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Legal Update
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GILTI Pleasures: The IRS Releases Proposed Regulations on Global Intangible Low-Taxed Income

Every one of us has some guilty pleasure, whether it's watching soap operas, binging on jelly donuts, attending electronic dance music parties after your 20s or whatnot. For tax aficionados, however, few pastimes can surpass perusing the 157 pages of regulations proposed on September 13, 2018, by the Internal Revenue Service ("IRS") under Section 951A of the US Internal Revenue Code of 1986, as amended (the "Code") (the "Proposed Regulations"). This Code section contains the rules applicable to the tax imposed on global intangible low-taxed income or "GILTI." The GILTI rules were intended to protect the US tax base from the shifting of profits to non-US jurisdictions, especially in light of the new participation exemption system under which offshore profits can be repatriated to US corporate shareholders with no US tax.

The introduction of the GILTI regime left taxpayers and practitioners struggling with a host of thorny questions. The Proposed Regulations provide awaited guidance on a number of these issues, such as the calculation of GILTI income inclusions for US consolidated groups and US partnerships. However, the IRS deliberately decided not to tackle in the Proposed Regulations some of the most critical questions, notably, those relating to the calculation of foreign tax credits for GILTI income and its interaction with the expense allocation rules. According to the preamble, tax aficionados will need to wait a few more months to indulge, yet again, in the guilty pleasure of unwrapping a new piece of IRS guidance to uncover the answers to those other questions.[1]

This Legal Update explores the Proposed Regulations, which generally are slated to be effective for tax years beginning in 2018.

Highlights of the Proposed Regulations

- Broad anti-abuse rules for certain transactions intended to reduce the GILTI inclusion.
- GILTI calculation on a consolidated basis for US consolidated groups.
- Hybrid approach for the taxation of CFCs owned by US partnerships.
- Stock basis reduction in CFCs that generate a tested loss.
- Confirmation that GILTI income is determined before Code § 956 inclusions.
- Announcement that the "Code § 78 gross up" will be included in the GILTI basket for foreign tax credit purposes.

Background

The GILTI rules were enacted as part of the Tax Cut and Jobs Act in December 2017 and apply beginning in 2018.[2] These rules were folded into the rules governing the taxation of CFCs under the subpart F regime, but operate largely independently of such rules.[3] Specifically, for each year beginning in 2018 or after, a US shareholder[4] must include in its gross income

the excess of his "net CFC tested income" over its "net deemed tangible income return" ("net DTIR").[5] The Proposed Regulations define this excess as a US shareholder's "GILTI inclusion amount."[6]

Broadly speaking, the US shareholder's "net CFC tested income" is the excess of (i) the aggregate of its pro rata share of its CFCs' "tested income" over (ii) the aggregate of its pro rata share of its CFCs' "tested loss."[7] A CFC's "tested income" equals the excess of (x) the CFC's gross income without regard for certain items (including, but not limited to, items of subpart F income, effectively connected income and dividends received from related parties) over (y) the CFC's deductions properly allocable to such tested income—if, instead, (y) exceeds (x), the CFC will be considered to have a "tested loss."

The net DTIR equals (i) the shareholder's pro rata share of the aggregate adjusted bases of its CFCs' "specified tangible property"[8] (determined by using the alternative depreciation system, regardless of when the property is acquired[9]) multiplied by a deemed 10 percent return, *minus* (ii) the amount of interest expense that reduced the CFCs' net tested income and was not included in another CFC's tested income.[10] The Proposed Regulations refer to a CFC's investment in specified tangible property as "qualified business asset investment" or "QBAI."

In plain English, the CFC is deemed to earn a 10 percent return on its QBAI and all income earned by the CFC in excess of such 10 percent return is deemed to be GILTI. Thus, between the subpart F income rules and the GILTI rules, most US shareholders of CFCs do not truly enjoy a significant exemption or deferral on the income earned by their foreign subsidiaries, other than with respect to the 10 percent return on the investment in tangible property. So much for the proclaimed "territorial system."

