them. Downward attribution causes all of the subsidiaries to be CFCs, either because FC1’s other owners have U.S. subsidiaries or FC1 has U.S. subsidiaries. For those subsidiaries of FC1 with a different-country parent, the same-country exception under §954(c)(3) is unavailable. Downward attribution subjects USP to current-year subpart F inclusions by creating CFCs in which it is a U.S. shareholder. To prohibit USP from using the §954(c)(6) exception because CFC status results from downward attribution would be logically inconsistent and produce inequitable results. All of the subsidiaries paying dividends are subject to the U.S.’s taxing jurisdiction and that status supports their CFC owners benefitting from §954(c)(6)’s look-through rule.

Where the subpart F income of a payor CFC is included in a U.S. person’s taxable

³ Pending clarification that section 245A applies for purposes of determining the taxable income of foreign corporations.

income, §954(c)(6) should remain available, as Congress intended, regardless of whether that circumstance arises with or without downward attribution. The IRS' reasoning for the proposed rule disallowing the §954(c)(6) exception is not implicated where a payor, made a CFC solely by reason of downward attribution, has its income subject to the U.S. tax system. Additionally, taking into account the requirement of relatedness inherent in §954(c)(6) and the policing of such relatedness under the recently finalized modifications to Regs. §1.954-1(f)(2)(iv), it would be unduly complex to implement any sort of accounting mechanism to suss out minute ownership issues conceivable in certain structures. The complexity would not be worth the regulatory burden on the IRS or taxpayers.

The Chamber appreciates the opportunity to provide this feedback on REG-110059-20. The Chamber strongly urges Treasury and the IRS to continue to work closely with the business community to implement the 2017 tax law changes in a manner to ensure as little disruption as possible to normal business operations and to enable the U.S. economy to achieve its fullest growth potential. The Chamber looks forward to working with you to address these and other issues as we work to implement our revised tax code. Thank you for your time and attention.

Sincerely,



Caroline L. Harris

Cc: Charles P. Rettig, Commissioner, Office of the Commissioner, Internal Revenue Service,
U.S. Department of the Treasury

David J. Kautter, Assistant Secretary, Office of Tax Policy, U.S. Department of the
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