Once a non-corporate US shareholder has determined his GILTI inclusion amount, he simply includes such amount in his gross income. If, however, the US shareholder is a domestic C-corporation, the US shareholder is entitled to a deduction equal to 50 percent of such amount (and of the Code § 78 gross-up).[11] This deduction generally results in an effective rate of 10.5 percent for GILTI taxed to a C corporation, compared to the 37 percent top rate for GILTI taxed to a non-corporate shareholder. In addition, a US corporate shareholder is entitled to a foreign tax credit for up to 80 percent of the foreign taxes of a CFC that are properly attributable to the tested income.[12] No foreign tax credits are available to non-corporate US shareholders. These disparities incentivize non-corporate US shareholders of CFCs to contribute their CFC stock to a C corporation or, alternatively, to consider making elections under Code § 962 to be subject to tax at the corporate rate and benefit from the foreign tax credits.

The Proposed Regulations

DETERMINATION OF TESTED INCOME AND TESTED LOSS

The Proposed Regulations flesh out how tested income and tested loss are calculated. The Proposed Regulations start the calculation with gross income excluding certain items (e.g., subpart F income) and then deduct CFC expenses that are allowable as deductions under the existing subpart F rules.[13]

On the income side of the calculation, subpart F income is excluded from tested income even if it is not taxed to a US shareholder because the CFC lacks sufficient earnings and profits. Conversely, no amount is excluded when subpart F income is recaptured in a later year under Code §952(c)(2).[14] Further, the Proposed Regulations clarify that tested income does not include foreign base company income or insurance income that is excluded from subpart F income by reason of the high tax exception or kick-out. Importantly, this exclusion applies only to income that is excluded from subpart F income *solely* by reason of the high tax kick-out and

not to income that would not otherwise be subpart F income.[15]

As for the deductible expenses, following the subpart F rules, the Proposed Regulations generally allow a CFC to deduct expenses that would be deductible if the CFC was a domestic corporation, subject to certain exceptions.[16] Among these exceptions, notably, a CFC is not allowed a net operating loss ("NOL") carryforward deduction under Code § 172 and, therefore, a CFC's tested loss in one year cannot be used to offset that CFC's tested income in a later year.[17]

The IRS has requested comments on other applications of the general rule that allows CFCs to deduct expenses that would be allowable to a domestic corporation. For example, comments are requested on whether this fiction should allow a CFC to claim a dividend received deduction under Code §245A. In addition, the IRS announced that forthcoming guidance will address whether and how the interest deduction limitation rules of Code § 163(j) and the anti-hybrid rule of Code §267A should apply to the calculation of a CFC's tested income.

DETERMINATION OF QBAI. ANTI-ABUSE RULES

The Proposed Regulations clarify a few aspects of the calculation of a CFC's QBAI and also include anti-abuse provisions to prevent taxpayers from improperly boosting the QBAI of a CFC to reduce their GILTI income inclusion.

The Proposed Regulations provide that QBAI is tested quarterly and the annual average number is used to determine net DTIR.[18] A CFC's share of specified tangible property held through a partnership is also taken into account as part of the CFC's specified tangible property. The obligation by partnerships to provide this information to CFC partners, determined quarterly, will constitute a significant administrative burden. [19] If specified tangible property (whether held directly or through a partnership) generates both tested and non-tested income ("dual-use property"), its basis is allocated to QBAI based upon the percentage of tested income that is generated by the asset (or, if this cannot be identified, the ratio of tested to non-tested income of the CFC as a whole).[20]

Consistent with the legislative history, the Proposed Regulations clarify that a tested loss CFC does not have any specified tangible property or QBAI.[21]

In one of the most significant developments introduced by the Proposed Regulations, the IRS included anti-abuse provisions that would disregard certain property owned by a CFC for purposes of the GILTI calculation.

First, if a CFC acquires specified tangible property with a principal purpose of reducing the GILTI inclusion amount of a US shareholder and the CFC holds the property "temporarily" (but at least over the close of one quarter), the specified tangible property shall be disregarded in determining the CFC's QBAI. This rule is supplemented with a (presumably irrebuttable) presumption that specified tangible property held by a CFC for less than a twelve-month period is treated as held with a principal purpose of reducing the GILTI inclusion amount and, thus, shall be disregarded under this anti-abuse rule.

Second, the Proposed Regulations include an anti-abuse rule addressing transactions allegedly undertaken by certain taxpayers in which a fiscal year CFC transfers specified tangible property to another CFC prior to the transferor CFC becoming subject to GILTI by reason of the effective date of Code §951A. As a result, the stepped-up basis in the transferred property would increase the QBAI of the transferee CFC, while the transferor CFC would not recognize tested income that could be subject to GILTI as a result of the transfer. In response to these transactions, the Proposed Regulations disallow the benefit of a stepped-up basis in specified tangible property that was transferred between related CFCs during the period before the

transferor CFC's first inclusion year.[22] This anti-abuse provision is not literally described in the statutory grant of authority to the IRS, but is described to some extent in the Conference Report.

Finally, a third anti-abuse rule addresses a transaction similar to that addressed by the second rule but applies to disregard the amortization or depreciation deductions attributable to the disqualified stepped-up basis in the transferred property for purposes of calculating tested income and tested loss.[23] In this case, the Proposed Regulations use the term "specified property," which includes property that is amortizable under Code §197 as well as property that is depreciable under Code § 167.[24]

It is worth noting that the second and third anti-abuse provisions do not depend on whether the taxpayer had a "principal purpose" to reduce its GILTI inclusion and, rather, appear to operate as per se automatic rules that apply to any transaction, even if done for substantial business reasons.

SPECIFIED INTEREST EXPENSE

As explained above, the US shareholder's net DTIR is reduced by the amount of interest expense that was subtracted from the CFC's net tested income and that was not "attributable" to interest income included in another CFC's tested income (the "specified interest expense"). As such, "specified interest expense" will generally refer to third-party interest expense or interest expense paid to related US persons.

The Proposed Regulations clarify that, to avoid administrative burdens, no tracing will be required to determine whether an item of interest expense is "attributable" to an item of interest income taken into account in the tested income of another CFC. Instead, the Proposed Regulations adopt a netting approach providing that a US shareholder's specified interest expense will be the excess of its aggregate pro rata share of the tested interest expense of each CFC over its aggregate pro rata share of the tested interest income of each CFC.[25] For this purpose, interest is broadly defined to include all amounts paid or received for the use or forbearance of money and, surprisingly, is not limited to amounts otherwise treated as interest for US federal income tax purposes.[26]

The Proposed Regulations provide that interest expense and interest income of a CFC engaged in an insurance business or the active conduct of a financing business are generally not taken into account for purposes of the specified interest expense calculation.[27]

DETERMINATION OF PRO RATA SHARES OF QBAI, TESTED INCOME AND TESTED LOSS

As explained above, the calculation of the GILTI inclusion amount requires determining a US shareholder's pro rata share of different items from the shareholder's CFCs, namely, tested income, tested loss and QBAI. The Proposed Regulations generally incorporate the rules applicable in the context of subpart F income to determine a common shareholder's share of tested income, tested loss and QBAI, but they provide special rules for holders of preferred stock.

Under the special rules, the amount of QBAI that can be allocated to preferred stock is capped at 10 times the amount of tested income.[28] In other words, if the CFC is heavy with tangible assets, such assets may be deemed attributable to preferred stock only up to an amount that would generate a DTIR equal to the tested income. The excess of QBAI is then allocated to the CFC's common stock. This rule limits the GILTI tax benefits that can be passed to investors whose only investment is preferred stock financing.

Tested losses may not be allocated with respect to preferred stock except in certain cases involving dividend arrearages. Further, tested losses are not allocated to common stock with no liquidation value.[29] Finally, a shareholder's pro rata share of tested loss is reduced in proportion to the number of days in the year on which the shareholder did not own the tested loss CFC.[30]

Under existing subpart F regulations, if a CFC has classes of stock with discretionary distribution rights, the earnings and profits of the CFC are allocated among such classes of stock pro rata to their fair market value. According to the preamble to the Proposed Regulations, the IRS is aware that some taxpayers have improperly tried to leverage these rules using structures with preferred liquidation and distribution rights or cumulative preferred stock with dividends that compound less frequently than annually.

The Proposed Regulations amend these rules to provide that, for purposes of determining a US shareholder's subpart F or GILTI income, the earnings and profits of the CFC shall be allocated to each class of stock based on all relevant facts and circumstances.[31] Further, the Proposed Regulations would disregard any transaction undertaken with a principal purpose of reducing a US shareholder's pro rata share of subpart F income.[32]

SPECIAL PARTNERSHIP RULES

Special rules are provided for domestic partnerships and S corporations that are US shareholders of CFCs.[33] These special rules adopt a hybrid approach that combines elements of both the aggregate and entity approaches to partnership taxation. Specifically, partnerships are treated as entities with respect to partners that are not US shareholders of CFCs owned by the partnership. In this case, the partnership determines its GILTI inclusion amount and then allocates such inclusion amount to the partners (i.e., small partners that own less than 10 percent of the CFC through the partnership will still have a GILTI income inclusion).[34]

Conversely, partnerships are treated as an aggregate with respect to partners who are US shareholders of the CFCs owned by the partnership.[35] In other words, if a partner owns 10 percent or more of a CFC (including by looking through the domestic partnership), it will take into account its proportionate share of the partnership's pro rata share of the GILTI-relevant items of the CFC (tested income, tested loss, QBAI). This treatment essentially treats a US partnership as a non-US partnership for GILTI purposes. In other words, a partner will take into account its share of a partnership's GILTI inclusion with respect to a CFC only if it does not separately take into account that inclusion as a US shareholder of the CFC.

As a result of this hybrid approach, a US shareholder partnership is required to provide (i) to each of its partners that are not US shareholders, their distributive share of the partnership's GILTI inclusion amount, and (ii) to each US shareholder partner, its proportionate share of the partnership's pro rata share of each GILTI-relevant item of the CFC. The Proposed Regulations announce that forms will be created to implement this reporting.[36] These rules also apply to S corporations and their shareholders.[37]

BASIS ADJUSTMENTS

The Proposed Regulations contain basis adjustment rules for CFCs that generate tested losses that offset tested income of other CFCs. According to the IRS, absent such a basis adjustment, the US shareholder would recognize a duplicative benefit from the loss when it disposes of the stock of the tested loss CFC. Under the proposed rule, immediately prior to the disposition of stock of a CFC, a corporate US shareholder must reduce its basis in the CFC stock by the amount of tested loss that has been used to offset tested income in calculating the net CFC tested income of the US shareholder.[38]

INTERACTION WITH DEDUCTION DEFERRAL RULES

Under Code § 267(a)(3)(B) of the Code, a deduction is generally not allowed for an item payable to a CFC until the amount is paid, except to the extent that an amount attributable to such item is previously includible in the gross income of a US shareholder of such CFC. Similarly, Code § 163(e)(3)(B)(i) provides that an issuer of an

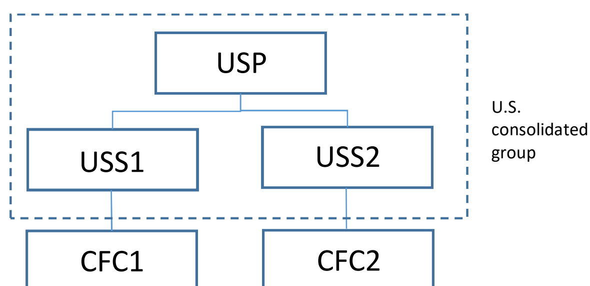
instrument with original issue discount ("OID") held by a related CFC shall not be allowed a deduction for the OID prior to payment, unless the OID is includible in the gross income of a US shareholder of the CFC.

The Proposed Regulations clarify that deductions shall not be deferred under Code §§ 267(a)(3)(B) or 163(e)(3)(B)(i) to the extent of the amount taken into account in determining the net CFC tested income of a US shareholder.[39]

CONSOLIDATED GROUP RULES

Prior to the Proposed Regulations, one of the most pressing questions about the GILTI rules was whether US consolidated groups should calculate their GILTI inclusion on a consolidated basis or, rather, whether each member should determine its inclusion on a separate basis. Depending on the specific facts, a consolidated calculation may result in a smaller or greater GILTI inclusion than a separate member-by-member calculation.

Assume this simple example with two different members of a US consolidated group, each owning 100 percent of the stock of a CFC:



CFC1 has $100 of tested income and CFC2 has $100 of tested loss. For simplicity, assume neither CFC1 nor CFC2 have any QBAI.

If the GILTI income is calculated on a consolidated basis, the USP consolidated group would have no GILTI inclusion because CFC1's $100 of tested income would be offset by CFC2's $100 of tested loss and, as a result, the USP group would have no net tested income.

The result would differ if USS1 and USS2 are each considered a separate US shareholder and no consolidation is otherwise permitted. In that case, USS1 would have $100 of GILTI inclusion, which would result in $100 of taxable income to the USP consolidated group. USS2 would have $0 of GILTI inclusion, but the $100 tested loss of CFC2 would not be available to offset USS1's GILTI inclusion.

The IRS favored the consolidated approach in the Proposed Regulations. The proposed rule provides that, to determine a member's GILTI inclusion amount, the pro rata shares of tested loss, QBAI, tested interest expense and tested interest income of each member of the consolidated group are aggregated, and then a portion of each aggregate amount is allocated to each member of the group that is a US shareholder of a tested income CFC based on the proportion of such member's aggregate pro rata share of tested income to the total tested income of the consolidated group. [40]

GILTI AND NET INVESTMENT INCOME TAX

The Proposed Regulations provide that GILTI income shall be treated as subpart F income for purposes of the net investment income tax of Code § 1411.[41] Thus, the GILTI income will not constitute net investment income unless the taxpayer makes an election to treat it as such.[42]

ORDER OF SUBPART F, GILTI AND SECTION 956

The preamble to the Proposed Regulations confirms that the GILTI inclusion is determined before a Code § 956 inclusion for investments in US property. This is so because GILTI is treated as subpart F income for purposes of the "previously taxed income" rules of Code § 959.[43]

REPORTING: NEW FORMS

Under the Proposed Regulations, US shareholders of CFCs will need to file with their US federal income tax return a new Schedule I-1 to the Form 5471 and a new Form 8992 ("US Shareholder Calculation of GILTI").[44]

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Endnotes

[1] As a preview, the preamble to the Proposed Regulations announces that "it is anticipated" that the Code §78 gross-up will be included in the "GILTI basket" for foreign tax credit purposes.

[2] See Section 14201(a) of P.L. 115-97.

[3] One particular distinction is that subpart F income inclusions are limited by the CFC's earnings and profits. GILTI, on the other hand, is included in the income of a US shareholder without regard to the CFC's earnings and profits. Additionally, while subpart F income is determined at the level of the CFC, the GILTI inclusion amount is determined at the shareholder level.

[4] A US shareholder is a US person who owns, actually or through the application of certain attribution rules, 10 percent or more of the voting stock or value of all stock of the CFC. Code § 951(b).

[5] Code § 951A(b)(1).

[6] Prop. Treas. Reg. § 1.951A-1(c).

[7] Code § 951A(c).

[8] "Specified tangible property" is defined as tangible property used in the production of gross tested income. Prop. Treas. Reg. § 1.951A-3(c)(1). Tangible property is defined as property eligible for depreciation under Code § 168 determined without regard to Code §§168(f)(12), (2) or (5). Prop. Treas. Reg. § 1.951A-3(c)(2).

[9] Prop. Treas. Reg. § 1.951A-3(e)(3).

[10] Code § 951A(b)(2).

[11] Code § 250(a)(1). The Code § 78 gross-up increases the amount taxable to certain US shareholders to account for taxes imposed on the CFC which may be claimed as a foreign tax credit by the US shareholder.

[12] Code § 960(d).

[13] Prop. Treas. Reg. § 1.951A-2(c)(2).

[14] Prop. Treas. Reg. § 1.951A-2(c)(4).

[15] Prop. Treas. Reg. § 1.951A-2(c)(iii).

[16] Treas. Reg. § 1.952-2.

[17] Treas. Reg. § 1.952-2(c)(5). *See also* Lewis-Velarde, *Proposed GILTI Regs Could Result in Taxable Phantom Income*, Worldwide Tax Daily (September 17, 2018).

[18] Prop. Treas. Reg. § 1.951A-3(c)(2).

[19] See O'Neal & Versprille, *Private Equity Firms Face Compliance Woes Under 'GILTI' Tax Rules*, Daily Tax Report (September 17, 2018); Lewis-Velarde, *Proposed GILTI Regs Could Result in Taxable Phantom Income*, Worldwide Tax Daily (September 17, 2018).

[20] Prop. Treas. Reg. § 1.951A-3(d)(1).

[21] Prop. Treas. Reg. §§ 1.951A-3(b), (c)(1) and (g)(1).

[22] Prop. Treas. Reg. § 1.951A-3(h)(2).

[23] Prop. Treas. Reg. § 1.951A-2(c)(5).

[24] This provision, like the second provision, is not literally described in the statutory grant of authority to the IRS. It appears that the IRS is finding its support from a sentence in the Conference Report that refers to "non-economic transaction intended to affect attributes . . . including tested income and tested loss." However, this provision appears to go beyond the IRS's authority to issue anti-abuse rules, which, according to Code § 951A(d)(4), is limited to preventing avoidance of the purposes of the QBAI rules (and not, more generally, of any item of the GILTI inclusion amount calculation). *See also* Olivo, *Proposed GILTI Regs' Anti-Abuse Rule Seen as Overly Broad*, Law360 Tax Authority (September 17, 2018); Velarde-Lewis, *Practitioners Bristle at GILTI Antiabuse Provision*, Worldwide Tax Daily (September 17, 2018)

[25] Prop. Treas. Reg. § 1.951A-1(c)(3)(iii).

[26] Prop. Treas. Reg. § 1.951A-4(b)(1)(ii).

[27] Prop. Treas. Reg. §§ 1.951A-4(b)(1)(iii); 1.951A-4(b)(2)(iii).

[28] Prop. Treas. Reg. § 1.951A-1(d)(3)(ii).

[29] Prop. Treas. Reg. § 1.951A-1(d)(4)(i) – (iii).

[30] Prop. Treas. Reg. § 1.951A-1(d)(4)(i)(D).

[31] Prop. Treas. Reg. § 1.951-1(e)(3).

[32] Prop. Treas. Reg. § 1.951-1(e)(6).

[33] Prop. Treas. Reg. § 1.951A-5.

[34] Prop. Treas. Reg. § 1.951A-5(b).

[35] Prop. Treas. Reg. § 1.951A-5(c).

[36] Prop. Treas. Reg. § 1.951A-5(f).

[37] Code § 1373.

[38] Prop. Treas. Reg. § 1.951A-6(e).

[39] Prop. Treas. Reg. § 1.951A-6(c)(1).

[40] Prop. Treas. Reg. § 1.1502-51(e).

[41] Prop. Treas. Reg. § 1.951A-6(b)(1).

[42] Treas. Reg. § 1.1411-10(g).

[43] Code § 951A(f)(1)(A).

[44] Prop. Treas. Reg. § 1.6038-5.

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